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IN THE SUPREME COURT OF FLORIDA

PATRICIA RAFTERY and DIANA BURNS,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

CASE NO: 81,998

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA CERTIFYING QUESTIONS TO BE OF GREAT PUBLIC IMPORTANCE

****

AMENDED

INITIAL BRIEF ON THE MERITS OF PATRICIA RAFTERY AND DIANA BURNS

****

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THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF TEST INSTRUMENT ACCURACY PURSUANT TO RULEMAKING REQUIREMENTS OF CHAPTER 120 FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF TEST INSTRUMENT ACCURACY THROUGH ADOPTION "AFTER PUBLIC HEARING" AS REQUIRED BY SECTION 316.1932(1)(f)(1) FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO EMPLOY "APPROVED" MAINTENANCE PROCEDURES AND STANDARDS FOR TEST INSTRUMENTS RENDERED THE TEST RESULTS OBTAINED INVALID.

POINT II
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RULES 10D-42.023 AND 10D-42.024 FLORIDA ADMINISTRATIVE CODE, IN EFFECT PRIOR TO AUGUST 1, 1991 ARE VOID FOR VAGUENESS. SUCH DOES PRECLUDE THE STATE'S USE OF THE BREATH TEST RESULTS OBTAINED THEREUNDER IN A CRIMINAL TRIAL.

POINT III

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PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout this Initial Brief in the Merits of Petitioners, PATRICIA RAFTERY and DIANA BURNS:

The term "Petitioners" or "Defendants" shall refer to the Defendants in the County Court below, PATRICIA RAFTERY and DIANA BURNS.

The term "Respondent" shall refer to the prosecution in the County Court below, the State of Florida.

Citations to the pleadings filed at the trial court level contained with the Record of Appeal logged in the District Court of Appeal, Fourth District, together with transcripts of the hearings conducted below, the decision issued by the Fourth District and the Order on Motion for Certification, contained within pages 1-556 of the Appendix to Initial Brief on the Merits shall be designated by "A" followed by the appropriate page number (A).

All emphasis in this Petitioner's Brief on the Merits have been supplied by the undersigned counsel unless otherwise specified.

STATEMENT OF CASE

On November 22, 1989 Petitioner PATRICIA RAFTERY was arrested for violation of Section 316.193 Florida Statutes (A 218, 222).

On January 11, 1991 Petitioner DIANA BURNS was arrested for violation of Section 316.193 Florida Statutes (A 221, 224).

On April 22, 1991 the Petitioner PATRICIA RAFTERY filed her "Motion to Suppress Breath Test Results" (A 226-231) and "Motion to Exclude Documents" (A 226-231, 232-235).

On April 24, 1991 the Petitioners PATRICIA RAFTERY and DIANA BURNS filed their "Supplemental Response to States Demand for Discovery" (Rulemaking packages for Chapter 10D-42 F.A.C. (A 275-277).

On April 26, 1991 Petitioner DIANA BURNS filed her "Motion to Suppress Breath Test Results" (A 236-241).

On May 1, 1991 Petitioner DIANA BURNS filed her "Motion to Exclude Documents" (A 242-245).

On May 8, 1991 Petitioners PATRICIA RAFTERY and DIANA BURNS filed their "Supplemental Response to States Reciprocal Demand for Discovery" (Instrument and Maintenance documents for Intoxilyzer Serial No. 64-002863 A 268-274; and for Intoxilyzer 64-002864 A 261-267).

On May 6 and 8, 1991 Petitioners DIANA BURNS and PATRICIA RAFTERY filed their respective "Memorandum of Law in Support of Motion to Exclude Documents and Motion to Suppress Breath Test Results" (A 246-260).

On May 16, 1991 hearing was held before the Honorable Zebedee Wright, County Court Judge upon Petitioners PATRICIA RAFTERY and

DIANA BURNS "Motion to Suppress Breath Test Results" and "Exclude Documents" (A 129-216).

On May 17, 1991 Petitioners PATRICIA RAFTERY and DIANA BURNS filed their respective "Clarification of Argument Presented at Hearing on Motions" (A 278-280).

On June 6 and 7, 1991 hearing was held before the Honorable Susan Lebow, Robert Zack, and June LaRian Johnson upon subject motions filed by the undersigned counsel in their respective trial divisions (A 1-128). The record of these June 6 and 7, 1991 hearings was incorporated into the record herein as stipulated between the parties and predates, is separate, and is to be distinguished from the hearings held in State v. Rushing, et. al., Supreme Court Case No. 81,999, 4DCA Case No. 92-469 held on July 12, 1991 and September 20, 1991.

On June 14, 1991 the Honorable Zebedee Wright, County Court Judge rendered his Order GRANTING Motion to Suppress Breath Test Results with certification to the District Court of Appeals (A 281-292).

On June 16, 1991 the Respondent filed its "Notice of Appeal" (A 298-299).

On July 17, 1991 the Honorable Zebedee Wright filed his Certification to the District Court of Appeals, Fourth District NUNC PRO TUNC (A 304-305).

On June 15, 1992 the Respondent filed "Notice of Related Cases" before the District Court of Appeals for the Fourth District in the subject 4DCA Case No. 91-1848 (A 306-307).

On July 24, 1992 the Petitioners filed their "Notice of Opposition to Grouping of Appeal with Unrelated Cases" in the subject 4DCA Case No. 91-1848 (A 308-310).

On July 24, 1992 the Petitioners filed their "Supplemental to Notice of Opposition to Grouping of Appeal with Unrelated Cases" in the 4DCA Case No. 91-1848 (A 311-314).

On July 28, 1992 the Petitioners filed their "Second Supplemental Notice of Opposition to Grouping with Unrelated Cases" (A 315-317).

On August 4, 1992 the District Court of Appeals for the Fourth District entered its Order directing the Respondent-Appellant to respond to Petitioner-Appellees Motions filed on July 24 and 28, 1992 (A 318-319).

On August 14, 1992 the Respondent-Appellant filed its "Response to Order to Respond" (A 320-322).

On August 21, 1992 the District Court of Appeals for the Fourth District rendered its Order directing Petitioners-Appellees to respond to Respondent-Appellant's response filed August 14, 1992 (A 323).

On August 31, 1992 Petitioners filed their "Appellees Response to Appellants Response to Order to Respond" (A 324-338).

On November 4, 1992 the District Court of Appeals for the Fourth District rendered its Order GRANTING Petitioner-Appellees "Second Supplemental Notice of Opposition to Grouping with Unrelated Case filed July 28, 1992" (A 339-340).

On March 10, 1993 the District Court of Appeals for the Fourth District entered its Order reversing the Order of the Honorable

Zebedee Wright suppressing the breath test results on authority of State v. Rochelle, 609 So2d 613 (Fla 4DCA 1992) (A 341).

On March 24, 1993 the Petitioners-Appellees filed their "Motion for Rehearing and/or Certification" with attached exhibits from the record (A 342-358).

On June 9, 1993 the District Court of Appeals GRANTED the Petitioners-Appellees "Motion for Rehearing and/or Certification" filed March 24, 1993. By this Order the 4DCA certified "as questions of great public importance those questions certified in State v. Nevadomski, Case No. 92-0763 (Fla 4DCA June 9, 1993)" (A 359).

On June 23, 1993 Petitioners filed their "Motion to Invoke Discretionary Jurisdiction" of this Most Honorable Court (A 360).

On June 23, 1993 Petitioners filed their Motion for Clarification of Order Granting Motion for Certification (A 361-367).

On August 16, 1993 the Court of Appeals rendered its Order "deferring" ruling on Motion for Clarification (A 368).

STATEMENT OF FACTS

Petitioner Raftery was administered a breath test for determination of blood alcohol content on November 22, 1989 upon Broward Sheriff's Office Intoxilyzer 5000 Serial No. 64-002864 (A 218, 222, 267).

