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IN THE SUPREME COURT OF FLORIDA

RICHARD CARLTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO: 82,071
4TH DCA NO: 92-0228

****

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

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Sr. Assistant Attorney General
Chief, Criminal Law,
West Palm Beach Bureau
Florida Bar No. 339067

JAMES J. CARNEY
Assistant Attorney General
Florida Bar No. 475246
Suite 300
1665 Palm Beach Boulevard
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Respondent

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PRELIMINARY STATEMENT

Mark Hennis was the defendant below and will be referred to as "Petitioner". The State of Florida was the plaintiff below and will be referred to as "Respondent". References to the petitioner' appendix will be preceded by "A." References to any supplemental appendix will be preceded by "SA."

PRELIMINARY STATEMENT ON JURISDICTION

This Court should decline jurisdiction as it did in the similar cases of Reisner v. State, 584 So. 2d 141 (Fla. 5th DCA), rev. denied, 591 So. 2d 184 (Fla. 1991) and Rochelle v. State, 609 So. 2d 613 (Fla. 4th DCA 1992), dismissed sub nom., Comrey v. State, 617 So. 2d 318 (Fla. 1992).

Respondent notes that this Court has accepted jurisdiction (without oral argument) in the similar case of Veilleux v. State (Case No. 80,767).

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with appellant's statement of the case and facts, with the following additions, exceptions and clarifications.

Ira Karmelin testified that there were accuracy standards for the machines when they came on line (A 128). Karmelin testified that the definition of accuracy in HRS rule 10D-42.022(b) dealt with systematic error, "among other things" (A 129).

Fries testified that a technician does not have to run tests beyond what is called for by the form, so that he was not required to run an acetone test (A. 82-84).

He said that he always does more than he is required by the 1982 form in his monthly checks of a intoxilyzer. (A 84-90). He performs three tests on .10 simulator and three tests on .20 simulator, and then does a software check which includes radio frequency, ambient air, mouth-alcohol, invalid mode, printer, diagnostic, range exceeded, sample, and wrong time checks (A. 84-90). Fries said that all those checks are beneficial, not harmful, to a defendant (A. 85).

Intoxilyzer technicians are required to take a 40 hour course on how to fill out each blank on Form 1514 (A. 86-87, 119, 120). The course deals with factors such as cleanliness, appearance, and accuracy of a intoxilyzer (A. 87). Fries explained that "accuracy" refers to the value of simulators, and the number of each value, which should be used in tests (A. 87). He said that the criteria of the course are based on scientific principles (A. 90).

Fries was qualified as an expert on the specific reliability of breath tests (A. 95-96). He stated that when an Intoxilyzer is in service on a particular day, it is because it is working properly (A. 96). He said that he would remove a machine if it was not operating correctly (A. 96).

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). He also said that he was aware that forms different from Form 1514 (1982) were being used in the state, and in the county (A. 108). Fries could not really explain why in the annual maintenance data sheet, an error factor at .10 is 5%, while an error factor at .05 is 10% (A. 115).

However, he noted that a .05 simulator at 5% error would require a printout of 4 digits, and an Intoxilyzer 5000 does not print out more than three digits (A. 118). Fries said that the acetone test was helpful with uncontrolled diabetics, but that generally, acetone is not a major chemical inherent with breath analysis (A. 118). He pointed out that acetone cells vary from person to person (A. 119).

Karmelin testified that in 1982, three alcohol standard tests were taken in monthly maintenance, and in 1989, nine such tests were taken, but that the rules never provided for the number of alcohol standard tests to be conducted (A. 180). He also stated that the rules never called for the concentration levels at which tests should be performed (A. 180). Karmelin testified that the new form (1991) proposes monthly maintenance

tolerance factors at .10 and .20, plus or minus five percent, and "it also gives the standard in reference to a .10 contained with acetone" (A. 137-138).

Respondent does not agree that the trial court's findings on pp. 5-6 of petitioner's brief are purely factual in nature. They include conclusions of law.

SUMMARY OF ARGUMENT

I

The Fourth District did not reweigh the evidence in this case. It simply disagreed with the county court's legal conclusions. Respondent does not agree that the county court had jurisdiction. Petitioner has failed to exhaust his administrative remedies.

The void for vagueness doctrine is inapplicable where the issue is the adequacy of administrative rules to give guidance to professionals testing equipment used for blood-alcohol testing for evidentiary purposes. Assuming the doctrine has some applicability, the rules, with accompanying forms, are sufficiently specific.

There is also no equal protection violation. As recognized in Rochelle v. State, 609 So. 2d 613 (Fla. 4th DCA 1992), the forms did not vary substantially from the adopted form. Accordingly, the different form was not discriminatory. Additionally, assuming that the reliability of the results from the different procedures were questionable, respondent has not shown how he was adversely affected. Id. at 617. As held by the Fourth District, one cannot claim discriminatory treatment if one was not treated unfairly, merely because it is possible someone was unfairly treated. Id. at 618.

II

Even if the Rules are void for vagueness and/or violate due process, the results are admissible if the State can lay the traditional predicate.

