Supreme Court of Florida

WEDNESDAY, SEPTEMBER 8, 1993

NADINE NEVADOMSKI

Petitioner,

vs. Case No. 82,064

STATE OF FLORIDA

Respondent.

* * * * * * * * * * * * * *

Motion to Adopt Brief of petitioners' Carino/Rushing is granted. The motion and brief as been filed with the Court.

A TRUE COPY

TEST:

Sid J. White
Clerk Supreme Court

BDM
c: Mr. Stacey J. Pastel
Mr. James C. Carney

IN THE SUPREME COURT OF FLORIDA

RUSSELL CARINO and DAVID RUSHING, Petitioners, vs. STATE OF FLORIDA, Respondent.	CASE NO: 81,999 4TH DCA NO: 92-00469

****

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

****

INITIAL BRIEF ON THE MERITS OF RUSSELL CARINO AND DAVID RUSHING

****

LAW OFFICES OF RICHARD L. ROSENBAUM
ATTORNEY FOR PETITIONER, RUSHING
CO-COUNSEL FOR PETITIONER, CARINO
ONE EAST BROWARD BLVD.
PENTHOUSE - BARNETT BANK PLAZA
FT. LAUDERDALE, FL 33301
FLA. BAR NO: 394688

LAW OFFICES OF RHONDA ROGERS
ATTORNEY FOR PETITIONER, CARINO
4601 SHERIDAN STREET, 5TH FLOOR
HOLLYWOOD, FL 33021
FLA. BAR NO: 354902

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

TABLES OF CITATIONS AND AUTHORITIES (cont'd)

TABLES OF CITATIONS AND AUTHORITIES (cont'd)

TABLES OF CITATIONS AND AUTHORITIES (cont'd)

POINTS ON APPEAL

ARGUMENT I:

THE ORDER SUPPRESSING BREATH TEST EVIDENCE WAS FACTUALLY SUPPORTED BY THE RECORD AND CORRECTLY BASED UPON STATE v. REISNER; EACH OF THE CERTIFIED QUESTIONS SHOULD BE ANSWERED IN THE AFFIRMATIVE

A) The Trial Court Properly Suppressed Breath Test Evidence Based Upon Specific Factual Findings

B) The Trial Court Correctly Determined HRS Rules 10D-42.023 and 10D-42.024 as They Existed Prior to August 1, 1991 are Void for Vagueness

C) The Trial Court Correctly Suppressed Breath Test Evidence Finding the Use of Different (Not Uniform) Forms Reflecting Different Monthly Maintenance Procedures Constituted a Denial of Equal Protection

ARGUMENT II

THE TRIAL COURT CORRECTLY PRECLUDED THE STATE FROM USING THE TEST RESULTS OBTAINED; NO TRADITIONAL PREDICATE FOR ADMISSION OF THE SCIENTIFIC EVIDENCE WAS PRESENTED BY THE STATE

PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout this Initial Brief on the Merits of Petitioners, RUSSELL CARINO and DAVID RUSHING:

The term "Petitioners" or "Defendants" shall refer to the Defendants in the County Court below, RUSSELL CARINO and DAVID RUSHING.

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 on Appeal lodged 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 page 1 - 238 of the Appendix to Initial Brief on the Merits shall be designated by an "A" followed by the appropriate page number (A).

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

STATEMENT OF THE CASE AND OF THE FACTS

Petitioners, RUSSELL CARINO and DAVID RUSHING, were each arrested and subsequently charged by Information with the offense of driving under the influence. (A 1-3; 39-41) Each filed Motions to Suppress and to exclude breath test results based upon, inter alia, the unconstitutional vagueness of HRS Rules 10D-42.023 and 10D-42.024 based upon the lack of reliability of the testing procedures and the standard establishing the zones of intoxication levels. Petitioners' contended that Rules 10D-42.023 and 10D-42.024 of the Florida Administrative Code in effect prior to August 1, 1991 were void for vagueness, that the testing procedures and standards violated their constitutional rights to equal protection under the law, and that the HRS rules effective August 1, 1991 should not be applied retroactively. The Defendants further asserted that the Rules did not provide a sufficient predicate for the introduction of breath test results, therefore rendering the statutory presumption of impairment inapplicable. (A 4-31; 42-53)

The State of Florida filed a Response to Appellants' Motion, and stated that any infirmities in the Rules in existence at the time of the Petitioners' arrest were cured by the August 1, 1992 amendment of the Rules because the latter Rules could be applied retroactively. (A 33-34; 54-55)

An en banc evidentiary hearing was conducted in front of the Honorable Susan Lebow, June L. Johnson, Leonard Feiner and Ronald Rothschild, County Court Judges in Broward County, Florida on July

12, 1991. (A 64-164) Testimony was elicited in the hearing from defense expert Ira D. Karmelin and from State expert Deputy David E. Fries.

Ira Karmelin, a certified breathalyzer technician was accepted by the court as an expert with respect to DUI and the Intoxilyzer machine. (A 126) Mr. Karmelin is certified by the Department of Health and Rehabilitative Services, (hereinafter referred to as "HRS") as a maintenance technician, and is likewise certified by the manufacturer of the Intoxilyzer 5000, CNI, Inc., to repair the instrument. (A 124) The expert had run over 1000 breath tests in his career, and had been previously qualified as an expert regarding the Intoxilyzer 5000 on over 300 occasions. (A 126-127) Mr. Karmelin lectures with regard to the machine, and has worked as an expert in this area for both the defense and the prosecution. (A 126)

Mr. Karmelin testified that no accuracy standards were in existence with respect to the measurements on the Intoxilyzer 5000 machine anywhere in the HRS rules or regulations prior to August 1, 1991. (A 128) Mr. Karmelin testified that the only definition of "accuracy" concerning breath testing at the time was contained within HRS Rule 10D-42.022(b), which dealt with "systematic error" which is defined in the statute as being "the difference between the means and the measured value and a known value as well as the percentage of the known value." (A 129) Mr. Karmelin likewise testified that the Form 1514/1982 which were utilized for the Intoxilyzer 5000 had no way to measure an error factor. No

specifications were in existence as to what concentration would be used to determine accuracy. There is "nothing in the rules to guide them." (A 136-137) The previous rules never provided for the number of alcohol standard tests to be conducted, nor the concentration levels at which the tests should be performed. (A 130) The expert testified that the new form effective in August, 1991 proposed monthly maintenance tolerance factors at .10 and .20, plus or minus five percent. (A 137) The expert also testified that the data sheets utilized to test the Intoxilyzer 5000 were never brought before the HRS and tested pursuant to the Administrative Procedures Act, nor were they the subject of a public hearing. (A 132)