Petitioner Burns was administered a breath test for determination of blood alcohol content on January 11, 1991 upon Broward Sheriff's Office Intoxilyzer 5000 Serial No. 64-002863 (A 221, 224, 274).

EXHIBITS INTRODUCED INTO EVIDENCE AT HEARING ON MOTIONS

Broward Sheriff's Deputy David Fries, maintenance officer for the Intoxilyzer Serial No. 64-002863 and 64-002864 (A 140-141), identified at the outset of the May 16, 1991 hearing upon Petitioner's Motion to Suppress Breath Test Results and Motion to Exclude Documents (A 226-235, 236-245) the preventative monthly maintenance and annual inspection documents for these respective test instruments filed in the Petitioners "Supplemental Response to State's Demand for Discovery" (A 261-267, 268-274, 141-142). These documents included: the instrument registrations (A 262, 269); the annual inspection sheet HRS Form 713 for each instrument (A 263, 269); the unpromulgated "Inspectors Annual Data Sheet" utilized in the 1989 annual inspection of Instrument Serial No. 64-002864 (A 264); the unpromulgated "Inspectors Annual Data Sheet" utilized in the 1991 annual inspection of Instrument Serial No. 64-002863 (A 271) the unpromulgated HRS Form 1514, Feb. 86 utilized in preventive monthly maintenance of Instrument Serial No. 64-002864 for the months of October and November 1989 (A 265-266); the unpromulgated HRS Form 1514, Feb 86 utilized in preventive

monthly maintenance of Instrument Serial No. 64-002863 on January 2, 1991 and January 26, 1991 (A 272-273); the Running Log HRS Forms 1503, Nov 86 for the respective Instruments (A 267, 274).

The Trial Court accepted into evidence the Rulemaking Packages under Seal of the Secretary of State for Chapter 10D-42 Florida Administrative Code, hereinafter referenced as F.A.C., as such existed during the State Department of Health and Rehabilitative Services tenure as the agency charged with implementation of the Implied Consent Law from 1983 through date of the hearing herein (A 139).

These Rulemaking Packages set forth in the Petitioners "Supplemental Response to States Demand for Discovery" contained Amendments to Chapter 10D-42 F.A.C. effective March 8, 1983 (A 401-424), effective October 23, 1984 (A 425-453), effective January 10, 1989 (A 454-465), and effective February 25, 1990 (A 466-478).

These exhibits included HRS Form 1514, Sept 82 (A 393) with HRS Forms 711 and 713 which were all incorporated by reference into Chapter 10D-42 F.A.C. "filed pursuant to Chapter 120 F.S." effective March 8, 1983 (A 391-395).

The "law implemented" by the 1983 Amendments was Section 316.1932(1)(f)(1) Florida Statutes (A 401). These 1982 Amendments to Chapter 10D-42 F.A.C. at Rule 10D-42.23 F.A.C. (1983) set forth the following standards for instrument registration and annual inspection:

> 10D-42.023 Registration - Chemical Test Instruments or Devices. All chemical breath test instruments or devices used for breath testing under provisions of Chapter ~~322~~ 316, Florida Statutes, shall be previously checked, certified for proper calibration and performance, and

> registered by authorized personnel of the ~~Florida~~ Department ~~of Health and Rehabilitative Services~~, by trade name, model number, serial number and location, on forms provided by the Department. All such chemical test instruments or devices registered hereunder and allied equipment shall be checked at least annually for accuracy and reproducibility ~~by Department personnel~~. (A 402).

The Registration/Annual Inspection Rule above mentioned remained substantially the same until August 1, 1991 Amendments, with minor revisions occurring only in the amendments to Chapter 10D-42 F.A.C. effective October 23, 1984 (A 427-428) as set forth below:

> 10D-42.023 Registration - Chemical Test Instruments or Devices. All chemical breath test instruments or devices used for breath testing under provisions of Chapter 316, and 327, Florida Statutes, shall be previously checked, ~~certified~~ approved for proper calibration and performance, and registered by authorized personnel of the department, by the trade name, model number, serial number and location, on forms provided by the Department. All such chemical test instruments or devices registered hereunder ~~and allied equipment~~ shall be checked at least ~~annually~~ once each calendar year (January 1 through December 31) for accuracy and reproducibility.

These exhibits contained in the 1983 Rulemaking Package Rule 10D-42.24(1)(c) F.A.C. (1983) concerning preventive monthly maintenance, as follows:

> (c) Chemical instruments used in the breath method shall be inspected at least once each calendar month by a technician to insure general cleanliness, appearance and accuracy (A 404).

This above mentioned rule governing preventive monthly maintenance was additionally accompanied by provisions in Chapter 10D-42 F.A.C. (1983) that incorporated "HRS Form 1514, Sept 82 as follows:

> (b) Maintenance Procedures - Preventive maintenance shall be performed according to procedures outlined in HRS Form 1514, Sept 82, "Breath Alcohol Instrument Check List Preventive Maintenance Procedures".

Please see: Rule 10D-42(10)(b) F.A.C. (1983) (A 408).

These provisions governing the use of the HRS Form 1514, Sept 82 for preventive monthly maintenance remained the same until August 1, 1991 as reflected in the Amendments to Chapter 10D-42 F.A.C. (effective February 25, 1990). Rule 10D-42(11)(d) F.A.C. (1990) provided:

> d ~~b~~ Maintenance Procedures-Preventive maintenance shall be performed in accordance with procedures outlined in HRS Form 1514, Sept 82, "Breath Alcohol Instrument Check List- Preventive Maintenance Procedures", which is incorporated by reference (A 472).

There was "no change" in the 1990 Amendments to Chapter 10D-42 of Rule 10D-42.024(1)(c) F.A.C. governing preventive monthly maintenance which contained the same language as had existed in the 1983 Rule (A 467).

The promulgated rules contained in Chapter 10D-42 F.A.C. governing preventive monthly maintenance and annual inspections of test instruments set forth at 10D-42.023 and 10D-42.024(1)(c) F.A.C. were the same from 1983 through August 1, 1991.

The Trial Court at the May 16, 1991 hearing further accepted into evidence the 1989 Amendments to Chapter 10D-42 F.A.C. (effective January 10, 1989) (A 454-465). These Amendments codified by formal rule promulgation "the existing HRS Approval Criteria for Evidentiary Alcohol Breath Testing Instruments" (A 462) which criteria were utilized in prototype testing for "approval" of proposed types of testing instruments.

The Rule 10D-42.022 F.A.C. (1989) governing criteria for Certification of types of Instruments required specific tests and set specific standards for acceptable accuracy deviation in instrument prototype evaluation that did not exist by formal rule

promulgation for Instrument Registration, Annual Inspection, or Preventive Monthly Maintenance as follows:

> (3) The department shall conduct the following tests for precision, accuracy (systematic error), blank readings, and blood to breath correlation:
>
> (a) Precision-shall measure the alcoholic content of a vapor mixture with an average standard deviation of no more than 0.004 weight per volume at ethanol vapor concentrations of 0.050 percent weight per volume, 0.100 percent weight volume, and 0.150 percent weight per volume using a minimum of 50 simulator tests at each concentration.
>
> (b) Accuracy-shall measure the alcohol content of a vapor mixture with systematic error of no more than plus or minus 10 percent of an ethanol vapor concentration of 0.050 percent weight per volume, and no more than plus or minus 5 percent at concentrations of 0.100 percent weight per volume and 0.150 percent weight per volume using a minimum of 50 simulator tests at each concentration. The systematic error is the difference between the mean measured value and the known values expressed as a percentage of the known value.
>
> (c) Blank reading-shall indicate an average instrument reading of no more than 0.01 percent weight per volume when breath from an alcohol-free subject is tested, using a minimum of 25 breath tests or blank simulator tests.
>
> (d) Breath to blood correlation - the instrument reading shall be compared with direct measurement of capillary or venous whole blood samples. A minimum of 8 tests shall be conducted and at least 7 of the 8 breath alcohol data points shall not deviate from the breath to blood correlation line by more than 0.02 percent weight per volume.