POINT I

THE FOURTH DISTRICT CORRECTLY REVERSED THE ORDER SUPPRESSING THE BREATH TESTS. THE CERTIFIED QUESTIONS SHOULD BE ANSWERED IN THE NEGATIVE.

A) The Trial Court Erred in Suppressing The Breath Test Results As Its Legal Conclusions Were Incorrect.

Petitioner first suggests that the Fourth District improperly ignored the trial court's factual findings in determining that the Rules were not void for vagueness. This is incorrect. The Fourth District's decision did not reweigh the evidence. It was based on legal conclusions from the evidence presented.

Moreover, when an appellate court reviews the validity of a rule after a trial court has found it to be unconstitutional, the rule is favored with a presumption of constitutionality. In re Caldwell's Estate, 247 So. 2d 1,3 (Fla. 1971) See also Gardner v. Johnson, 4512 So.2d 477, 479 (Fla. 1984); Department of Legal Aff. v. Sanford-Orlando Kennel, 434 So.2d 879, 881 (Fla. 1983). In other words, every presumption must be indulged in favor of the validity of the rule. Department of Law Enf. v. Real Property, 588 So.2d 957, 961 (Fla. 1991); Florida Citrus Commission v. Golden Gift, 91 So.2d 657, 658 (Fla. 1956). If a rule may reasonably be construed in more than one way, an appellate court has a duty to adopt the interpretation which upholds the constitutionality of the rule. Vildibill v. Johnson, 492 So.2d 1047, 1050 (Fla. 1986); Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815, 820 (Fla. 1983); Hill v.

State, 238 So.2d 608, 611 (Fla. 1970); Holley v. Adams, 238 So.2d 401, 404 (Fla. 1970).

Respondent also does not agree with petitioner's suggestion that the County Court had subject matter jurisdiction. "Subject matter jurisdiction . . . is a power that arises solely by virtue of the law." Florida Export Tobacco Co. v. Department of Revenue, 510 So.2d 936, 943 (Fla. 1st DCA 1987) (citation omitted). "[S]ubject matter jurisdiction has its origin only in the statutes or constitutions." Steckel v. Blafas, 549 So.2d 1211, 1213 (Fla. 4th DCA 1989) (citation omitted).

The county courts are not vested with jurisdiction to entertain direct challenges to administrative rules by any constitutional provision. Article V, Section 6(b), Florida Constitution, provides:

> Jurisdiction - The county courts shall exercise the jurisdiction prescribed by general law. Such jurisdiction shall be uniform throughout the state.

See also Article V, Section 20(c)(4), Florida Constitution. No statute invests the county courts with subject matter jurisdiction to entertain attacks upon administrative rules. See the Administrative Procedure Act (A.P.A), chapter 120, Fla. Stat. (1989). The higher courts, on the other hand, are both constitutionally and statutorily invested with jurisdiction to consider in initio challenges to administrative rules and/or to review administrative actions.

Only the circuit courts have jurisdiction to initially entertain a direct attack on an administrative rule. Section 120.730, Florida Statutes, reads:

> Circuit court proceedings; declaratory judgments-Nothing in this chapter shall be construed to repeal any provisions of the Florida Statutes which grants the right to a proceeding in the circuit court in lieu of an administrative hearing or to divest the circuit courts of jurisdiction to render declaratory judgments under the provisions of chapter 86.

And, the state constitution provides:

> Circuit courts. -
>
> (b) Jurisdiction - the circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by law.

Article V, Florida Constitution; See also Article V, Section 20(c)(3), Florida Constitution.

Article V, Sections 3b and 4b, Florida Constitution, gives the district courts of appeal and the Florida Supreme Court the authority to hear appeals from orders entered in regard to agency actions as prescribed by general law. Under the A.P.A., judicial review of rules is delegated as follows:

> Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district court where the agency maintains its headquarters or where a party resides.

Section 120.68(2), Florida Statutes.

Moreover, there simply was no due process requirement that the defendant be allowed to challenge the H.R.S. rules before the county court. "The fundamental requirements of due process are satisfied by reasonable opportunity to be heard." Florida Public Service Commission v. Tripple "A" Enterprises, Inc., 387 So.2d 940, 943 (Fla. 1980) (citations omitted); See also Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972); Zimmermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 964, 108 L.Ed.2d 100 (1990). The defendant had a reasonable opportunity to be heard through the administrative rulemaking process. Although due process guarantees the defendants a right to have their claims heard, it does not guarantee a particular forum. "[D]ue process is met if one adequate method of judicial review of the orders of administrative agencies is set up . . . such methods may be made exclusive by statute." Bath Club, Inc. v. Dade County, 394 So.2d 110, 113-114 (Fla. 1981) (citations omitted).

Petitioner seems to claim that the court in State v. Cumming, 365 So.2d 153 (Fla. 1978) implicitly recognized the county court's authority to determine the constitutionality of administrative rules used to prosecute criminal cases over which it has jurisdiction. Petitioner urges that Respondent had no choice but to focus on what he alleges to be the court's implication, since the court never was asked to address the county court's jurisdiction over the validity of the rules. In its discussion of the case, the court noted the State's arguments as bearing only on the merits. Id. at 154-156.