Deputy David Fries of the Broward County Sheriff's Office testified on behalf of the State. (A 80-122) Deputy Fries acknowledged that in 1982, HRS promulgated Form 1514 to be filled out as part of the monthly maintenance procedure when a breath test machine is examined. (A 81) Deputy Fries stated that the form requires an inspector to run "three tests on a known solution", as well as check the lights, appearance, etc. of the machine. (A 81-82)

Deputy Fries testified that breathalyzer technicians are required to take a 40 hour course on how to fill out the Form 1514. (A 86-87) Fries testified that "accuracy" refers to the value of simulators, and the number of each value which would be used in tests. (A 87)

Deputy Fries admitted that Form 1514 does not set out

instructions on how to fill blanks relative to lights and digital display, temperature equilibrium, carrier test pressure, standard test, blank test, alcohol standard test, standard concentration or mix, and general appearance. (A 99-104) Finally, the State expert could not explain why on the annual maintenance data sheet an error factor at .10 was 5% while an error factor at .05 was 10%. (A 115)

Ira Karmelin testified that no accuracy standards were in existence in the Rules on the maintenance of breathalyzers. (A 128-129) Mr. Karmelin testified that the definition of "accuracy" given in the Rules for Breath Tests refers to "systematic error" or "getting an average and making sure that you are within the tolerance of that". (A 129)

On January 27, 1992, the trial court entered a written Order granting DAVID RUSHING'S Motion to Suppress Breath Test Results. (A 56-59) In so doing, the court made several findings of fact which led the court to hold that HRS Rules 10-D42.023 and 10D-42.024 are "unconstitutionally vague, and thus void." (A. 57)

The court's factual findings were as follows:

> 1) Florida Statute 322.261(2)(a) mandates the Department of Health and Rehabilitative Services to promulgate rules and regulations "after public hearing" to insure the accuracy and reliability of breath testing equipment.
>
> 2) HRS properly adopted Rule 10D-42.022 which provides specific definitions for accuracy, precision and reproducability for a breath testing instrument being initially tested and certified for use in Florida.
>
> 3) Rules 10D-42.023 and 10D-42.024, prior to amendment, do not contain definitions for accuracy, precision or reliability relating to monthly or yearly maintenance.

4) From September, 1982 until February, 1986, HRS provided all police departments in Florida involved in breath testing with "form 1514/September 1982". This form was incorporated by reference in Rule 10D-42.024(5)(b).

5) Since February of 1986 different forms reflecting maintenance procedures for breath testing instruments have been used throughout the State of Florida. None of these forms have been properly promulgated or adopted after public hearing as required by Florida Statute 316.1932(1)(F)(1).

6) All the 1986 forms submitted in evidence differ substantially from the promulgated 1982 forms by the inclusion of a test for acetone.

7) The instruments used to test the defendants' breaths were not tested or maintained using the original form.

(A 56-57)

Likewise, the court concluded that the:

> Procedures utilized subsequent to February 1986 in attempting to conform with the former HRS Rules 10D-42.023 and 10D-42.024 were not uniformly applied to all persons arrested who submitted to breath testing and so are in violation of their right to equal protection under the law.
>
> (A 57-58) [emphasis in original].

With regard to the State's argument concerning the retroactivity of the HRS rules as amended on July 31, 1991, the Court noted:

> The rules regarding testing and maintenance of the breath testing equipment reflected on the original "Form 1514/September 1982" on the various February 1986 forms and as testified to by the two experts vary substantially from the rules effective August 1, 1991. The rules now require a simulator test at .05% level which is a much lower alcohol concentration. The more significant change is the requirement

> of calculating the arithmetic average of three acetone test readings. Defense counsel demonstrated that an instrument that previously passed inspection after acetone testing could fail under the new standards.
>
> (A 58)

After concluding that the HRS rules were procedural rather than substantive, the court below stated:

> Rules and regulations of a governmental agency may be applied only prospectively unless the legislature specifically granted the power and authority to HRS to make the rules and regulations apply retroactively.
>
> (A 58-59)

Accordingly, DAVID RUSHING'S Motion to Suppress Breath Test Results was granted. (A. 57-59)

In the trial court's order granting Petitioners' Motion to Suppress, the following three questions were certified as being of great public importance:

> I) Are Rules 10D-42.023 and 10D-42.024 of the Florida Administrative Code in effect prior to August 1, 1991 void for vagueness, and, if so, does this preclude the State's use of the result of the breath testing instruments in a criminal trial?
>
> II) Is the use of different forms reflecting different monthly maintenance procedures to test breathing equipment a denial of equal protection, and, if so, does this preclude the State's use of the results from the breath testing instruments in a criminal trial?
>
> III) Should Rules 10D-42.023 and 10D-42.024 effective August 1, 1991, be applied retroactively?

On appeal to the Fourth District of Appeal, a three judge panel reversed the suppression order entered below, remanding the

case to the trial court based upon State v. Rochelle, 609 So. 2d 615 (Fla. 4th DCA 1992). (A 237) Thereafter, RUSSELL CARINO and DAVID RUSHING'S Motions for Certification were granted and the Fourth District certified as questions of great public importance those certified in State v. Nevadomski, ___ So. 2d ___ (Fla. 4th DCA June 9, 1993) [18 Fla. L. Weekly D1411]. (A 238)

In Nevadomski, the court certified the following four questions[1]:

> A) Are Rules 10D-42.023 and 10D-42.024, Florida Administrative Code, as they existed prior to August 1, 1991, void for vagueness?
>
> B) If so, does this preclude the State's use of test results obtained on breath - testing machines maintained pursuant to those rules in a criminal trial?
>
> C) Is the use the use of different (not uniform) forms, reflecting differently monthly maintenance procedures for breath testing equipment, a denial of equal protection?
>
> D) If so, does this preclude the State's use of test results from the breath - testing instruments so tested in a criminal trial?