Specific Authority: 316.1932(1)(b)(1), 316.1932(3) (A 456).

TESTIMONY OF MAINTENANCE OFFICER FRIES AND HRS INSTRUCTOR LOWER

Deputy Fries testified that he utilized three .10% ethanol simulator solutions, three .10% ethanol simulator solutions with acetone added, and three .20% ethanol simulator solutions in conducting his monthly preventive maintenance (A 143). Deputy Fries testified that the standard for accuracy deviation on the

.10% ethanol solutions utilized in the monthly preventive maintenance was .005%, on the .20% ethanol solutions was .01%, and on the acetone/ethanol solution .005% (A 143). Deputy Fries testified that these standards for accuracy deviation were utilized throughout Broward County (A 143) by authority of "instructions of HRS, verbal instructions" (A 144). Deputy Fries testified that aforementioned standards for accuracy deviation were not promulgated as "Rules" pursuant to rule making provisions of Section 120.54 Florida Statutes and that they were not contained in Chapter 10D-42 F.A.C. which regulates "approved" chemical testing (A 144-145).

Deputy Fries testified that the approval standards for models or instrument prototypes requiring 150 simulator tests, 25 blank tests, and blood/breath correlations contained in the Amendments to Chapter 10D-42 F.A.C., effective January 10, 1989 (A 454-465) as set forth at 10D-42.022 did not apply to monthly maintenance set forth at Rule 10D-42.024(1)(c) F.A.C. (1990) (A 146).

Deputy Fries testified that the State Inspector conducted 25 simulator tests pursuant to Rule 10D-42.023 F.A.C., to satisfy the requirement of the "annual inspection". Deputy Fries acknowledged that the requirement of 25 tests for annual inspection had not been promulgated as a "rule" pursuant to Section 120.54 Florida Statutes and was not contained in Chapter 10D-42 F.A.C. (A 146-147). Deputy Fries acknowledged that none of the maintenance standards employed to determine accuracy of the instruments Petitioners were tested upon had been promulgated as Rules made part of the F.A.C. (A 147). Deputy Fries further acknowledged that the State Inspector has expressed concern that the preventive monthly

maintenance and annual inspection standards "may constitute invalid rules because they have not been promulgated after hearing" and notice (A 148). Deputy Fries expressed "concern" further "on the failure to put in writing the standards which we use on the monthly maintenance" (A 149) and further advised that "the standard for annual inspections as well as monthly inspections may constitute invalid rules because they have not been promulgated" (A 149). Deputy Fries noted that the State Inspector further expressed "concern" that the Inspectors Annual Data Sheet utilized in yearly inspections had not been promulgated as a Rule (A 155).

Deputy Fries advised that the maintenance procedures utilized had not been noticed in the Florida Administrative Weekly as required by Section 120.54(1) Florida Statutes (A 151). Deputy Fries advised that there had been no published comparison with existing Federal Standards as required by Section 120.54(11)(a) Florida Statutes in the informal application of these unpromulgated standards and procedures (A 152-153). Deputy Fries advised that these "standards" and "procedures" for determination of instrument accuracy (of which Deputy Fries was "verbally informed") had further not been published by the Secretary of State in the F.A.C. as required by Section 120.55 Florida Statutes (A 153-154). Deputy Fries testified that these "standards" and "procedures" have not been subjected to public hearing as required by Section 316.1932(1)(f)(1) Florida Statutes (A 155). Please also see: Section 120.54(3)(a) Florida Statutes.

Deputy Fries testified that HRS Form 1514, Feb 86 utilized by Deputy Fries in his maintenance had not been promulgated as an "approved" form through Section 120.54 Rulemaking. Deputy Fries

testified that the Form 1514, Sept 82/HRS Form 1514, Feb 86 on its face does not set standards for accuracy (A 165).

Officer Richard Lower at the May 16th hearing testified that he is an Instrument Maintenance Officer on the Intoxilyzer 5000, lead HRS Instructor for all chemical breath testing at Broward County Community College, the instructor at the Police Academy in Dade County, and that he has instructed chemical breath testing at Indian River Police Academy (A 172). Officer Lower further advised as to these "secret rules" (A 174) that:

> Right now, the rule standards, there is no specification as to what simulator values shall be mixed to test the instrument. It has been verbally communicated that we, should be doing .010. There is also, on the 1986 version, the Form 1514 requirement for acetone. But I had been informed by HRS inspector that <u>there really isn't an acetone standard. So if the instrument fails that test, it can still be continued to use</u> (A 175).

Officer Lower at the May 16th hearing testified that he has expressed concern to HRS (regarding instrument maintenance) as to the lack of codified standards and the non-compliance with Chapter 120 <u>Florida Statutes</u> Rule Making Procedures (A 180-182).

As to Rule 10D-42.024(1)(c) <u>F.A.C.</u> (1990) that requires inspection "at least once each calendar month by a technician to insure general cleanliness, appearance,and accuracy", Officer Lower advised of its failure to set adequate standards as follows:

A. And there was a previous incident where one of my students from an agency had been called on his maintenance. I had been called as a defense witness against him. And he had been doing the maintenance and what he had been doing was not in compliance with what I was doing. I was called to testify as to what the standards were which is what initiated my initial conversation with HRS, asked them where the standards were written down, because I didn't want to go in testifying saying that these are the standards that I used. They must be right. I wanted to know where it was written down so I could testify. That's when I first was

> informed by HRS that they weren't written down any place. It was kind of assumed we are doing it. I expressed the desire then that it would make it a whole lot easier for us in the breath testing field that if HRS would just specifically tell us what we got to do. If we don't do it, shame on us. If we do do it, there is no argument. They said, "yeah, we probably should do that, and ---
>
> The problem I saw, I saw complications where this particular individual, he was not doing a very decent maintenance job. But when it came to going to the rule to say that he wasn't doing it, it really wasn't there in the rules that he wasn't doing the job because there was nothing written down saying what he was supposed to be doing (A 180-181, See also: A 61-65, 71-72).

On June 6 and 7, 1991 additional Hearings were held before the Honorable Susan Lebow, Robert Zack, June LaRain Johnson and Leonard Feiner, transcript of which has been incorporated into the record herein (A 1-128).

At the June 7th Hearing Deputy Fries testified that he performs diagnostic tests in his maintenance, and that there was no requirement set out in Chapter 10D-42 F.A.C. for the performance of diagnostic tests, and that this was a procedure Deputy Fries had "evolved" himself (A 14).

At the June 7th Hearing, Deputy Fries testified that he performs Radio Frequency Interference (RFI) checks in his maintenance, that there was no procedure for performance of an RFI check set forth at Chapter 10D-42 F.A.C., and that this was a procedure Deputy Fries had "evolved" himself.

At the June 7th Hearing, Deputy Fries testified that he performs a mouth alcohol check, that there was no procedure for performance of mouth alcohol checks set forth at Chapter 10D-42 F.A.C., and that this was a procedure Deputy Fries had "evolved" himself (A 15).

Deputy Fries testified that the standards for accuracy deviation with .10% and .20% ethanol simulator solutions was 5%, that these standards are utilized throughout the State, and that HRS has instructed the use of such 5% accuracy deviation standard in monthly maintenance (A 17-18). Deputy Fries testified that the requirement of performing three (3) simulator tests utilizing .10% ethanol solutions in monthly maintenance was mandatory but that the use of (3) simulator tests utilizing .20% ethanol solutions in monthly maintenance was "recommended" but "not required" (A 18-19). Deputy Fries further testified that the performance of acetone tests in monthly maintenance "was recommended as well, that was not required" (A 18-19).

