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IN THE SUPREME COURT OF FLORIDA

LAWRENCE B. FOLSOM, ET AL,

Petitioner,

v. FSC NO. 82,289

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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(Answered YES by the court below)

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DO THE CURRENT METHODS OF HRS MONTHLY AND YEARLY MAINTENANCE ACCURACY CHECK COMPLY WITH THE REQUIREMENTS OF SECTION 316.1932(F) (1), FLORIDA STATUTES, AND/OR THE FLORIDA ADMINISTRATIVE PROCEDURES ACT, SECTION 125.50. ET SEQ., FLORIDA STATUTES, AND IF NOT, DOES THIS PRECLUDE THE STATES USE OF BREATH TESTING INSTRUMENTS IN A CRIMINAL TRIAL?
(Answered Yes, in the first part, by the court below)

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STATEMENT OF THE CASE AND FACTS

Respondent completely disregards Petitioner's Statement of the Facts as they were developed in the trial court and relies totally on the following recitation of the facts.

All Petitioner's herein have been charged with driving while having a blood alcohol concentration of ".10" or greater pursuant to Section 316.193, et seq, Florida Statutes, otherwise known as "DUBAL". (R. 328,329,330) Petitioner together with respresentatives of the local criminal defense bar association brought a motion to suppress the results of breath tests performed on an Intoxilyzer Model 5000 as used in Polk County. (R. 331-340) This motion (and "motion in limine") addressed the constitutional application of the Department of Health and Rehabilitative Service's Rules as they apply to the administration of breath tests as performed on the Intoxilyzer Model 5000. The State filed a motion to strike the foregoing which, in due course, was denied. (R. 341-351)

An extensive hearing was held before the Honorable Judges Harvey A. Kornstein and Anne H. Kaylor on July 29, 1991. Dr. Howard Rarick, the Scientific Director of the Department of the Implied Consent Program for HRS was the first to testify. Dr. Rarick's job entails carrying out the dictates of Chapters 316.322 and 327, Florida Statutes, with respect to alcohol, blood and breath testing. (R. 29) He testified that he has six

inspectors working under his direction and one supervising inspector who conducts annual inspections of Intoxilyzer instruments. (R. 33) He requires the inspectors to visit each agency at least once a year and recommends more than that. (R. 100) Such is an example of HRS interpreting and enforcing its own rules. (R. 101) The annual checks of the instrument are performed by the HRS inspectors but the monthly maintenance checks are performed by local agency technicians. (R. 37) A Guth simulator is used to test the accuracy of the instrument. However, the simulator itself is not approved pursuant to an HRS rule. (R. 37) The stock alcohol testing solutions are prepared by HRS. (R. 37) It is prepared under Dr. Rarick's direction, is quality control checked and certified before it is sent out to the local agencies for use in their working solutions for monthly testing. (R. 38) The precise formula for mixing a 10% alcohol solution has not been promulgated by HRS. (R. 39) The stock solutions's accuracy is verified through the use of a 3400 Gas Chromatograph using standards traceable to the National Bureau Standards Primary Standards to insure that the concentration will give the desired end result. (R. 41) Several small bottles of the solution are sent out to the local agencies and are subject to random testing to verify their quality. (R. 42) The certified stock solutions have a shelf life of at least one year but can be used after that. If for some reason a test performed

with an older solution does not render a .10, then the operator would know there is a problem. (R. 44) If an operator does not get a .10 result during a maintenance check, for any reason, he would need to initiate an investigation to find out what is wrong. (R 46)

10D-42.025 (the "Rules") outlines the concepts to be taught in a 40 hour class on the Intoxilyzer. Preventative maintenance is one of the concepts taught in the course as directed by HRS. (R. 46,50) Such is duly promulgated under the Rules. (R. 47) The course and materials cover 12 to 15 subject areas. (R. 47) The instructional materials are not promulgated pursuant to rule. (R. 48) As a result of the course, if a maintenance operator where to encounter a problem, they are trained to check several things, including the working solution. (R. 49) Dr. Rarick knows that the local technicians mix the solutions properly because they are trained and are checked once a year. (R. 84) HRS approves the 40 hour course and every student is given a practical examination. (R. 100) Approval of the class is an example of an agency enforcing and interpreting its own rules. (R. 100)

The newly promulgated rules that went into effect in July 1991 add only a .05 alcohol test to the maintenance procedures. (R. 60)

Radio frequency interference affects the Intoxilyzer to the extent that it would be impossible to get two results within .02 tolerance of each other. (R. 65)

If an instrument is dirty, a maintenance operator will not get a .10 result. An investigation would reveal that the instrument needs cleaning. (R. 66)

Dr. Rarick was called upon to testify at length about the use of distilled water for maintenance procedures. Suffice it to say that he recommends that distilled water be used as opposed to tap water. (R. 68) Such is taught in the 40 hour course. (R. 68,78)

The HRS Form 1514-86 as used in performing maintenance is identical to the 1982 version except that the 1986 form adds an acetone check. (R. 69,70,74) The '86 form was not promulgated. (R. 69) There is no rule that acetone be tested. (R. 70) The techniques used for maintenance testing have not changed from the 1982 to the 1991 version of the form and none of the forms specifically spells out the exact procedures to be used. (R. 117,118)

Though Dr. Rarick did not pin point where in the Rules accuracy and precision are defined (other than for the certification of a prototype) he did indicate that the percentages for the annual and monthly tests are the same as for the testing of a prototype. (R. 76) He was comfortable that the

technicians know when an instrument is within paramerers or not and that they follow the directions given in the 40 hour course. (R. 77) He further testified that HRS accuracy standards have been a matter of public record for years. The ranges for testing have been public record for years. (R. 101) The maintenance standards differ from the prototype tests only in the number of simulation tests. They have been the same since 1975. (R. 101,102) The accuracy standards for maintenance checks and prototype testing is within 5 percent. (R. 104)