Contrary to the contention of Respondent, the Fifth District did not rule in State v. Reisner, 584 So.2d 141 (Fla. 5th DCA 1991) that the county court had subject matter jurisdiction to entertain a direct challenge to the administrative rules of the Department of Health & Rehabilitative Services (H.R.S.). Jurisdiction was not at issue; the court simply rejected the State's argument that Reisner was first required to exhaust administrative remedies. Id. at 143. Subject matter jurisdiction and exhaustion of administrative remedies are two distinct, albeit related, issues:

> [T]he companion doctrines of primary jurisdiction and exhaustion of remedies require circuit courts to abstain from exercising their equitable jurisdiction over administrative proceedings where adequate administrative remedies have not have exhausted.

Florida Board of Regents v. Armesto, 563 So.2d 1080, 1081 (Fla. 1st DCA 1990)(emphasis added)

The county courts, unlike the circuit courts, are without subject matter jurisdiction to entertain direct challenges to the administrative rules of The Department of Health and Rehabilitative Services (H.R.S.) because they do not have the equitable jurisdiction given the circuit courts in §120.73, Florida Statutes (1989). It bears reemphasizing that the challenges below were direct attacks on the validity of the administrative rules as opposed to a claim that law enforcement officers did not substantially comply with the rules and related statutes. The county court had jurisdiction to consider claims that there was no substantial compliance by law enforcement with

H.R.S. Rules and related statutes. See State v. Bender, 382 So.2d 697 (Fla. 1980); State v. Donaldson, 579 So.2d 728 (Fla. 1991).

Section 316.1934(2), Florida Statutes, provides certain evidentiary presumptions as to "the results of any [breath] test administered in accordance with s.316.1932 . . . and this section shall be admissible into evidence when otherwise admissible. . ." (emphasis supplied). Section 316.1932, Florida Statutes, provides in material part:

> 316.1932 Breath, blood, and urine tests for alcohol, chemical substances, or controlled substances; implied consent; right to refuse.
> (1)(a) . . .
> (b) An analysis of a person's breath, in order to be considered valid under this section, must have been performed substantially according to methods approved by the Department of Health & Rehabilitative Services. For this purpose, the department is authorized to approve satisfactory techniques or methods. Any insubstantial differences between approved techniques and actual testing procedures in any individual case shall not render the test or test results invalid.

(emphasis supplied).

Neither section conditions admissibility of breath test results upon the facial validity of the H.R.S. rules or upon the manner in which the rules enacted. The breath tests are conducted by law enforcement agencies, not H.R.S. Moreover, section 316.1932(1)(f)(1) confirms that the substantial requirement applies to law enforcement in administering the tests rather than to H.R.S. in enacting rules:

> The tests 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 adopted by the Department of Health and Rehabilitative Services. . .

(emphasis supplied).

Clearly then, whether there is substantial compliance with the rules in the administration or performance of the tests in an issue relevant only to the manner in which the tests are conducted by the police agencies.

While the county court had jurisdiction to determine whether there was substantial compliance by law enforcement with the rules of H.R.S. and relates statutes, it had none to entertain an attack upon the rules themselves. It is because the circuit courts are both constitutionally and statutorily vested with jurisdiction to entertain initially or upon review challenges to administrative rules that "the determination of whether a particular controversy may be taken out of the administrative process and into a circuit court is a question of judicial policy and not a matter of judicial jurisdiction." Key Haven Associated Enterprises, Inc. v. Board of Trustees, 427 So.2d 153 (Fla. 1982). The same is not true of the county courts because under no circumstances do they have subject matter jurisdiction to consider direct attacks on administrative rules.

There is an "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists. . ." Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811

(1988). "While perhaps tempted to address the merits, [the county court should not have done so] it is fundamental principle of law that if a court is without jurisdiction, it has no power to adjudicate or determine any issue or cause submitted to it." Capricorn Marble Company v. George Hyman Construction Co., 462 So.2d 1208 (Fla. 4th DCA 1985)(citation omitted).

Petitioner has also failed to exhaust administrative remedies. It has long been established that "where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the court will act." Halifax Area Council on Alcoholism v. City of Daytona Beach, 385 So.2d 184, 186 (Fla. 5th DCA 1980) (emphasis added) (citations omitted): see also Brooks v. School Board of Brevard County,, 382 So.2d 422 (Fla. 5th DCA 1980); Orange County, Florida v. Game and Fresh Water Fish Commission, 397 So.2d 411 (Fla. 5th DCA 1981); Criterion Insurance Co. v. State of Florida, Department of Insurance, 458 So.2d 22 (Fla. 1st DCA 1984); Gulf Coast Home Health Services of Florida, Inc. v. State of Florida, Department of Health and Rehabilitative Services, 513 So.2d 704 (Fla. 1st DCA 1987); City of Deland v. Lowe, 544 So.2d 1165 (Fla. 5th DCA 1989). Moreover, "[w]hen the facial unconstitutionality of an agency rule is the focus of an aggrieved party's constitutional claim, the administrative proceedings must be exhausted and the claim presented to the district court." Key Haven Associated Enterprises, Inc. v. Board of Trustees of the International Trust Fund et. al., 427 So.2d 153, 157 (Fla. 1982).