Deputy Fries did testify that the standard for accuracy deviation "requires compliance", and that if an instrument in monthly maintenance was "outside .005 on .10 ethanol solution, the instrument is deemed to be out of calibration" and "taken out of service" (A 19). Deputy Fries did testify that this standard of accuracy deviation had the "force and effect of law" to the extent it "required compliance" (A 20).

Deputy Fries testified that there was not a standard he was instructed to follow with acetone maintenance testing, that Deputy Fries had developed his own procedure for acetone testing, and that "according to HRS rules, you can still use an instrument that fails the acetone sensitivity test" (A 21).

Deputy Fries examined the provisions of Rule 10D-42.024(1)(c) F.A.C., governing monthly maintenance which required test instruments "be inspected at least once each calendar month by a technician to insure general cleanliness, appearance, and accuracy"

(A 24). Deputy Fries acknowledged that the standard for accuracy deviation in monthly maintenance had not been promulgated as a Rule pursuant to Section 120.54 Florida Statutes (A 24).

Deputy Fries at the June 7th Hearing acknowledged the "protocol testing" standards for acceptance of instrument models set forth at 10D-42.022 (1989) to require 150 simulator tests, as well as blood/breath correlations but advised this did not apply to monthly maintenance or yearly inspections (A 25-26). Deputy Fries advised that he had expressed "concern" to the Scientific Director of the Implied Consent Program Dr. Rarick as to the failure of HRS to establish standards in Chapter 10D-42 F.A.C. as to "accuracy and calibration" in monthly maintenance (A 29-30).

Deputy Fries further advised as to the adoption of these informal standards of general applicability utilized in monthly maintenance that there have been no public hearings required by Section 316.1932(1)(f)(1) Florida Statutes, and no legislative participation by the Joint House Administrative Procedures Committee required by Section 120.54(11)(a) and 120.545 Florida Statutes (A 32). Deputy Fries testified that he was not "free as a maintenance technician to deviate in any way from the standards of accuracy calibration" on monthly maintenance (A 33).

Deputy Fries testified that the procedure for testing instrument maintenance was originally to require three (3) .10% simulator tests. Deputy Fries acknowledged that this procedure had evolved but HRS has failed to promulgate these changes in its standards of general applicability in monthly maintenance through Section 120.54 Rule Making (A 50). Please see: Rule 10D-42.24(1)(c) (1983) through 10D-42.024(1)(c) (1990) F.A.C..

At the June 6th Hearing Officer Lower testified that the original procedure in monthly maintenance was to "mix" a simulator as long as my results did not exceed what the simulator said it would be it was supposed to be acceptable" (A 54-55, 56). Officer Lower advised that originally there was no required concentration of ethanol utilized in simulator solutions, and that the concentration values used were ".10 solution, sometimes .150, sometimes .20, sometimes .05" (A 55). There was no requirement to utilize a specific value of simulator solution each month (A 55).

The Scientific Director of the Implied Consent Program, Dr. Rarick in 1987 or 1988 advised Officer Lower to utilize simulator concentration values of .10% and .20% with standards of acceptable accuracy deviation of 5% of the mixed value. These standards were not adopted as rules under the Administrative Procedures Act and Rule 10D-42.024(1)(c) F.A.C. remained unchanged (A 56). Officer Lower advised this was a "mandatory standard that requires compliance" (A 56). Officer Lower advised that the language of Rule 10D-42.024(1)(c) F.A.C. (1990) as to checks for "cleanliness", "general appearance" and "accuracy" was the same as originally existed in the rules in 1978 (A 59). Officer Lower testified that there have been changes in the "standards for accuracy deviation as well as the number of simulator tests being performed" from 1978 through 1990 as to monthly maintenance but such changes in standards for determination of instrument accuracy have not been promulgated as rules pursuant to Section 120.54 Florida Statutes (A 60, 65-66). Officer Lower testified that Rule 10D-42.024(1)(c) F.A.C. (1990) was "vague" and "indefinite" (A 64-65).

Officer Lower testified as to the yearly inspection procedures utilizing the Inspectors Annual Data Sheet attached to HRS form 713, and advised the ethanol concentration values, the number of tests (25) and standards for accuracy deviation on yearly inspection had not been promulgated as rules pursuant to Section 120.54 Florida Statutes and thereby incorporated into Chapter 10D-42 F.A.C. (A 66-67). Officer Lower advised that these are standards of "general applicability" that "require compliance" that "have the force and effect of law" (A 67-68).

Deputy Fries further acknowledged that in 1982 the yearly inspection procedures involved only three (3) .10% ethanol simulators (A 50). Deputy Fries acknowledged that the yearly inspection standards, number of tests, and values of simulator solutions changed over the years and each time yearly inspection procedure changed, there was no notice to the public published in the Florida Administrative Weekly (A 50). Deputy Fries acknowledged that the changes in the yearly inspection have not been adopted after public hearing as Rules (A 50-51).

The promulgated rule for yearly inspection set forth at Rule 10D-42.023 F.A.C. (1990) was unchanged from 1979 to 1990.

TRIAL COURT FINDINGS OF FACT

On June 13th, 1991 the Honorable Zebedee Wright rendered his Order Granting Motion to Suppress Breath Test Results (A 281-292). The Court therein entered specific Findings of Fact (A 282-288). The Court found as to the accuracy standards utilized in ethanol simulator solutions for monthly maintenance:

> "This accuracy standard of "general applicability that implements, interprets, or prescribes law or policy...or practice requirements", requires compliance, and has the

> force and effect of law is a "Rule" within the meaning of Section 120.52(16) Florida Statutes. It has not been promulgated as a "Rule" in accordance with Section 120.54, 120.545 and 120.55 Florida Statutes. Please see: Department of Administration v. Harvey, 356 So2d 323 (Fla 1DCA 1977)" (A 283).

The Court further found as to the concentration of ethanol simulator solutions used in monthly maintenance as follows:

> 5. This Court further finds the uniform procedure or "practice requirements" of using values of .10% and .20% BAC simulator solutions in maintenance has not been "approved" as required by Section 316.1932(1)(f) and (1)(b) Florida Statutes through Rule Making Procedures. This Court further finds the number of tests to be administered utilizing .10% and .20% BAC simulator solutions has not been "approved" through Rule promulgation in compliance with the Florida Administrative Procedure Act (A 283).

The Court further entered Findings of Fact as to the yearly inspection as follows:

> 7. The HRS Inspector further conducted yearly instrument maintenance on the subject instruments herein. This Court finds the standards for instrument accuracy, the values or simulator solution to be utilized, the number of simulator tests administered and other procedures implemented in yearly maintenance of the subject instruments have not been "approved" within the meaning of Section 316.1932(1)(b) and (1)(f)(1) Florida Statutes. This Court finds said yearly maintenance procedures and standards are of "general applicability" throughout the State of Florida, have the force of law, and require compliance. These yearly maintenance standards and procedures are Rules within the meaning of Section 120.52(16) Florida Statutes but have not been promulgated as Rules in accordance with Section 120.54, 120.545, and 120.55 Florida Statutes (A 284).

The Court in finding the unpromulgated standards for yearly inspection and monthly maintenance to constitute INVALID RULES noted the HRS pronouncement in its Statement of Justification for the 1989 Amendments to Rule 10D-42.022 F.A.C. (A 462) which set forth prototype approval criteria:

> This Court notes the Statement of Justification for the 1989 Amendments to

Chapter 10D-42 as filed herein wherein HRS as justification of the need for Rule 10D-42.022(3) promulgation states:

> Recent Court rulings have found the alcohol breath test instrument approval criteria to be rule pursuant to Florida Administrative Code Section 120.54 thus requiring promulgation".

This Court finds that as the "approval criteria" for prototype acceptance are "Rule pursuant to F.A.C. Section 120.54 thus requiring promulgation", so too, the subject aforementioned monthly and yearly maintenance criteria "for accuracy" are rule pursuant to F.A.C. 120.54 thus requiring promulgation" (A 287-288, citing to A 462).