On June 23, 1993 the Petitioners filed a Notice to Invoke Discretionary Review. This appeal ensues.

---

[1]Judge Hursey dissented from the order on certification without an opinion.

SUMMARY OF THE ARGUMENT

The suppression order entered below was factually supported by the Record and was correctly based upon State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA), reviewed denied 581 So. 2d 184 (Fla. 1991). Accordingly, each of the certified questions should be answered in the affirmative.

The trial court properly suppressed the breath test evidence at bar based upon factual findings. The factual findings were supported by the expert testimony elicited at trial.

The trial court correctly suppressed the breath test evidence based upon a factual finding that HRS Rules 10D-42.023 and 10D-42.024 as they existed prior to August 1, 1991 are void for vagueness. As an additional ground, the Court suppressed the breath test evidence finding that the use of different (non-uniform) forms reflecting different monthly maintenance procedures constituted a denial of equal protection. Because the forms were void for vagueness and violated the equal protection clauses of the United States and Florida Constitution, the trial court correctly precluded the State from using the test results at trial. Alternatively, Petitioners assert that this Honorable Court should decline to answer the second and fourth certified questions in that the State of Florida failed to present evidence establishing how a traditional predicate could be laid for admission of the scientific evidence.

Petitioners assert that Form 1514 was never properly

promulgated prior to August, 1991. Form 1514 did not direct the maintenance operator to perform a standard test at either the .05, .10, or .20 blood alcohol levels. Based upon the Rule's failure to assure accuracy in testing, as well as inconsistencies in the form and its application, the trial court correctly suppressed the breath test evidence at bar.

ARGUMENT I

THE ORDER SUPPRESSING BREATH TEST EVIDENCE WAS FACTUALLY SUPPORTED BY THE RECORD AND CORRECTLY BASED UPON STATE v. REISNER; EACH OF THE CERTIFIED QUESTIONS SHOULD BE ANSWERED IN THE AFFIRMATIVE

The trial court's order entered by the Honorable Susan Lebow suppressing evidence of breath test results was proper based upon factual findings supported in the Record and should be upheld. The court relied upon State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA 1991), review denied 591 So. 2d 184 (Fla. 1991), requiring this Court to reverse the opinion entered by the Fourth District below and affirm the suppression order.

In certifying four questions below as being of great public importance, the Fourth District relied upon its decision in State v. Rochelle, 609 So. 2d 613 (Fla. 4th DCA 1992) in reversing the trial court's determination. In Rochelle the same panel that decided State v. Carino and State v. Rushing below, reversed Judge Lebow's suppression order finding that the rules governing methods of maintaining and testing equipment used to determine blood alcohol content were not void for vagueness during the time that the variant form rather than the promulgated form for checking equipment was used in Broward County, and that the use of different forms for such equipment testing in different parts of the State was not discriminatory so as to violate the equal protection clause. Rochelle at 615-616.

Although the Fourth District acknowledged that it reached a

"seeming contrary conclusion" as that in Reisner, in actuality the Reisner court correctly held that the original form 1514 incorporated Rule 10D-42.024, the rule adopted pursuant to Section 316.1932(1)(f)(1) to govern monthly and annual testing of intoxilyzer equipment for accuracy and reproducability, holding the same sufficient. As stated in Rochelle, the Reisner court found

> "... that since the rule without the promulgated form could not pass constitutional muster, and since the unpromulgated form could not be considered to be part of the rule, the blood alcohol test results obtained with the machine whose accuracy and reproducability had been checked using the new form were properly excluded."
>
> Rochelle at 616

In Reisner, no testimony was presented by either side. Both sides only made legal argument. Below both sides did present expert testimony. However, the trial judge, as the finder and interpreter of fact found that the

> "unpromulgated rules are not acceptable for the purpose of supplementing or substituting for appropriately adopted rules. See State v. Reisner, 16 Fla. L. Weekly D2094 (5th DCA August 8, 1991); State Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878 (Fla. 1st DCA 1988), review denied 548 So. 2d 1333 (Fla. 1989); Department of Transportation v. Blackhawk Quarry Co. of Florida, Inc., 528 So. 2d 447 (Fla. 5th DCA), reviewed denied 536 So. 2d 243 (Fla. 1988); Balsann v. Department of Health and Rehabilitative Services, 452 So. 2d 976 (Fla. 1st DCA 1984); McCarthy v. Department of Insurance and Treasury, 479 So. 2d 135 (Fla. 2nd DCA 1985)."
>
> (A 36; 57)

Accordingly, the trial court, based upon Reisner, held that

former HRS Rules 10D-42.023 and 10D-42.024 were unconstitutionally vague and void and that "based upon the testimony and evidence produced at the hearing" the court concluded that the procedures utilized subsequent to February, 1986 in attempting to conform with the former rules were not uniformly applied to all persons arrested who submitted to breath testing and so are in violation of their right to equal protection under the law. (A 36; 57) [Emphasis in original]

As of the filing of this brief, Petitioners are aware of conflicting decisions from three district courts of appeal on the issues raised.

The Fifth District Court of Appeal's decision in Reisner and State v. Hoff, 591 So. 2d 648 (Fla. 5th DCA 1991) support Petitioners' arguments for affirmance of the trial court's suppression order.

Since the Reisner opinion, the Second and Fourth District Court of Appeals have adopted a conflicting position. In State v. Berger, 605 So. 2d 488 (Fla. 2nd DCA 1992) the Second District disagreed with Reisner and held that the rules regulating alcohol breath testing and the procedures used sufficiently ensured the reliability of the tests. Berger at 489. The Berger court held that the county court had subject matter jurisdiction over the challenge to the rules. The questions certified as being of great public importance in Berger, while similar to those presented sub judice, are not identical. Id.