Thus, the county court erred in considering the sufficiency of the HRS rules, because exhaustion of administrative remedies before obtaining judicial review is mandatory.

Even if the county court had discretion to consider the challenge advanced below, its ruling represents an abuse of discretion. First, exhaustion of administrative remedies is in accordance with the provisions of the Administrative Procedure Act. Second, Petitioner would not be prejudiced by following the administrative course. Although the trials would be delayed beyond the usual 90 day period, the defendants are not forced to sacrifice their speedy trial rights. See Fla.R.Crim.P. 3.191(d)(2). Third, it can hardly be agreed that the methods employed by the Petitioner are more judicially economical. While in a very narrow and short term view it would appear more economical, in the larger scheme of things it is anything but economical. There are 67 counties in the state. There are hundreds of sitting county court judges. When the total number of those judges is multiplied by the number of driving under the influence cases that involve breath testing machines, it is clear that thousands of challenges are possible with possibly hundreds of differing conclusions reached by the assorted county court judges. A determination that judicial economy is served by proceeding in the instant fashion is refuted by the sheer number of cases which are now before the courts as a result of various rulings.

It is far more judicially economical to require initial presentation of such claims to H.R.S. One consistent

interpretation will be rendered by the agency for judicial evaluation. Assuming that judicial review is sought, at most there will be five different rationales because the legislature has limited judicial review of this sort to the district courts of appeal. The long term efficacy of requiring exhaustion of administrative remedies was explained this way:

> [A]gency review of a constitutional attack upon one of its rules affords the agency the opportunity of modifying its rule should it appear necessary or desirable to do so thus perhaps eliminating the need for further litigation or administrative hearing regarding the rule.

Occidental Chemical Agricultural Products, Inc. v. State of Florida, Department of Environmental Regulation, 501 So.2d 67 678 (Fla. 1st DCA 1987).16

Petitioner may, counter that procedures for monthly and annual checks for testing of the intoxilyzers have statewide application and thus meet the definition of a "rule" as that term is defined in Section 120.52.16, Florida Statutes, and Department of Transportation v. Blackhawk Quarry Co. 528 So.2d 447 (Fla. 5th DCA), review denied, 536 So.2d 243 (Fla. 1988).

Accepting that as true, that does not negate the necessity of first exhausting administrative procedures. In Occidental Chemical the court held that if a rule is deemed to be a statute the circuit court could exercise jurisdiction, but if it were deemed to be a typical agency rule then the circuit court could not exercise jurisdiction. Id., 677 citing Key Haven, supra. Dicta in the Key Haven case appears to have engendered some of the confusion regarding both the exhaustion issue and the jurisdictional issue. The court stated:

> We have expressly recognized that circuit courts have the power, in all circumstances to consider constitutional issues. Gulf Pines Memorial Park, Inc. v. Oakland Memorial Park, Inc., 361 So.2d 695 (Fla. 1978). However, we stated in Gulf Pines that, as a matter of judicial policy, 'the circuit court should refrain from entertaining declaratory suits except in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains under Chapter 120." Id., at 169. Clearly, the determination of whether a particular controversy may be taken out of the administrative process and into a circuit court is a question of judicial policy and not a matter of jurisdiction.
>
> Key Haven, 156-157.

The issue in Key Haven was not jurisdictional because the circuit courts have jurisdiction to render declaratory judgments under §120.73. Again, the county courts have no such jurisdiction. Moreover, even if there was a jurisdictional basis for the county court to proceed upon, it could not properly entertain the claims advanced below. As the above passage reveals, such judicial relief is appropriate only "in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains available under Chapter 120" Id., 157. No showing of extraordinary circumstances was made below.

While §316.1932(1)(f), Fla. Stat. (1989), states that public hearing is required, this statute does not provide an exception to the requirement of exhaustion of administrative remedies. An express statement of legislative intent is provided in the Administrative Procedure Act:

> (1)(a) The intent of the Legislature in enacting this complete revision of chapter 120 is to make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state. To that end, it is the express intent of the Legislature that chapter 120 shall supercede all other provisions in the Florida Statutes, 1977, relating to rulemaking, agency orders. Administrative adjudication, licensing procedure, or judicial review or enforcement of administrative action for agencies as defined herein to the extent such provisions conflict with chapter 120. . .
>
> §120.72(1)(a), Fla. Stat. (1989) (emphasis added).

Administrative remedies must first be exhausted before judicial review is appropriate.

B) The Fourth District Correctly Determined that the Void For Vagueness Doctrine Is Not Applicable Here And That If It Were, The Rules Were Not Void For Vagueness.

As explained by the Fourth District, the void for vagueness doctrine has no applicability here:

> As a sister court noted in State v. E.L., 595 So.2d 981, 983 (Fla. 5th DCA_, juris. accepted 601 So.2d 551 (Fla. 1992), the United States Supreme Court described the void-for-vagueness doctrine in Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983) 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.
>
> (Citations omitted.)
>
> [1] Accordingly we agree with the well reasoned opinion of the Honorable David A. Demers in State v. Westerberg, 16 F.L.W. 149 (Fla. Pinellas Cty. Ct. July 19, 1991), that void-for-vagueness doctrine is inapplicable in the present circumstances, where the issue is the adequacy of administrative rules to give guidance to professionals testing equipment which is used for blood-alcohol testing for evidentiary purposes. We conclude, as did Judge Demers, as well as the Second District Court in its recent opinion in State v. Berger, 605 So.2d 488 (Fla. 2d DCA 1992), that the administrative scheme is sufficient to ensure reliability of results although the standards set forth for monthly and annual testing are not specifically stated in the rules.