SUMMARY OF ARGUMENT

POINT I
(QUESTIONS CERTIFIED SUBJUDICE TO THE 4DCA)

THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF TEST INSTRUMENT ACCURACY PURSUANT TO RULEMAKING REQUIREMENTS OF CHAPTER 120 FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF BREATH TEST INSTRUMENT ACCURACY THROUGH ADOPTION "AFTER PUBLIC HEARING" AS REQUIRED BY SECTION 316.1932(1)(f)(1) FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO EMPLOY "APPROVED" MAINTENANCE PROCEDURES AND STANDARDS FOR TEST INSTRUMENTS RENDERED THE TEST RESULTS OBTAINED INVALID.

POINT II
NEVADOMSKI CERTIFIED QUESTION I

RULES 10D-42.023 AND 10D-42.024 OF THE FLORIDA ADMINISTRATIVE CODE, IN EFFECT PRIOR TO AUGUST 1, 1991 ARE VOID FOR VAGUENESS. SUCH DOES PRECLUDE THE STATE'S USE OF THE BREATH TEST RESULTS OBTAINED THEREUNDER IN A CRIMINAL TRIAL.

POINT III

RULES 10D-42.023 AND 10D-42.024 FLORIDA ADMINISTRATIVE CODE EFFECTIVE AUGUST 1, 1991, SHOULD NOT BE APPLIED RETROSPECTIVELY.

POINT I

THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF TEST INSTRUMENT ACCURACY PURSUANT TO RULEMAKING REQUIREMENTS OF CHAPTER 120 FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF BREATH TEST INSTRUMENT ACCURACY THROUGH ADOPTION "AFTER PUBLIC HEARING" AS REQUIRED BY SECTION 316.1932(1)(f)(1) FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO EMPLOY "APPROVED" MAINTENANCE PROCEDURES AND STANDARDS FOR TEST INSTRUMENTS RENDERED THE TEST RESULTS OBTAINED INVALID.

The above enumerated issues were first certified to the District Court of Appeals for the Fourth District on June 14, 1991 (A 281-292, 304-305). Although the Court of Appeals has certified this instant cause to this Most Honorable Court by its Order of June 9, 1993, the questions originally certified by the Honorable Zedebee Wright have not been answered. These issues were addressed in In re: En Banc Hearing Regarding HRS Rule Promulgation and Breath Testing, 16 FLW C97 (Palm Beach County Court, June 17, 1991), but were not answered in State v. Kepke, 17 FLW D752 (Fla 4DCA, March 18, 1992) where the Court of Appeals declined to accept jurisdiction.

The issue we pray this Most Honorable Court to address is whether the monthly preventive maintenance and yearly inspection procedures and standards employed were "approved" within the meaning of Section 316.1932(1)(b)(2) and 316. 1932(1)(f)(1) Florida Statutes.

The issue we pray this Most Honorable Court to address is whether the standards of general applicability as to instrument annual inspection and monthly preventive maintenance that

implemented Sections 316.1932(1)(b)(2) and 316. 1932(1)(f)(1) Florida Statutes were properly promulgated as "Rules" in accordance with the legislative mandate of Sections 120.54, 120.545 and 120.55 Florida Statutes.

The issue subjudice is not whether Petitioners were prejudiced or not prejudiced as to their particular breath tests. The issue is not whether the maintenance procedures as to the specific instruments utilized were adequate, or as with the Hollywood Police Department maintenance referenced by Officer Lower at Hearing, inadequate (A 180-182, 52-54, 61-65, 71-72).

As announced by the Court of Appeals for the Fifth District in State v. Reisner, 584 So2d 141, 145 (Fla 5DCA 1991):

> HRS must approve and specify the specific technology and methods of ensuring (among other things) the accuracy of the machines used. Bender at 699; Gargone at 423. It must do so by formally promulgating rules.

The issue subjudice is whether the unpromulgated standards of general applicability that require compliance and have the force and effect of law in instrument monthly maintenance and yearly inspection are "Rules" within the meaning of Section 120.52(16) Florida Statutes. The Trial Court in its Findings of Fact (A 282-288) found the subject monthly preventive maintenance procedures and standards of accuracy deviation to be "Rules" within the meaning of Section 120.52(16) Florida Statutes (A 283). The Trial Court further found the annual inspection procedures and standards to be "Rules" within the meaning of Section 120.52(16) Florida Statutes (A 284). The above cited Findings of Fact are subject to a presumption of correctness. State v. Polak, 598 So2d 150 (Fla 1DCA 1992); State v. Burke, 531 So2d 416, 418 (Fla 4DCA 1988);

State v. Garcia, 431 So2d 651 (Fla 3DCA 1983); State v. Thomas, 212 So2d 910, 911 (Fla 1DCA 1968); State v. Battleman, 374 So2d 636, 637 (Fla 3DCA 1979).

The issue is whether such unpromulgated "Rules" constitute an "invalid exercise of delegated legislative authority" for reason of noncompliance with Rulemaking requirements of Section 120.54 Florida Statutes as defined in Section 120.52(8)(a) Florida Statutes. The Trial Court in its Findings of Fact specifically found HRS noncompliance with Chapter 120 Florida Statutes Rulemaking requirements. The Trial Court further found the unpromulgated standards for preventive monthly maintenance and yearly inspection that were in noncompliance with Chapter 120 Rulemaking requirements to constitute an invalid exercise of delegated legislative authority (A 284-287). These Findings of Fact are subject to a presumption of correctness. Please Read: Department of Administration v. Harvey, 356 So2d 323 (Fla 1DCA 1977); McCarthy v. Department of Insurance, 479 So2d 135 (Fla 2DCA 1985).

The issue subjudice, is whether the failure of HRS to "approve" its "standards of general applicability" as to determination of test instrument accuracy pursuant to Rulemaking Requirements of Chapter 120 Florida Statutes renders such standards "unapproved" and "unlawful". The Trial Court entered specific Findings of Fact that such standards and procedures had "not been 'approved' as required by Section 316.1932(1)(f)(1) and (1)(b)(2) Florida Statutes through Rule promulgation in compliance with Chapter 120 Florida Statutes Rulemaking Procedures" (A 283-284). The Trial Court in holding Section 316.1932(1)(a) Florida Statutes

to equate an "approved chemical test" with a "lawful test" (A 290) correctly found the subject maintenance/inspection standards to not be "approved" and to be "unlawful". This Finding of Fact is subject to presumption of correctness. State v. Polak, 598 So2d 150 (Fla 1DCA 1992); State v. Flood, 523 So2d 1180, 1181-1182 (Fla 5DCA 1988).

Moreover, in State v. Hoff, 45 Fla Supp 2d 141 (Orange Cty. Ct., 1991) affirmed State v. Hoff, 591 So2d 648 (Fla 5DCA 1991) the Trial Court in its discussion of Rules 10D-42.023 and .024(1)(c) F.A.C. (1990) and the unpromulgated maintenance/inspection standards actually employed by HRS announced:

> "The Rules fail to provide for yearly testing procedures and they provide no performance standards for either the yearly or monthly checks.
>
> Although HRS's formally-promulgated rules do not themselves specify a procedure for the yearly checks or standards of performance for yearly or monthly checks, there are established procedures and standards for the yearly and monthly check actually used by personnel who conduct these checks. None of these are formally promulgated but, instead, are composed by HRS employees Dr. Howard Rarick, Paul Tomilson, and Dr. Charles Hartwig. These informally-adopted procedures and standards have statewide application and otherwise meet the definition of a "rule" as that term is used in Section 120.52(16) Florida Statutes and Department of Transportation v. Blackhawk Quarry Co., 528 So2d 447 (Fla 5DCA 1988), review denied, 536 So2d 342 (Fla 1988). Yet none of them has been put through the rulemaking procedures of the APA or otherwise been subjected to a public hearing as required in Section 316.1932(f)(1). Because they were not this Court cannot consider them valid provisions of the regulatory scheme which purports to be a substitute for the traditional evidentiary predicate for the admissibility of breath test instruments".