The Second District continues to follow Berger despite its

conflict with Reisner. Recently, in State v. Folsom, et al, ___ So. 2d ___ (Fla. 2nd DCA July 23, 1993) [18 Fla. L. Weekly D1646] the Second District followed Berger and certified three "somewhat different" questions to the Florida Supreme Court. Id. The Court distinguished Folsom and Berger from Reisner factually, stating

> We are not certifying conflict with Reisner because, although we are reaching a contrary conclusion, the result in Reisner may be explained by the fact that the State failed to present any evidence to support its position. In Berger and the instant cases the State presented extensive expert testimony regarding the rules relating to breath testing, the periodic inspection procedures, and the forms used when testing the equipment.
>
> Id. at D1647 n. 5

Below, the trial court was in the best position to assess and analyze the expert testimony. It is clear from the trial court's suppression order that based upon the facts presented the trial court's findings clearly supported the suppression order.

A) The Trial Court Properly Suppressed Breath Test Evidence Based Upon Specific Factual Findings

The trial court's Order suppressing breath test results entered below was not erroneous, and must be upheld. The suppression order was based upon the court's factual findings that the HRS rules are unconstitutionally vague. In addition, the trial court determined that admission of the breath test results would violate the Petitioners' constitutional rights to equal protection under the law, thereby properly suppressing the breath test results pretrial. (A 36-37) The lower court noted that the HRS rules

regarding the testing and maintenance and breath testing equipment varied substantially from the rules which went into effect on August 1, 1991, stating "defense counsel demonstrated that an instrument that previously passed inspection after acetone testing could fail under the new standards." (A 37; 58) The newly adopted Rules were thus not permitted to be applied retroactively. The Petitioners' breath test results were riddled with constitutional infringements, requiring suppression.

The Petitioners assert from the outset of this Appeal that the trial court's suppression Order was based upon several theories, including 1) HRS Rules 10D-42.023 and 10D-42.024 are void for vagueness, precluding the State from introducing the breath test results in a criminal proceeding; 2) the State's failure to use uniform Intoxilyzer maintenance procedure forms, and 3) the lack of standards to establish accuracy violated the Defendant's right to equal protection under the law; and 3) the Rules adopted on August 1, 1991, should not be applied retroactively.

The Petitioners contend the trial court correctly suppressed the breath test evidence below, finding the HRS Rules regarding accuracy unconstitutionally vague and that the use of different maintenance forms by different maintenance technicians, combined with the lack of standards for instructing maintenance technicians how to determine accuracy of a machine violated the Petitioners' rights to equal protection under the law.

In order to prevail the State has the burden of establishing error at the trial court level. While some of the issues argued by

the State on appeal apply to purely legal issues, i.e., the retroactiveness of HRS Rules, most involve factual determinations which cannot now be disturbed on appeal absent clear error. The trial court's findings of fact come to this Court clothed with a presumption of correctness. DeConingh v. State, 443 So. 2d 501 (Fla. 1993); Reddish v. State, 167 So. 2d 858 (Fla. 1964) This Court must interpret the evidence and reasonable inferences and deductions derived therefrom in the manner most favorable to sustain the trial court's ruling. McNamara v. State, 356 So. 2d 410 (Fla. 1978) This Court is not at liberty to substitute its views regarding the credibility or weight of conflicting evidence for that of the trial judge, whose sole province is to determine credibility of witnesses and the weight of evidence. The trial court's ruling should not be lightly set aside. Stone v. State, 378 So. 2d 765, 769-770 (Fla. 1979); Lane v. State, 353 So. 2d 194 (Fla. 3rd DCA 1977). The trial court's resolution of questions of fact at a hearing on a motion to suppress will not be reversed unless clearly shown to be without basis in the evidence unless predicated upon an incorrect application of the law. State v. Riocabo, 372 So. 2d 126 (Fla. 3rd DCA 1979). Accordingly, as the State cannot establish that the trial court erred in suppressing the breath test results, the trial court's order must be affirmed.

The State argued below that the trial court lacked subject matter jurisdiction to entertain an attack on HRS rules. The State's argument is devoid of merit and has been rejected by the Fifth District Court of Appeal in State v. Reisner, 584 So. 2d 41

(Fla. 5th DCA 1991), reviewed denied 591 So. 2d 184 (Fla. 1991); and State v. Hoff, 591 So. 2d 648 (Fla. 5th DCA 1991).

In Reisner, the Fifth District, inter alia, affirmatively answered the following question certified by the County court for Orange County, as involving a matter of great public importance:

> May the defendant raise these issues [Florida Administrative Code, Rule 10D-42.023 void for vagueness and HRS maintenance accuracy tests compliance with 316.1932(1)(f)(1), Florida Statutes and/or §120, Florida Administrative Procedures Act] in the context of a criminal prosecution in the county court? Id. at 142.

The Court opined that a defendant "clearly" had standing to contest the reliability of the testing procedures, as the State was seeking to introduce the results of the test at the defendants criminal trial. Id at 143; State v. Bender, 382 So. 2d 697 (Fla. 1980).

In Reisner, the court stated:

> Initially, the state contends that Reisner should not be allowed to attack the validity of the rules adopted by HRS in this criminal proceeding; but that he should mount an administrative proceeding pursuant to Chapter 120 to challenge them. We disagree. As our Florida Supreme Court has said in State v. Bender, 382 So. 2d 697 (Fla. 1980), a defendant may attack the reliability of the testing procedures and the standards establishing the zones of intoxication levels in cases involving vehicle driver intoxication where the results of tests taken pursuant to the implied consent law (Chapter 322) are sought to be proffered into evidence. Clearly, such a defendant has standing to raise such an issue in his own criminal case. State v. Flood, 523 So. 2d 1180 (Fla. 5th DCA 1988). Further, in view of the vital role which the legal presumptions (.10 or .20) play in determining a defendants guilt in a DUI case, and the clear prejudice which would

> result if a test were wrongfully put into evidence, resolving the issue of admissibility in a pretrial proceeding appears to be an orderly method of resolving the admissibility bel non of the tests, although such a procedure need not necessarily be resolved on the basis of such a scanty record as the one before us in this case. Id. at 143.

Sub judice, the record is not "scant" as in Reisner. In Reisner, no expert witnesses were presented. Herein, expert testimony was elicited from both the prosecution and defense. (A 64-236). The trial court's suppression order was supported factually by the expert testimony elicited.