A similar result was reached by the Court in Shannon v. State, 800 S.W.2d 896, 900 (Tex. App. 1990).

Assuming that the doctrine applies, the Rules are not void for vagueness. Rule 10D-42.024 incorporates by reference Form 1514, which was properly promulgated in 1982. The Court in State v. Reisner, 584 So.2d 141, 144 (Fla. 5th DCA), rev. denied, 591 So.2d 184 (Fla. 1991) specifically noted that the original form made Rule 10D-42.024 "sufficiently specific." Deputy Fries established below that the 1986 form used in the instant case was identical to the 1982 form, except that it added a few extra requirements that were to the benefit of Respondent.

Rule 10D-42.023 governs the conduct of "authorized personnel of the Department." See Ferguson v. State, 377 So.2d 709, 710, 711 (Fla. 1979)(provisions relative to same subject

matter shall be construed with reference to one another); Board of Public Instruction of Broward Co. v. Doran, 224 So.2d 693, 698 (language used in statute should be construed as an entirety). See Also Rule 10D-42.023 (1991)(amended to specifically state that authorized personnel "check" registered breath test machines annually); Palma v. Del Mar v. Commercial Laundries, 586 So.2d 315, 317 (Fla. 1991)(courts may consider subsequent amendment to interpret intended meaning of pre-amended rule). Clearly, the rule was written for the understanding of "authorized" persons, and not for members of the general public withouot familiarity with breath tests machines. See Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881, 884 (Fla. 1972) (a statutory scheme should be construed in light of its purpose); Doran, 274 So.2d at 698 (statute should be construed with reference to purpose of law as shown by all enactments on subject).

Significantly, due process only requires that sufficient notice be given to apprise those to whom a rule applies of conduct it proscribes, State v. Wershow, 343 So.2d 605, 608 (Fla. 1977); Doran, 224 So.2d at 698; Bertens v. Stewart, 453 So.2d 92, 93 (Fla. 2d DCA 1984). The test for vagueness is more lenient for an administrative rule than penal statute Bertens, 453 So.2d at 94. In fact, an administrative rule may satisfy due process requirements even though it contains general terms and lacks detailed specifications for conduct prescribed. Id.; See also Wereshow, 343 So.2d at 608.

Even under a regular statutory scheme, a statute needs only to convey proscribed conduct as measured by common understanding

or practices, and does not need detailed plans or specification. State ex rel. Powell, 262 So.2d at 884; Doran, 224 So.2d at 698. Should a statute appear facially vague, its legality is merely voidable, not void, and the narrowing construction placed on it by an agency can preserve its constitutionality. Naturist Soc. Inc. v. Fillyaw, 736 F.Supp. 1103, 1109 (S.D. Fla. 1990) reversed in part 958 F. 2d 1515 (11th Cir. 1992). See also Raffield v. State, 565 So.2d 704, 706 (Fla. 1990), cert. denied, 420 U.S. 1025, 111 S.Ct. 674, 112 L. Ed.2d 666 (1991) (interpretation of administration officers, with special expertise, who are charged with administering law, is one entitled to judicial deference and should be given great weight by courts).

Section 316.1932(f)(1), Florida Statutes, reads in pertinent part:

> "The test determining the weight of alcohol in the defendant's blood shall be administered . . . substantially in accordance with rules and regulations which have been adopted by the Department of Health & Rehabilitative Services . . . Such rules shall specify precisely the test or tests which are approved by the Department of Health & Rehabilitative Services for the reliability of results and facility of administration, and shall provide an approved method of administration which shall be followed in all such tests given under this section.

(emphasis supplied).

Under these terms, H.R.S. is responsible for developing tests and methods of administration approved for "reliability of results and facility of administration". Preliminarily, the State urges

this Court to note that the Florida Supreme Court has already decided that the H.R.S. rules on maintenance of breathalyzers are sufficient to insure the administration of breath test results.

In Drury v. Harding, 461 So.2d 104, 107 (Fla. 1984), the court held:

> At the time that chapter 82-155 took effect on July 1, 1982, the Florida Administrative Code contained existing H.R.S. rules regarding blood alcohol testing. Fla.Admin.Code Rule 10D-42 et. seq. These rules contained detailed and comprehensive instructions for the operation and maintenance of chemical test instruments and were sufficient by themselves to provide for the production of reliable evidence of alcohol content while protecting the health and safety of the public.

(emphasis supplied).

Webster's Student Dictionary defines "reliability" as "the quality or state of being dependable" or "the extent to which an experiment, test, or measuring procedure yields the same results on repeated trials." "Administering" is defined in H.R.S. rule 10D-42.0211(3) as "the taking or the collecting of a sample of blood or breath from a person for the purpose of determining the alcoholic content of his blood." Therefore, the responsibility of H.R.S. by statute is simply to adopt regulations providing for approved tests and methods for taking a sample of blood or breath that will be easy to use and produce dependable readings that yield the same results on repeated tests.