Moreover, formal Rulemaking is required under Section 120.54 Florida Statutes because HRS standards for accuracy deviation, simulator concentration values, and number of simulator tests

administered in monthly maintenance and yearly inspection are "policy statements of general applicability" that are intended to "require compliance, or to otherwise have a direct and consistent effect of law". Department of Administration v. Harvey, 356 So2d 323, 325 (Fla 1DCA 1977); Department of Transportation v. Blackhawk Quarry Co., 528 So2d 447 (Fla 5DCA 1988); McCarthy v. Department of Insurance, 479 So2d 135 (Fla 2DCA 1985); Department of Corrections v. Holland, 469 So2d 166 (Fla 1DCA 1985).

We are not unmindful of State v. Burke, 599 So2d 1339 (Fla 1DCA 1992) wherein the Court addressed validity of HRS Rules 10D-42.028-10D-42.030 F.A.C. concerning the alcohol dehydrogenase and gas chromatography methods of testing blood samples for alcohol content. The Court of Appeals found the adoption of the two "approved" methods of blood testing (10D-42.028 F.A.C.) with the Rules governing blood labeling, collecting and storage (10D-42.029 F.A.C.) sufficient (at page 1342).

This is distinguishable from the case subjudice where Petitioners submit that HRS had informally adopted uniform standards for ethanol simulator concentration values and number of simulator tests to be administered in preventive monthly maintenance and annual inspection setting forth a 5% accuracy deviation standard in use of .100% and .200% ethanol simulator solutions, without formal rule promulgation, public hearing, publication or oversight by the Joint House Committee on Administrative Procedures (as required by Sections 316.1932 (1)(b)(2) and (1)(f)(1) Florida Statutes and Sections 120.53, 120.54, 120.55, and 120.545 Florida Statutes).

The Burke case supra is also distinguishable from the case subjudice where Petitioners submit that HRS has informally adopted uniform standards of general applicability that constituted "Rules" within the meaning of Section 120.52(16) Florida Statutes in Preventive Monthly Maintenance and Annual Inspection for "acceptable" accuracy deviation in simulator testing without formal Rulemaking and Public Hearing.

The "Inspectors Annual Data Sheet" (A 264, 271) which was not promulgated as a "Rule", nor published, nor subjected to public hearings as required by the Administrative Procedures Act and the Implied Consent Law sets forth these "unapproved" standards of acceptable accuracy deviation that constitute an "invalid exercise of delegated legislative authority" as defined in Section 120.52(8)(a) Florida Statutes.

The Burke case supra is distinguishable because in the case subjudice, HRS has from 1983 until the new Amendments to Chapter 10D-42 F.A.C. (effective August 1, 1991) circumvented the "approval" requirements of Sections 316.1932(1)(f)(1) and (1)(b)(2) Florida Statutes by its failure to promulgate, publish, submit to legislative oversight, and hold public hearings upon the adoption of these existing standards HRS applied in determination of Breath Test Instrument "Accuracy".

Moreover, in the absence of an "approved" test, we respectfully submit that Breath Test results obtained from Petitioners may not be introduced into evidence through application of a traditional evidentiary predicate.

In State v. Bender, 382 So2d 697 (Fla 1980) this Court explained the nature of the "Implied Consent" law at page 700 as a

legislative assignment "to the agencies" of "responsibility to establish uniform testing procedures for the protection of the public who must submit to the test or lose their driving privileges". The Bender case supra further noted at page 700 that "the tests are part of a statutory scheme which prescribes the implied consent of all drivers to take these tests and where the tests and procedures are always subject to judicial scrutiny".

The interrelation between "approved testing" and "implied consent" can thus be understood. As announced by the Bender Court supra at page 699:

> It must be recognized that the implied consent provision of Chapter 322 and the approved testing methods and presumptions contained therein are all interrelated.
>
> The test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority.

Moreover, this Compact between the People and their government was again expressed by the District Court of Appeals for the First District in State v. Polak, 598 So2d 150 (Fla 1DCA 1992). In the Polak case supra, law enforcement agency substantially modified an Intoximeter removing its Taguchi Sensor Cell which detected acetone. The Court of Appeals held that the removal of the acetone detection component of the instrument rendered the instrument no longer an "approved" testing instrument.

The Court reasoned that "because the intoximeter here was not an 'approved' instrument, as required by Section 316.1932(1)(a), the tests given to the defendants could not be considered 'approved'". Please see: State v. Numerous Defendants, 47 Fla Supp 2d 89 (Leon Cty. Ct. 1991); State v. Flood, 523 So2d 1180 (Fla 5DCA 1988); State v. Bender, 382 So2d 697, 700 (Fla 1980).

Moreover, in State v. Donaldson, 579 So2d 728, 729 (Fla 1991) this Most Honorable Court reasserted the interrelation between "implied consent" and "approved" testing that necessarily excludes application of the traditional evidentiary predicate:

> In State v. Bender, 382 So2d 697 (Fla 1980), we stated that test results obtained under subsection 322.262(2), Florida Statutes (1979), are admissible into evidence only upon compliance with statutory provisions and the administrative rules enacted by the Department of Health and Rehabilitative Services (HRS). Thus, we agree with the District Court that there must be probative evidence (1) that a breathalyzer test was performed substantially in accordance with methods approved by HRS, by a person trained and qualified to conduct it and (2) that the machine itself had been calibrated, tested, and inspected in accordance with HRS regulations to assure its accuracy before the results of a breathalyzer test may be introduced.

Moreover, the express mention of "approval" as a requirement of "lawful testing" pursuant to Section 316.1932 Florida Statutes implies the "exclusion" of other means of test administration and maintenance that lack such "approval". See: Thayer v. State, 335 So2d 815 (Fla 1976); Williams v. State, 374 So2d 1086 (Fla 2DCA 1979).

As announced by the Williams Court supra, at page 1087:

> "It is of course, a well established principle of statutory construction that when a statute expressly enumerates a list included offenses, it impliedly excludes from its operation any offenses not expressly enumerated".

This principle applied to Section 316.1932 Florida Statutes further compels a finding that the "traditional predicate" is not available where a defendant submits to a breath test administered pursuant to his or her "Implied Consent". Section 316.1932(1)(f)(1) Florida Statutes articulates the only

circumstance in which a traditional evidentiary predicate is available:

> "However, the failure of a law enforcement officer to request the withdrawal of blood shall not affect the admissibility of a test of blood withdrawn for medical purposes".

For the additional reason that the principle of statutory construction "expressio unius est exclusio alterius" herein applies, the breath test results obtained pursuant to the "Implied Consent" of a Criminal Defendant "are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority" State v. Bender, supra at page 699.

Accordingly, there is no traditional evidentiary predicate available that would permit the public hearing and rulemaking requirements of Chapter 120 Florida Statutes to be circumvented. The Honorable Zebedee Wright properly suppressed the breath test results herein.

POINT II
NEVADOMSKI
CERTIFIED QUESTION I

RULES 10D-42.023 AND 10D-42.024 OF THE FLORIDA ADMINISTRATIVE CODE, IN EFFECT PRIOR TO AUGUST 1, 1991 ARE VOID FOR VAGUENESS. SUCH DOES PRECLUDE THE STATE'S USE OF THE BREATH TEST RESULTS OBTAINED THEREUNDER IN A CRIMINAL TRIAL.

The Petitioners do not embrace argument's addressed in the "Rochelle" line of cases supra that HRS Rules 10D-42.023 and 10D-42.024(1)(c) F.A.C. (1990) are "constitutionally vague".

Rather, the Petitioners respectfully submit that these abovementioned promulgated rules were "vague" within the meaning of Section 120.52(8)(d) Florida Statutes. Section 120.52(8)(d) Florida Statutes provides that "a proposed or existing rule is an invalid exercise of delegated legislative authority if...(d) the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency".