Below, the Fourth District Court substituted its evaluation of the testimony presented at the trial court level for that of the trier of fact. The court substituted its "proper understanding" of the evidence for the trial court's "improper understanding" of the testimony. In reevaluating the evidence, the Fourth District incorrectly substituted its judgment for that of the trial court. Diversified Commercial Developers, Inc. v. Formright, Inc., 450 So. 2d 533 (Fla. 4th DCA 1984); Marcoux v. Marcoux, 475 So. 2d 972 (Fla. 4th DCA 1985), reviewed denied 486 So. 2d 597 (1986).

The Fourth District apparently ignored substantial evidence educed at the trial level supporting the Petitioners' theory of suppression including the following:

A) Deputy David Fries, the State's expert witness, testified that neither Form 1514 nor the unpromulgated form provide definition for the terms used on the monthly maintenance forms. (A 98-100)

B) Deputy Fries testified that .05, .10, and .20 are

important blood alcohol levels and that Form 1514 did not direct the maintenance operator to perform a standard test at any of those levels.[2] (A 101-103)

C) Deputy Fries testified that the February, 1986 form was never promulgated by HRS. (A 109)

D) Deputy Fries stated that if the machine does not properly separate acetone from ethanol, it will give a false reading. (A 109-110)

E) Deputy Fries testified that the Rules does not require testify for acetone. (A 97)

F) Deputy Fries further stated that the results of a machine which is properly reading acetone and adding that onto the accused citizen's blood alcohol level is inadmissable under the Rules and Form 1514. (A 110)

G) Deputy Fries testified that monthly maintenance forms unlike the annual maintenance forms do not have any tolerance or error factors. (A 114)

H) Deputy Fries testified that the error factor on the annual form is plus or minus 5% at .10 bac, plus or minus 10% at .05. He further stated that he knew of no scientific reason for the difference in error factors between the two blood alcohol levels. (A 114-115)

I) Deputy Fries admitted that he had testified as a

---

[2]This is especially true in David Rushing's case in that the Petitioner faces aggravated penalties as a result of the intoxilyzer result alleged to be a .22% and .21%. Russell Carino was alleged to have a .13% and .14% blood alcohol level.

defense witness in a case involving a machine which failed the acetone test. Fries stated that the test was not reliable, although the results were technically admissible. (A 114-117)

J) Ira Karmelin, the defense expert witness, testified that there are no accuracy standards in existence with respect to the measurement on the Intoxilyzer 5000 machines anywhere in the HRS Rules and Regulations. (A 127-128)

K) Karmelin testified that the 1982 form did not specify what concentration the alcohol standard tests were to be taken. (A 130-131)

L) Karmelin stated that neither the 1982 form nor the 1986 form included an error factor for testing the machine. (A 131-132)

M) Deputy Fries testified that the Form 1514 was not used across the State in uniformity (A 107-108)

In reversing the suppression order, the Fourth District Court misapprehended the conclusion that was drawn by the trial court based upon the testimony below. In Rochelle, the Fourth District stated

> If the machine failed the acetone test but was not removed from service, the driver whose breath sample was analyzed with the machine was in the exact same place as he would have been had the machine been checked by the use of the promulgated form without the added Pillip.
>
> Rochelle at 616

In so stating, the Fourth District ignored the State's witness' testimony that a machine failing the acetone test is not reliable, but its test results are admissible under the promulgated

form. This testimony was wholly consistent with the trial court's findings the Rule 10D-42.023 and 10D-42.024 are void for vagueness and were analogous to the situation presented in Reisner. The Rules do not define the terms necessary to conduct monthly or annual maintenance and result in the admissability of unreliable test results. There is not a standard for accuracy set forth in the Rules, nor are there error factors provided to determine whether a machine has passed a monthly maintenance test.

In a frequently cited county court decision, State v. Westerberg, 616 Fla. L. Weekly C149 (Fla. Pinnellas County Court, July 19, 1991) an extensive analysis of the County Court's jurisdiction led the court to determine that the county court does indeed have subject matter jurisdiction to determine evidentiary issues arising during the course of criminal proceedings. Clearly, Article V, Section 6(b), Florida Constitution, provides for the county court's jurisdiction to consider administrative questions arising in criminal cases.

In Westerberg, the court stated:

> Constitutional considerations are particularly acute in the instant cases due to the nature of the suggested errors. Those go to the heart of the cases because the Intoxilyzer readings are the best evidence of blood alcohol level which is an alternative method of proving DUI in this State. Section 316.193, Fla.Stat. 1989. In Holzapfel v. State, 120 So. 2d 195, 196 (Fla. 3d DCA 1960), the court concluded that procedural rules which effect the substantial rights of the defendant must be strictly followed as a matter of due process. Similarly, in Henderson v. State, 20 So. 2d 649, 651 (Fla. 1949), the court held that the State and federal due process clauses contemplate a

> trial with full evidence. In Brown v. State, 375 So. 2d 66 (Fla. 2d DCA 1979), the court held that a prisoner's right to raise constitutional issues by habeas corpus cannot be denied by reliance on the doctrine of exhaustion. Defendants have the right to raise matters such as those presented in the motions which relate directly to the right to a fair trial before the trial court. The court cannot divest itself of this responsibility by deferring to an administrative agency. Id. at C151.

Finally, in determining that the county court had jurisdiction to hear defendant's motion to suppress, in Westerberg it was summarized:

> The State's contentions concerning jurisdiction and the doctrine of exhaustion must be rejected for many reasons. Several courts who have considered these points have rejected the State's position for the reasons set forth herein or for other reasons. State v. Reisner, 16 Fla. L. Weekly D1605 (Fla. 5th DCA June 13, 1992); In Re: En Banc Hearing Regarding H.R.S. Rule Promulgating & Breath Testing, 16 Fla. L. Weekly C97 (Palm Beach County June 17, 1991); State v. Catron, 16 Fla. L. Weekly C78 (Hillsborough County Ct. April 5, 1991); State v. Huff, 16 Fla. L. Weekly C25 (Orange County Ct. January 14, 1991); State v. Kouracos, Case No: 72835-SF (Volusia County Ct. Opinion File March 12, 1991); State v. Evans, Case No: 90-21204 DDA-41 (Escambia County Ct. Opinion filed June 4, 1991). This court has jurisdiction to hear the motions to suppress and good judicial policy requires it.
> Id. at 152.