H.R.S. has met that responsibility by providing for monthly and annual inspections for accuracy and reproducibility. Those inspections were not specifically directed by the legislature.

Instead, they are a part of the administrative scheme to meet the statutory mandate. H.R.S. has also provided sufficient standards to conduct the inspections for which it has provided.

Specifically, H.R.S. rules 10D-42.023 and 10D-42.024 contain workable standards. Rule 10D-42.023 reads:

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

(emphasis supplied).

Rule 10D-42.024 reads in part:

> Approved Chemical Breath Testing Instruments and Devices-Operational and Preventive Maintenance Procedures.
> (1) General rules
> (c) Chemical test instruments and devices used in the breath method shall be inspected at least one each calendar month by a technician to insure general cleanliness, appearance and accuracy.

(emphasis supplied).

Rule 10D-42.024(11) incorporates by references Form 1514, entitled "Breath Alcohol Instrument Check List to Preventive Maintenance Procedures." Fries testified that the form requires that a technician run three tests on a known solution, as well as obtain information on other aspects of the breath machine.

He testified that Form 1514 sets out blanks next to the factors which maintenance technicians must consider (A80-83). He said that technicians are required to attend a 40 hour course on how to fill out those blanks. He stated that the course deals with the terms used in the rules (A. 87). Indeed, rule 10D-42.025, on the requirements for one to be certified as a "technician," [1] specifically mandates the course discussed by Fries:

> 10D-42.025 Permit - Technician. Chemical Test of Breath for Intoxication Course. The permit shall be issued to persons 18 of age or older and otherwise qualified under the provisions of these rules upon written application by an individual who has successfully completed the course of instruction prescribed by the State Department of Education through county school districts and state community colleges, as approved by the Department. Said technician course shall provide for no less than 40 hours of instruction covering such subject matter as the history of alcohol, its effect upon the human body, alcohol tolerance (**scientific laws affecting chemical test and the specific measurement procedures for determination of alcohol in the body by breath testing using approved instruments, the course shall also include instruction in the preventive maintenance of the chemical test instruments or devices**) as well as case preparation and course work incidental to enforcement of the provisions of the law, and a knowledge of the previsions of the Implied Consent Law. Applicants requiring permits for instruments having a significantly different method of theory shall complete an additional

[1] Rule 10D-42.025 states that monthly checks will be performed by a "technician."

> eight hour course providing the theory of operation and method of each instrument.

Since all H.R.S. rules on the maintenance and operation of breath machine were authorized by the same statutory scheme. Chapter 316, Florida Statutes, and relate to the same subject matter, chemical breath testing, the rules should be construed with reference to each other. See Ferguson v. State, 377 So.2d 709, 710, 711 (Fla. 1979); State v. Hayles, 240 So.2d 1, 3 (Fla. 1970); State v. Tate, 420 So.2d 116, 117-118 (Fla. 2nd DCA 1982).

The terms, "general appearance", "cleanliness" and "reproducibility," used in the rules should be afforded their plain and ordinary meanings since the rules do not define them anywhere. See S.E. Fisheries v. Dept. of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984). The phrase, "It appears in good order," is commonly used to indicate that no apparent defects exist. Webster's Student Dictionary describes "clean" as "free from dirt, stain, or any defilement". Likewise, "reproduce" means to "produce over again".

In addition to looking at the use of the standards in the statutory scheme and in common meaning, the interpretation given to the words by H.R.S. must also be considered. An established administrative interpretation of an agency's own rule should be given great weight. See Knight v. Munday Plastering Co., 220 So.2d 357, 360 (Fla. 1968); Reedy Creed Improvement District v. State Dept. of Environment, 486 So.2d 642, 648 (Fla. 1st DCA 1986) (determination that "reasonable assurances" had been given with regard to maintenance of greater quality standard was a

matter reserved to agency expertise and experience). In looking at an agency's interpretation of its rules, documents relied on by officers executing the rules may be considered. See Curtis v. Taylor, 625 F.2d 645, 652 (5th Cir. 1980), modified 648 F.2d 946 (5th Cir.). (HEW Publications); Wirtz v. Floridice Company, 381 F.2d 613, 614-615 (5th DCA 1967), cert. denied, 389 U.S. 1043, 88 S.Ct. 786, 19 L.Ed.2d 834 (1968) (Department of Labor Bulletin), and, the officers' practices may also be considered. See Bill Frey, Inc. v. State, 173 So.2d 812, 814 (Fla. 1937); E.M. Watkins Co. v. Board of Regents, 414 So.2d 583, 587 (Fla. 1st DCA), rev. denied, 421 So.2d 67 (Fla. 1982); Outdoor Advertising Art, Inc. v. Dept. of Transportation, 366 So.2d 114, 115 (Fla. 1st DCA 1979).

Here, Fries testified that the 1982 form required him to perform three tests on a known solution, while the 1986 revised form required him to also perform an acetone test (A 84-90). In practice, however, he stated that he always conducted three tests on .10 simulator and three tests on .20 simulator, in addition to an acetone test (A 84-90). Fries testified that he also always performed an elaborate software check (A 84-90).