The failure of these above mentioned promulgated rules to "establish adequate standards" was fully addressed by Deputy Fries and Instructor Lower at the May 16, 1991 and June 6-7, 1991 hearings (A 143-147, 165, 174-175, 180, 14-27, 61-65, 70-72).

We would respectfully submit that the vague terms "general appearance", "cleanliness", "reproducibility", and "accuracy" used in Rules 10D-42.023 and 10D-42.024(1)(c) F.A.C. (1990) set no standards by which compliance can be determined.

Moreover, the terms "general appearance", "cleanliness", "reproducibility", and "accuracy" cannot be found to impose actual specific standards of general applicability through "agency interpretation", as such would still constitute an "invalid exercise of delegated legislative authority" within the meaning of

Section 120.52(8)(a) Florida Statutes. The "agency interpretations" of these vague terms themselves constitute "invalid rules" within the meaning of Section 120.52(8)(a) and 120.52(16) Florida Statutes, for reason of HRS failure to properly promulgate these "agency interpretations" as "Rules" in accordance with Rulemaking requirements of Section 120.54 Florida Statutes. See: Department of Administration v. Harvey, 356 So2d 323 (Fla 1DCA 1977); McCarthy v. Department of Insurance, 479 So2d 135 (Fla 2DCA 1985).

Moreover, as announced in State v. Reisner, 584 So2d 141 (Fla 5DCA 1991) at page 145:

> HRS must approve and specify the specific technology for ensuring (among other things) the accuracy of machines used. Bender at 699; Gargone at 423. It must do so by formally promulgating rules.

Moreover, we are not unmindful of State v. Berger, 605 So2d 488 (Fla 2DCA 1992) which addressed the sufficiency of Rules 10D-42.023 and 10D-42.024 F.A.C. (1990). The Court in examination of HRS Form 1514 utilized in preventive monthly maintenance (A 272, 393) noted the Appellee-Defendants' assertion that HRS Form 1514 "fails to list the procedure to be used for monthly maintenance or the standard for accuracy" (at page 489).

The Court of Appeals in Berger, supra did note that the same standards for accuracy deviation and concentration values utilized pursuant to Rule 10D-42.022 F.A.C. (1989) for prototype initial certification (A 455-456) were utilized with a lesser number of simulator tests in annual inspection (A 264) pursuant to Rule 10D-42.023 F.A.C. (1990), and with still fewer simulator tests in preventive monthly maintenance (A 265). The Berger Court supra

noted at page 490 "that the rules as promulgated have no requirements at certain levels beyond the initial certification".

Reliance upon the Berger ruling supra which found guidance in the initial opinion in State v. Rochelle, 17 FLW D1756 (Fla 4DCA July 22, 1992) would be misplaced because the initial Rochelle opinion supra erroneously opined the monthly preventive maintenance HRS Form 1514 to be utilized in annual inspection performed pursuant to Rule 10D-42.023 F.A.C. (1990) (At 17 FLW D1756).

The record subjudice reflects the HRS Forms 1514 to bear the notation "To be Completed at least once in a calendar month by a technician" (A 265, 393) and to be utilized in preventive monthly maintenance pursuant to Rule 10D-42.024(1)(c) F.A.C. (1990).

The record subjudice reflects a different unpromulgated form utilized in annual inspection pursuant to Rule 10D-42.023 F.A.C. (1990). The record subjudice reflects the use of an unpromulgated "Inspectors Annual Data Sheet" which requires 25 simulator tests and sets forth specific standards of acceptable accuracy deviation at +\- 5% with .100% and .200% ethanol simulator solutions and 10% with 0.050% ethanol simulator solutions. The "Inspectors Annual Data Sheet" sets forth "pass/fail" standards for acetone simulator testing (A 264). The "Inspectors Annual Data Sheet" was not promulgated as a Rule pursuant to Section 120.54 Florida Statutes Rulemaking procedures.

Accordingly, the initial Rochelle "reasoning" to which the Berger Court supra opined its "agreement" is flawed. The initial Rochelle "reasoning" supra that the Annual Inspection Rule 10D-42.023 F.A.C. (1990) was not "vague" because "Form 1514...was sufficiently specific" must necessarily fail.

Moreover, neither the Rochelle nor the Berger decision supra address "vagueness" within the meaning of Section 120.52(8)(d) Florida Statutes as it applies to Rules 10D-42.023 F.A.C. (1990) and 10D-42.024(1)(c) F.A.C. (1990).

Moreover, the "modified" Rochelle opinion at 609 So2d 613, 617 (Fla 4DCA 1992) with its "acknowledgement" of the unpromulgated "Inspectors Annual Data Sheet" does not address the HRS material failure "to follow the applicable rulemaking procedures set forth in Section 120.54 Florida Statutes" (See: Section 120.52(8)(a) Florida Statutes). The "manufacturers manual" for the test instrument in State v. Bender, 382 So2d 697 (Fla 1980) was not a "rule" as defined as Section 120.52(16) Florida Statutes. The unpromulgated "Inspectors Annual Data Sheet" utilized subjudice that "imposed requirements" for test result admissibility at Trial is a "Rule", subject to the formal Rulemaking requirements of the Administrative Procedures Act.

Moreover, the issue subjudice is not the use of 9 promulgated preventive monthly maintenance Form 1514, Sept 82 (A 393) nor the unpromulgated Form 1514, Feb 86 (A 265). The issue subjudice is the substance of those unpromulgated standards utilized by HRS that determined whether the results recorded upon Form 1514 were "acceptable" or "unacceptable".

Because the specific procedures for preventive monthly maintenance and annual inspection, the specific standards for number of simulator tests in preventive monthly maintenance and annual inspection, the specific standards for simulator ethanol and acetone concentrations in simulator testing, and the specific standards for "acceptable" accuracy deviation in simulator testing

performed in monthly preventive maintenance and annual inspection of test instruments cannot reasonably be interpreted from the terms "general appearance", "cleanliness", "reproducibility", and "accuracy", Rule 10D-42.023 F.A.C. (1990) and 10D-42.024(1)(c) F.A.C. (1990) are "vague" and should be declared an "invalid exercise of delegated legislative authority" within the meaning of Section 120.52(8)(d) Florida Statutes.

POINT III

RULES 10D-42.023 AND 10D-42.024 FLORIDA ADMINISTRATIVE CODE EFFECTIVE AUGUST 1, 1991, SHOULD NOT BE APPLIED RETROSPECTIVELY.

The provisions of Rule 10D-42.023 and 10D-42.024(1)(b) F.A.C. (1991) should not be applied retrospectively because such an application of HRS Rule would "enlarge" and "modify" the delegation of legislative authority to HRS to promulgate rules implementing the Implied Consent Law. Section 120.54(15) Florida Statutes provides that "no agency has inherent rulemaking authority". Section 316.1932(1)(f)(1) Florida Statutes (1991) provides that the subject tests be administered "in accordance with Rules and Regulations which shall have been adopted by the Department of Health and Rehabilitative Services" (e.s.). HRS was without legislative authority to promulgate rules that would become effective as to breath tests administered before their adoption. Gulfstream Park v. Division of Para-Mutual Wagering, 407 So2d 263, 265 (Fla 3DCA 1981); Thayer v. State, 335 So2d 815, 818 (Fla 1976); State v. Papes, 21 Fla Supp 2d 151 (9th Cir. Ct., 1986); McKibben v. Mallory, 293 So2d 48 (Fla 1974); McCarthy v. Department of Insurance, 479 So2d 135 (Fla 2DCA 1985).

Moreover, there is not evidence of retrospective intent by HRS itself. There is express language of prospective application contained in Rule 10D-42.023 and .024(1)(b) F.A.C. (1991) with the words "effective August 1, 1991". There is additionally the effective date for the entire rulemaking package itself of August 1, 1991.