Likewise, the situation in State v. Cumming, 365 So. 2d 153 (Fla. 1978) is analogous to that at bar regarding the county court's authority to determine the constitutionality of administrative rules used to criminally prosecute individuals. In Cumming, the defendant was charged with the unlawful possession of

an ocelot, contrary to section 372.922, Florida Statutes. The law designated the Florida Game and Fresh Water Fish Commission to promulgate rules to implement the statute. Id. at 154. The defendant requested a dismissal of the charges claiming that the statute and rules were vague and overbroad. The county court granted the motion and the State appealed. The Supreme Court of Florida reversed the trial court's order as to the statute, but affirmed the county court's holding that the agency rules were vague and overbroad. Id. at 155-156. The court held that the rules effectively prevented a constitutional application of the statute, in that they govern that application. Id. at 156.

Thus, Cumming recognized the county court's authority to determine the constitutionality of administrative rules used to prosecute individuals in county court. As the trial court correctly found factually the breath test results were impermissible, the court correctly suppressed the evidence.

B) The Trial Court Correctly Determined HRS Rules 10D-42.023 and 10D-42.024 as They Existed Prior to August 1, 1991 are Void for Vagueness

The trial court correctly suppressed the breath test evidence based upon a factual finding that HRS Rules 10D-42.023 and 10D-42.024 are unconstitutionally vague and therefore void.

In reversing the suppression order, the Fourth District cited Reisner for the proposition that Rule 10D-42.024 taken together with Form 1514 was sufficiently specific and not void for vagueness. However, as the Fourth District noted, the Reisner court did not have an evidentiary record before it. The

evidentiary record before this Court clearly support Judge Lebow's suppression order. The Reisner court specifically pointed out that its decision that the rule was not sufficiently specific was made in the absence of scientific evidence or expert witnesses challenging the sufficiency of the original form. Reisner at 144. Sub judice, the trial court had before it two expert witnesses who testified as to the insufficiency of Form 1514, the original form. Both experts, Fries and Karmelin, testified that the form does not define "accuracy" and does not include error factors from which a technician could determine whether a particular machine passed or failed a monthly maintenance test. Thus, the trial court's determination that the rules were vague was substantiated by competent expert testimony and should have been affirmed by the Fourth District.

The trial court correctly determined that HRS Rules 10D-42.023 and 10D-42.024, in effect prior to August 1, 1991, were unconstitutionally vague and therefore void. The HRS rules did not properly define "accuracy" or "reproducability" and failed to advise maintenance operators of the standards to test the Intoxilyzer to determine its accuracy.

In Rochelle, the Fourth District utilized the void for vagueness doctrine set forth by the United States Supreme Court in Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed2d 903 (1983) which set forth as follows:

> As generally stated, the void - for - vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people

> can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
>
> 461 U.S. at 357, 103 S.Ct. at 1859

The Fourth District determined that the void - for - vagueness doctrine was inapplicable in the breath testing situation "where the issue is the adequacy of administrative rules to give guidance to professionals testing the equipment which is used for blood alcohol testing for evidentiary purposes. Rochelle at 615.

Petitioners contend that the trial court correctly determined that the rules under scrutiny herein were not properly promulgated and are not acceptable for the purpose of supplementing or substituting for appropriately adopted rules. Because the rules failed to contain definitions for accuracy, precision or reliability relating to monthly or yearly maintenance, arbitrary and discriminatory enforcement was encouraged.

HRS Rule 10D-42.023 requires all "chemical breath test instruments or devices" to be checked at least once per calendar year "for accuracy and reproducability." However, the Rules prior to August 1, 1991 failed to provide a definition for either "accuracy" or "reproducability." Similarly, Rule 10D-42.024(1)(c) provides:

> Chemical tests, instruments and devices used in the breath test method shall be inspected at least once each calendar month by a technician to ensure general cleanliness, appearance, and accuracy.

Rule 10D-42.022(3)(b) contains the only definition of "accuracy" in the HRS rules pertaining to breath testing. Said

definition is for purposes of the initial certification of instruments and states:

> Accuracy - shall measure the alcohol content of a vapor mixture with a 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 fifty (50) simulator tests at each concentration. The systemic error is the difference between the mean measured value and the known values expressed as a percentage of the known value.

The stringent definition of accuracy specified above was not met herein. A minimum of 50 simulator tests were not performed herein on the Intoxilyzer machine at each concentration. It must be stressed that the only definition of accuracy contained within the Rules applies only to initial certification of instruments. No standards were in effect to determine the accuracy of a machine on a day to day basis.

Section 316.1932, Florida Statutes, provides:

> The test determining the weight of alcohol in the defendant's blood shall be administered at the request of a law enforcement officer substantially in accordance with rules and regulations which shall have been adopted by the department of health and rehabilitative services. Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the department of health and rehabilitative services for reliability of result and facility of administration, and shall provide an approved method of administration which shall be followed in all such tests given under this section.

In Reisner, after engaging in an analysis of the Florida

Statutes and HRS Rules, the Court held "that the rule governing annual checks adopted by HRS is unconstitutionally vague and ambiguous." Id. at 144. The Reisner court cited State v. Cumming, in support of its finding that Rules 10D-42.023 and 10D-42.024 were unconstitutionally vague. Cumming set forth the analysis to be utilized in determining constitutional vagueness with regards to an administrative rule. In Cumming, the Florida Supreme Court held that the rules promulgated by the Florida Game and Fresh Water Fish Commission were unconstitutionally vague, in that the Rules failed to provide adequate standards for issuing permits, resulting in an unconstitutional application of §373.922, Florida Statutes. In Cumming, the issuance of permits was based upon vague and overbroad standards of "persons qualified," "sanitary surroundings," and "appropriate neighborhoods." Id. at 156. The court stated:

> It is the failure of the commission to implement through its rules the statutes guidelines that has left the statute to require "the doing of an act in terms so vague that men of average intelligence must necessarily guess at its meaning and differ to its application. Id at 156.