In State v. Reisner, 584 So.2d 141, 144 (Fla. 5th DCA 1991), the State apparently failed to argue the principles of statutory construction discussed above. Accordingly, the court felt that it had no choice but to conclude that the rules governing maintenance checks were constitutionally vague and ambiguous. Given the above analysis, this Court is not so restricted.

Moreover, the Court in Reisner, held that with 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 intoxilyzers for accuracy and reproducibility, was sufficiently specific. The problem that the fifth district had in Reisner, was that the machine used was tested not with the original form 1514, but with the revised unpromulgated form. The Reisner Court found that since the rule without the promulgated form could not pass constitutional muster, and since the unpromulgated be considered part of the rule, the test result obtained with the machine whose accuracy and reproducibility had been checked using the new form were properly excluded.

Key to that Court's conclusion was the fact that there was no testimony that the unpromulgated rule was not substantially different and was therefore in substantial compliance. Here, the testimony indicated the insubstantiality of the 1986 form's deviation from the promulgated form (A 83). Rochelle, 609 So.2d at 616. See also State v. Rawlins, 18 Fla. L. Weekly D1893 (Fla. 5th DCA Aug. 27, 1993) (citing Rochelle with approval for the proposition that a rule provides adequate notice).

Moreover, persons responsible for annual inspections use an H.R.S. form and associated paperwork for guidance, Form 713 and its attached data sheet (A 79, 113-115, 136-138). Admittedly, Form 713 was never promulgated. Nonetheless, the data sheet is what places "authorized" persons on notice of what is meant by "accuracy and reproducibility" as used in rule 10D-42.023. That data sheet is an attachment to Form 713 and the Form itself

(A 79, 113-115, 136-138). The form is only a manner of documenting necessary information once it is obtained. See Rule 10D-42.0211 (12)(definition of form). Section 120.52 (16)(a), Florida Statutes, specifically excludes from the definition of "rule" "internal management memoranda which do not affect either the private interest of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum." (emphasis supplied).

Rule 10D-42.23 is implemented by "authorized personnel of the Department", and not by "technicians," i.e., law enforcement personnel or other persons who obtain permits pursuant to rule 1CD-42.75 as is the case with Rule 10D-42.24. See Rule 10D-42.0211(f)(definition of technician). The procedures used by authorized personnel to conduct annual inspections of the breath test machines are not important to any citizen until after the citizen is arrested for driving under the influence, and wishes to challenge the reliability of such procedures. In that case, as was done here, the individual can obtain Form 713 and the data sheet through traditional discovery.

Moreover, Section 316.1934(3), Florida Statutes, which is the specific authority for Rule 10D-42.23, only requires, that chemical analysis of a persons breath be performed "substantially in accordance with methods approved by the Department of Health and Rehabilitative Services" (emphasis supplied). That section explains that "the Department of Health and Rehabilitation Services may approve satisfactory technique or methods, ascertain the qualifications and competence of persons to conduct such

analysis, and, issue permits which shall be subject to termination or relocation in accordance with rules adopted by the department." (emphasis supplied). The rule that guided annual equipment checking is not void for vagueness. See Rochelle, 609 So.2d at 617. See also Mehl v. State, 18 Fla. L. Weekly S487 (Fla. Sept. 16, 1993).

C) The Fourth District Correctly Concluded That The Use Of Different Forms Did Not Constitute A Denial Of Equal Protection.

This argument is without merit for several reasons. As recognized in Rochelle, the forms did not vary substantially from the adopted form. Accordingly, the different form was not discriminatory. Additionally, assuming that the reliability of the results from the different procedures were questionable, respondent has not shown how he was adversely affected. Id. at 617. As held by the Fourth District, one cannot claim discriminatory treatment if one was not treated unfairly, merely because it is possible someone was unfairly treated. Id. at 618. Fries testified that none of the 1514 forms require less than what was required by the 1982 form (A.120). Even Karmelin said that in 1989, nine tests, as opposed to three in 1982, were performed. Hence, all the forms request data from tests using more stringent standards than those called for by the 1982 form.

Regardless, as noted in State v. Bender, 382 So.2d 697, 700 (Fla. 1980), a defendant has the right in his individual proceeding to attack the reliability of a maintenance procedure. Here, the defendant's equal protection rights were clearly not violated. Fries said he did more testing than that which was

required by the 1982 form. He said that he performed three .10 simulator tests and three .20 simulator tests, as well as an acetone test (A 84-90). He stated that he also conducted a detailed software check (A 84-90). Fries testified that all of the extra tests were beneficial to the defendant, and that none of them were harmful to him (A 85).

The Fourth District correctly concluded that there was no equal protection violation. Rochelle, 609 So.2d at 617-618. A similar result was reached by the Second District. See State v. Berger, 605 So. 2d 488 (Fla. 2d DCA 1992).

POINT II

ASSUMING THAT THE RULES ARE VOID FOR VAGUENESS OR THE USE OF DIFFERENT FORMS CONSTITUTES A DENIAL OF EQUAL PROTECTION, THAT WOULD NOT PREVENT THE USE OF THE TEST RESULTS IF A PROPER PREDICATE IS LAID.