Moreover, there is no evidence of intent by HRS to apply the 1991 Amendments retrospectively in the agency's interpretation of

its own rules under Chapter 10D-42 F.A.C. See: Franklin Ambulance v. Department of Health and Rehabilitative Services, 450 So2d 580 (Fla 1DCA 1984). There is no evidence of HRS intention to apply the August 1st Amendments retrospectively to invalidate breath tests administered prior to August 1, 1991 upon the Intoxilyzer 4011AS, Intoxilyzer 4011ASA, GC Intoximeter Mark IV, Auto Intoximeter AI1, Breathalyzer 2000, BAC Verifier, or Indium Crimper. These instruments were all deleted by HRS from its list of "Approved" instruments contained in Rule 10D-42.034 F.A.C., effective August 1, 1991. Rules 10D-42.024(2)(a) and 10D-42.024(3)(a) F.A.C. effective August 1, 1991 amended operational procedures for the Intoxilyzer Models 3000, 3000 Rev. B1 and Intoxilyzer 5000 requiring that "to be acceptable any two of three results shall be within +/- 0.020 and taken within 15 minutes of each other". The provisions of this Section have not been applied by HRS retrospectively to tests administered prior to August 1, 1991 to invalidate tests results.

Moreover, there is no mention of retrospective intention by HRS in the Summary of Rule, Statement of Justification, Federal Comparison Statement, Economic Impact Statement, or Summary of Public Hearing, all contained within the Rulemaking Package filed with the Amendments to Rule 10D-42 F.A.C. with the Secretary of State on July 11, 1991, effective August 1, 1991 (pursuant to Section 120.54(13)(a) Florida Statutes).

Similarly, the previous Rulemaking Package for Chapter 10D-42 F.A.C. (effective January 25, 1990) deleted the Breathalyzer Models 800, 1000, 1100 and Alco-Analyzer from the list of "approved" test instruments. There is no evidence in the 1990 Rules of any

retrospective intent by HRS to invalidate tests administered upon those instruments prior to the January 25, 1990 deletion date (A 466-478).

Similarly, the definition of "determining" set forth at Rule 10D-42.211(4) F.A.C. (effective October 23, 1984) which required two breath tests to be administered within five minutes, where previously one breath test was required was not applied retrospectively by HRS. See: State v. Hodgson, 38 Fla Supp 2d 17 (17th Cir. Ct., 1989); Feeley v. State, 18 Fla Supp 2d 163 (17th Cir. Ct., 1985); State v. Blake, 10 Fla Supp 2d 17 (Volusia Cty. Ct., 1985); State v. Papes, 21 Fla Supp 2d 151 (9th Cir. Ct., 1986) (A 425-453).

We would respectfully note the August 1, 1991 Amendments to Chapter 10D-42 F.A.C. were filed on July 11, 1991 and took "effect 20 days from the date filed with the Department of State" (See: Section 120.54(13)(a) Florida Statutes). We would respectfully note that the January 25, 1990, January 10, 1989, October 23, 1984 and March 8, 1983 Rulemaking Packages for Chapter 10D-42 F.A.C. all took effect "20 days from the date filed" in accordance with Chapter 120 Florida Statutes Rulemaking procedures.

Moreover, in Drury v. Harding, 443 So2d 360 (Fla 1DCA 1983), quashed in part, 461 So2d 104 (Fla 1984), the DUI law was amended effective July 1, 1982 to re-delegate authority to promulgate rules governing administration of tests to HRS (Section 316.1932(1)(f)(1) Florida Statutes). Rulemaking authority had previously rested with DMV and HRS. On December 16, 1982 HRS adopted emergency rules pursuant to Section 120.54(9) Florida Statutes (which remained in effect for 90 days pursuant to Section 120.54(9)(c) Florida

120.54(9)(c) Florida Statutes). The provisions of Chapter 10D-42 F.A.C. thereafter became effective March 8, 1983. The Court addressed that period between July 1, 1982 and December 16, 1982. The First District Court of Appeals announced: "The Rules and Regulations adopted by HRS on December 16, 1982 are procedural and therefore they may be applied retrospectively...Because the purpose of the rules is to ensure that only reliable evidence is placed before the jury, the law in effect at the time of the Trial is the law that governs the admissibility of evidence" (at page 361). This Most Honorable Court took note of the language contained in Section 316.1932(1)(f)(1) Florida Statutes which required the tests to be administered in accordance with rules that "shall have been adopted", held the DMV rules "continued in effect" until "subsequent re-adoption of these rules on March 8, 1983". This Most Honorable Court expressly rejected retrospective application of HRS Chapter 10D-42 F.A.C. (1983) at page 108 as follows:

> It is a well-settled rule under Florida Law that when a statute is repealed and then substantially reenacted by the legislature its operation is deemed to be continuous and uninterrupted. McKibben v, Mallory, 293 So2d 48 (Fla 1974). Likewise, when an agency substantially re-adopts the provisions of its prior regulations the application of those provisions to actions which arose before their re-adoption is not destroyed or interrupted.
>
> We therefore quash that portion of the District Court opinion relating to the retrospective application of HRS rules adopted pursuant to Subsection 316.1932(1)(f)(1) Florida Statutes (Supp 1982), but we approve that portion of the District Court opinion which affirmed the Circuit Court's order and remand for further proceedings.

As in the Drury decision supra, so too herein there is no delegation of legislative authority to HRS to adopt rules to be retrospectively applied in implementing the Implied Consent Law.

As in the Drury decision supra the August 1, 1991 Amendments to Chapter 10D-42 F.A.C. became effective 20 days after filing with the Department of State.

Unlike the Drury decision supra the rules adopted on August 1, 1991 are not a re-adoption of provisions of its prior regulations.

Moreover, to the extent such August 1, 1991 rules have adopted unpromulgated procedures that were not properly promulgated as "Rules" in accordance with Section 120.54 Florida Statutes, such cannot be applied retrospectively. Please see: McCarthy v. Department of Insurance, 479 So2d 135 (Fla 2DCA 1985).

For this and the foregoing reasons, the Amendments to Chapter 10D-42 F.A.C., effective August 1, 1991 should not be applied retrospectively.

CONCLUSION

Section 316.1932(1)(f)(1) and (1)(b)(2) Florida Statutes mandate that breath testing administered pursuant to the Implied Consent Law be "approved" through formal Rules that "have been adopted" pursuant to Chapter 120 Rulemaking procedures "after public hearing". The standards for accuracy deviation, number of simulator tests and ethanol concentration values of simulator solution used in monthly maintenance and annual inspection of test instruments had not been "adopted" as formal Rules pursuant to Section 120.54, 120.55. and 120.545 Florida Statutes at time of test administration subjudice. Because these standards were "standards of general applicability" that "required compliance" they did constitute "Rules" as defined at Section 120.52(16) Florida Statutes. Because these "standards of general applicability" were not promulgated as "Rules" they were "INVALID RULES" within the meaning of Section 120.52(8)(a) Florida Statutes. Moreover, Rules 10D-42.023 and .024(1)(c) Florida Administrative Code (1990) required only in general terms "checks" for "accuracy", "reproducibility", and "cleanliness". These formally adopted rules constitute an "invalid exercise of delegated legislative authority" as defined in Section 120.54(8)(d) Florida Statutes for reason that they were so "vague" as to not set standards from which compliance could be determined. The August 1, 1991 Amendments to Chapter 10D-42 Florida Administrative Code cannot be applied retrospectively. There is no traditional evidentiary predicate available that would permit the Rulemaking requirements of Chapter 120 Florida Statutes to be circumvented.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original plus seven copies of the foregoing was furnished this 11th day of February, 1994 to the Clerk of Court, Florida Supreme Court, 500 South Duval Street, Tallahassee, FL 32399-1925 and a copy furnished to: JAMES CARNEY, ESQ., 111 Georgia Avenue, Suite 204, West Palm Beach, FL 33401.

Respectfully submitted,

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