At bar the crux of the inquiry is the reliability and accuracy of the Intoxilyzer 5000 prior to August 1, 1991. Without guidelines to determine accuracy how do we know the machines were accurate in their readings? What were the maintenance technicians substantially complying with if no standards for accuracy existed?

The trial court Order below included a specific finding that Rules 10D-42.023 and 10D-42.024, prior to the amendment, did not contain definitions for accuracy, precision or reliability relating

to monthly or yearly maintenance. (A 36; 57) Further, the "procedures utilized subsequent to February 1986 in attempting to conform with the formal HRS Rules 10D-42.023 and 10D-42.024 were not uniformly applied to all persons arrested who submitted to breath testing" in violation of the equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution. (A 36-37; 57-58)

The State asserted below that the HRS Rules on maintenance of breath have been determined by the Florida Supreme Court to be sufficient to insure the administration of breath test results, citing Drury v. Harding, 461 So. 2d 104 (Fla. 1984). However, sub judice, the court below determined that from February 1986 until August 1, 1991, there were no properly promulgated rules in effect to govern the administration of chemical tests for blood alcohol. Drury was predicated upon preexisting rules which were identical to the rules promulgated after the defendant submitted to a chemical breath test. Drury at 105. At bar, the court found, factually, without opposition by the State, that the 1986 form used in testing the breath machine was substantially different from the 1982 version. As neither the 1982 or 1986 form advised maintenance operators of the HRS requirements for determining accuracy, the trial court properly relied upon the expert testimony presented and prior Florida decisions in determining that HRS Rules 10D-42.023 and 10D-42.024 were void for vagueness.

C) The Trial Court Correctly Suppressed Breath Test Evidence Finding the Use of Different (Not Uniform) Forms Reflecting Different Monthly Maintenance Procedures Constituted a Denial of Equal Protection

The trial court noted that Florida law mandates HRS to promulgate rules and regulations "after public hearing" to insure the accuracy and reliability of breath testing equipment. (R 56) From September 1982 through February 1986, HRS provided all law enforcement agencies involved with breath testing with a "form 1514/September 1982." The 1514 form was incorporated by reference into Rule 10D-42.024(5)(b). (A 36; 57)

The 1514 form utilized at bar had not been properly promulgated at the public hearing, in accordance with the law. (A 36-37; 57-58) Section 322.63(3)(a), Florida Statutes (1989) states:

> The physical and chemical tests authorized in this section shall be administered substantially in accordance with rules adopted by the Department of Health and Rehabilitative Services. Such rules shall be adopted after public hearing, shall specify the tests that are approved, and shall provide an approved method of administration.

Likewise, §316.1932(f)(1) provides:

> The tests determining the weight of alcohol on the defendant's blood or breath shall be administered at the request of a law enforcement officer substantially in accordance with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services. Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the Department of Health and Rehabilitative Services, for reliability of result and facility of administration, and shall provide an approved method of administration which

shall be followed in all such tests given under this section.

Sub judice, it is uncontroverted that the 1514 form was not promulgated as a rule. The law is well settled that promulgated rules may not be utilized in lieu of appropriately adopted rules. Reisner at 144; State Board of Optometry v. Florida Society of Opthomology, 538 So. 2d 878 (Fla. 1st DCA 1988), review denied, 552 So.2d 1333 (Fla. 1989); Department of Transportation v. Blackhawk Quarry Co. of Florida, 528 So. 2d 447 (Fla. 5th DCA 1988), review denied, 536 So. 2d 243 (Fla. 1988); Balsann v. Department of Health and Rehabilitative Services, 452 So. 2d 976 (Fla. 1st DCA 1984); McCarthy v. Department of Insurance and Treasury, 479 So. 2d 135 (Fla. 2d DCA 1985).

Below, the State entirely skirted the issue of whether the HRS rules were properly promulgated pursuant to Chapter 316 and Chapter 322, Florida Statutes, arguing only that the 1989 standards were "more stringent" than the 1982 standards and that this was "beneficial" to the defendant. The Petitioners contend that the State's argument is meritless, based upon the lack of proper promulgation of the forms as argued hereinabove. Assuming arguendo, the forms had been properly promulgated, the Petitioners' rights to due process of law was still violated by the unconstitutional vagueness of HRS Rules 10D-42.023 and 10D-42.024. Because of the rules' failure to inform a reasonable person of the term "accuracy," the maintenance testing of the Intoxilyzer 5000 machines varies from county to county and from maintenance technician to maintenance technician, thereby violating the Equal

Protection Causes of the Florida and United States Constitution.

The court found factually that "since February 1986 different forms reflecting maintenance procedures for breath testing instruments had been used throughout Florida." (A 36; 57) Accordingly, the court determined that the HRS Rules were not uniformly applied to all persons arrested who submitted to breath testing, thereby violating DAVID RUSHING'S right to equal protection under the law. (A 37; 58)

At the District Court level, the State misconceived the equal protection violation below which, among other constitutional violations, supported the trial court's suppression order, seemingly contending that because some of the maintenance testing requirements are more stringent now than required by the 1982 1514 form, the equal protection clause is not implicated. At no time did the State address the equal protection violation. Instead, the State asserted that the machine is reliable.

It is clear from the Record and the trial court's ruling that the procedures utilized in attempting to conform with the HRS Rules were not uniformly applied. (A 135-137)

The Equal Protection Clauses and Article I, Section 2, of the Florida Constitution guarantee that each person shall be treated equally under the law. Likewise, the Fifth Amendment to the United States Constitution, made applicable through the Fourteenth Amendment guarantees each citizen of the United States equal protection. At bar, HRS's failure to specify standards for maintaining the Intoxilyzer accuracy, and the failure to have

uniform standards applied to determine what was indeed "accurate" violated the equal protection clause of both the federal and state constitutions. The regulations, made within the police power of this State, resulted in arbitrary classification as to whether an Intoxilyzer machine was "accurate." Due to the lack of guidance as to the manner to be utilized to determine accuracy, the Rules did not apply equally and uniformly to all persons who submitted to Intoxilyzer tests in Florida prior to August, 1991. See, e.g. Loftin v. Crowley's, Inc., 150 Fla. 836, 8 So. 2d 909 (1942), cert. denied, 63 S.Ct. 60, 317 U.S. 661, 87 L.Ed. 531.