Respondent does not agree that there was not substantial compliance here. Respondent agrees that even if the first and third questions are answered in the affirmative, the results are admissible if a proper predicate is laid (initial brief p. 33). See Robertson v. State, 604 So. 2d 783 (Fla. 1992) and Mehl v. State, 18 Fla. L. Weekly S487 (Fla. Sept. 16, 1993).

Moreover, the new rule may be applied retroactively. On August 1, 1991, Rules 10D-42.023 and 10D-42.024 were changed to incorporate the definitions of "accuracy" and "reproducibility," as given in new Forms 1855 and 1856. At the hearing below, it was stated that unlike with the 1982 form, the 1991 form requires an acetone test (R. 137 - 138). It also requires a .05 simulator test (R. 141 - 144). The State contended that these changes should be applied retroactively to the instant case since they are procedural and insignificant. Although, the county court agreed that the changes were procedural, it refused to apply them retroactively because the legislative had not indicated that they could be so applied.

The State submits that it was unnecessary for the legislature to explicitly state that the rules may be applied retroactively for them to be applied as such. An ex post facto violation does not occur where a change is merely procedural and

does not modify "substantial personal rights." Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 2450, 96 L.Ed.2d 351 (1987); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 2297, 53 L.Ed.2d 344 (1977). In Glendening v. State, 536 So.2d 212 (Fla. 1988), the Florida Supreme Court held that the hearsay exception for statements by a child victim could be applied retroactively. The court reasoned:

> The proscription against law which affect the legal rules of evidence and receive less, or different, testimony in order to convict the offender has been construed as prohibiting those laws which "'change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Miller*, 107 S.Ct. at 2453 (quoting *Hopt v. Utah*, 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1984). Changes in the admission of evidence have been held to be procedural.
>
> The same reasoning which resulted in the Supreme Court's determination that the statutes in *Hopt* and *Thompson* were procedural leads to the conclusion that section 90.803(23), Florida Statutes, is also procedural and that the statute does not affect "substantial personal right." As in *Hopt*, [t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by "the enactment of section 90.803(23). 110 U.S. at 589-90, 4 S.Ct. at 209-10. As in *Thompson*, section 90.803(23) "left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state . . . must overcome the presumption of his innocence, and establish his guilt beyond a reasonable doubt." 171 U.S. at 387, 18 S.Ct. at 924. Accordingly, we conclude that the district court below

> correctly held that application of section 90.803(23) in the present case does not violate the prohibition against *ex post facto* laws.

Id. at 215. (emphasis supplied).

In the instant case, the changes in the rules similarly do not prejudice the defendant in any way. They do not make it easier to get evidence in or to convict, and they do not increase criminal penalties. To the contrary, they make it more difficult for the state to get evidence introduced than did the 1982 form. After all, the State would still have to show that the maintenance procedures used substantially complied with the 1991 requirements, in order for the statutory presumption to apply. Indeed, Fries testified that he performed acetone tests in monthly maintenance and that he performed tests on a .05 simulator in annual maintenance (A. 82, 84, 114-115).[2]

It is worth noting that the district courts in Drury v. Harding, 443 So.2d 360, 361-362 (Fla. 1st DCA 1983) quashed in part, 461 So.2d 104 (Fla. 1984), State v. Fardelman, 453 So.2d 1183 (Fla. 1st DCA 1984), and Houser v. State, 456 So.2d 1265, 1267 (Fla. 1st DCA 1984), quashed in part, 474 So.2d 1193 (Fla. 1985) held that the 1982 H.R.S. rules could be applied retroactively to cases where defendants were arrested between the time the implied consent statute was amended in 1982 and the time the rules therein were amended. The court in Drury stated:

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[2] Fries states that acetone tests are primarily for the benefit of diabetics since acetine does not normally interfere with breath t ests (A 118).

> . . . Because the purpose of the rules is to ensure that only reliable evidence is placed before a jury, the law in effect at the time of the trial is the law that governs the admissibility of the evidence. This court finds the rules to be procedural in nature and we prove the decision of the Circuit Court, thereby allowing the test results to be introduced at trial, subject, of course, to a proper predicate for admissibility showing that the rules were complied with.

443 So.2d at 361-363.

However, on certiorari review, the Florida Supreme Court in Drury v. Harding, 461 So.2d 104, 107 (Fla. 1984) stated that the district court unneccessarily considered the retroactive application of the rules since H.R.S. was not obligated to amend the rules just because the legislature amended the delegating statute. Accord Houser v. State, 474 So.2d 1193, 1197 (Fla. 1985).

CONCLUSION

Based on the preceding argument and authorities, this Court should decline jurisdiction or affirm the Fourth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER, Senior
Assistant Attorney General

JAMES J. CARNEY
Assistant Attorney General
Florida Bar No. 475246
Suite 300
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(407) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished Brief of Respondent on the Merits has been furnishd to: STACEY J. PASTEL, Assistant Public Defender, Attorney for Petitioner, Broward County Courthouse, 201 Southeast Sixth Street, Room 730, Fort Lauderdale, Florida 33301, this 5 day of October, 1993.

Of Counsel

JJC/rb