ARGUMENT II

THE TRIAL COURT CORRECTLY PRECLUDED THE STATE FROM USING THE TEST RESULTS OBTAINED; NO TRADITIONAL PREDICATE FOR ADMISSION OF THE SCIENTIFIC EVIDENCE WAS PRESENTED BY THE STATE

The State incorrectly contended below that the breath test evidence was admissible by virtue of compliance with the requirements of the Rules, and/or under a traditional showing of reliability. As no HRS regulations insured the accuracy of the Intoxilyzer machine utilized herein, the State cannot establish substantial compliance with the Rules. Likewise, as no standards for accuracy existed, and the accuracy of any test was subject to the arbitrary unbridled discretion of a maintenance technician, who was not guided by the Rules in determining accuracy, the test results cannot meet the traditional predicate for reliability and admissibility.

Petitioners do not contest that breath test results are admissible into evidence in criminal proceedings if a proper predicate is laid. Section 316.1934(2), Florida Statute (1989) allows "the results of any tests administered in accordance with Section 316.1932 and 316.1933 and this section shall be admissible in evidence when otherwise admissible."

Last year, the Florida Supreme Court discussed the admissibility of breath test results, viewing the evidence allowable "only upon compliance with the statutory provisions and the administrative rules enacted by HRS". State v. Donaldson, 579

So. 2d 728, 729 (Fla. 1991). In Donaldson, the Court ruled that the State must submit evidence to establish that the test was performed and substantial compliance with methods approved by HRS, on a machine approved by HRS, and by a qualified technician. The Court further advised that the State must prove that "the machine itself has been calibrated, tested and inspected in accordance with HRS regulations to insure its accuracy before the results of a breathalyzer test may be introduced into evidence." Id. 729.

Petitioners concede that in instances where substantial compliance with the Rules has occurred, Intoxilyzer results may be admissible. The Intoxilyzer has passed accuracy requirements as established by the National Highway Traffic Safety Administration of the Department of Transportation. See, 38 Fed.Regs. 30495 (1973).

Petitioners contend that the involved regulations are insufficient to substitute for the traditional predicate of reliability. HRS is charged with the duty of properly establishing rules to ensure the reliability of chemical test results and it has failed to meet this responsibility. This defect means that as a matter of law, the regulatory scheme is insufficient to substitute for the traditional predicate, and that the various procedures that are followed constitute rules which have not been enacted and therefore, they cannot be considered. The power and authority of HRS to make the rules and regulations do not apply retroactively. (A 37-38; 58-59)

After concluding that the HRS Rules are procedural rather than

substantive, the court below noted that:

> The Rules regarding testing and maintenance of the breath testing equipment reflected on the original "Form 1514/September 1982," on the various February 1986 forms and as testified to by the two experts vary substantially from the rules effective August 1, 1991. The rules now require a simulator test at .05% level, which is a much lower alcohol concentration. The more significant change is the requirement of calculating the arithmetic average of three acetone test readings. Defense counsel demonstrated that an instrument that previously passed inspection after acetone testing could fail under the new standards. (A 37; 58)

In order to be admissible, substantial compliance must be shown and the scrutinized evidence must be reliable. To be reliable it must be accurate. Sub judice, the State was unable to show the machine's accuracy, and accordingly, the trial court did not err in suppressing the evidence.

Accordingly, Petitioners urge this Court to answer the second and fourth certified questions in the affirmative. The vagueness of the rules and their denial of equal protection caused by their use preclude the State's use of the test results obtained.

Alternatively, Petitioners request this Honorable Court decline to answer the certified questions concerning the permissibility of the State's use of the scientific breath evidence. As the State failed to present evidence below establishing a traditional predicate, it is mere speculation to guess how the State will attempt to lay a traditionally predicate. See Robertson v. State, 604 So. 2d 783 (Fla. 1992); Berger at 491.

Sub judice, the trial court determined that the breath test

results did not have the requisite indicia of reliability and accuracy required. The court's decision was based upon the same theories which led the court to deem that the HRS Rules were unconstitutional and void for vagueness, and were not properly promulgated. The evidence cannot be properly admitted. Therefore, the court correctly suppressed the breath test results below.

CONCLUSION

Based upon the foregoing arguments and authority the Petitioners, RUSSELL CARINO and DAVID RUSHING, respectfully request this Honorable Court enter an Order affirming the trial court's suppression order, reversing the District Court opinion entered below. Further, the Petitioners suggest that each of the certified questions should be answered in the affirmative.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF RICHARD L. ROSENBAUM
ATTORNEY FOR PETITIONER, RUSHING
CO-COUNSEL FOR PETITIONER, CARINO
ONE EAST BROWARD BLVD.
PENTHOUSE - BARNETT BANK PLAZA
FT. LAUDERDALE, FL 33301
FLA. BAR NO: 394688

RICHARD L. ROSENBAUM

LAW OFFICES OF RHONDA ROGERS
ATTORNEY FOR PETITIONER, CARINO
4601 SHERIDAN STREET, 5TH FLOOR
HOLLYWOOD, FL 33021
FLA. BAR NO: 354902

RHONDA ROGERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing was furnished via mail this **6th day of AUGUST**, 1993 to the Clerk of Court, Florida Supreme Court, 500 S. Duval Street, Tallahassee, FL 32399-1925 and a copy furnished to: Joseph A. Tringalo, Esquire, Office of the U.S. Attorney, 1655 Palm Beach Lakes Blvd., West Palm Bch., FL 33401-2299 and RHONDA ROGERS, ESQ., 4601 Sheridan Street, Hollywood, FL 33021.

Respectfully submitted,

LAW OFFICES OF RICHARD L. ROSENBAUM
ATTORNEY FOR PETITIONERS
ONE EAST BROWARD BLVD.
PENTHOUSE, BARNETT BANK PLAZA
FORT LAUDERDALE, FLORIDA 33301
(305) 522-7000
FLA. BAR NO: 394688

RICHARD L. ROSENBAUM