Dr. Rarick was also questioned about the glassware used in maintenance testing. (R. 78,80) He said that everyone is taught to use Class A volumetric glassware. (R. 79) The HRS inspectors look at the procedures. (R. 79) Pipette solutions prepared in the glassware are prepared at room temperature. However, the accuracy of the temperature has little or no bearing on a test. (R. 81)

It was Dr. Raricks opinion that when the instrument is checked at .10 and the test solution is mixed at .10, every component of the system is checked. (R. 86) If a simulator is not tightly sealed during a check, it will not yield a correct result when a .10 solution is mixed. (R. 88) It is simple to clean out the simulator. (R. 89) Thus, if it checks out at .10, there is no need to squirt any water through a simulator. (R. 89)

The Intoxilyzer tests at 34 degrees Celsius. (R. 91) If the temperature of the simulator is not at 34 degrees, a .10 will not be the result. (R. 91)

Under cross-examination by the State, Dr. Rarick testified that under Florida Statutes, HRS is only supposed to enumerate what tests are approved by it. (R. 95) The statutes do not require HRS to promulgate rules regarding maintenance procedures. (R. 96) He also indicated that the Rules have only an indirect affect upon a DUI defendant. (R. 97) As part of his job at HRS, Dr. Rarick meets with other state directors of departments similar to HRS. He also serves on the National Safety Council's Committee on Alcohol and other drugs. As a result, he indicated that the procedures used in Florida are the general procedures used throughout the country. (R. 98,99) Most of the standards come from the National Highway Safety Traffic Administration and compare with the Federal Registry of procedures for breath testing. (R. 99) The HRS rules for breath testing comply with those from across the nation. (R. 109) The nationwide standards information is distributed statewide through the 120 hour instructors course, the 40 hour breath test class, and the requalification classes as well as through agency meetings, presentations given to prosecutors and judges as well as through informal meetings. (R. 110)

If an inspector should find that an instrument has not been maintained in substantial compliance with HRS rules, he would condemn it and notify the State Attorney who would pass upon what to do with respect to the defendant's affected. (R. 104-105) A paper trail of the condemned unit is made. (R. 105)

If an operator is not testing the instrument properly (or, is using tap instead of distilled water) such would have to be brought up on a case by case basis with the court as a well as with the operator. (R. 113-115)

Next, David Waters was called to testify. He is a breath test technician in Polk County. (R. 125) He attended the 40 hour class on infrared breath testing. (R. 125) He has also taken the maintenance course for the Intoxilyzer 5000. (R. 126) This was a 40 hour course. (R. 126) He has also taken the 8 hour refresher course. (R. 143) At the classes, he received the 10D-42 HRS rules. (R. 127) He received his recertification certificate from inspector Shelly Decker with HRS. (R. 144) The testing on the refresher course is given by an HRS inspector. (R. 145,165) This same inspector performs the annual check but uses his own solutions. (R. 146) Apparently, the officer follows the HRS guidelines. (R. 128) He performs two monthly maintenance checks at both the .10 and .20 levels. (R. 129) He prepares both working solutions at the same time. (R. 130) He also uses Class A glassware. (R. 130) The pipette is pre-

marked for the .10 solution. (R. 130) The officer had a hard time remembering the details of his work while testifying at the hearing. (R. 131) Nonetheless, he still testified about how he measures the solutions. (R. 131,132) However, the officer uses tap water to mix his working solutions. (R. 132) He said that the class recommended using distilled water but that they did not say it was required. (R. 132,133,157) This, apparently, was a big deal. (R. 261) He further indicated that if he mixes the solutions the way they are supposed to be mixed, they should equal a .10. (R. 135) There have been times that he ran a check with the working solutions and it did not test correctly. In that case, the officer poured the solution out and tried it again. When it still didn't test correctly, the officer went ahead and checked the instrument. (R. 135,136) He was taught to do this in the class. (R. 136,166,167) He detailed how he cleans the simulator and the instrument. (R. 137-139) He further detailed how he performs an acetone test but that the test only indicates the presence of acetone. (R. 142) The concentration of acetone was not significant. (R. 167) Monthly maintenance procedures are performed according to the instruction received during the classes. (R. 149) The monthly maintenance form does not tell an operator how to go about performing the test. (R. 159) However, during a maintenance forms special class, he was taught how to fill out the maintenance forms. (R. 171)

Further examination revealed that Officer Waters did not know what a "meniscus" was. (R. 151) This, apparently, was a big deal too. He used the instrument to, in effect, test the accuracy of the working solution. (R. 153)

Officer Parmer testified that inspector Shelly Decker gave him instructions regarding alcohol and air blank tests. (R. 199) He received instruction in preparing the working solutions from the courses. (R. 200) He also said that HRS recommended that distilled water be used to prepare the working solutions. (R. 201) If he gets a result outside accepted parameters, he remixes the simulator solution. He has never had to do that more than twice. (R. 201,202) At another time when the instrument gave a false reading, Parmer simply pulled it out of service. (R. 202) This anomaly did not happen during the test of a suspect or during a maintenance check. (R. 203) In fact, a maintenance check occurred only a few days before the anomaly occurred. (R. 203) He further affirmed that the acetone check only tests to see if acetone is present, not what quantity exists. (R. 209)

Under examination by the State, Parmer reiterated that the procedures and forms he uses were obtained from HRS through the classes he attended. (R. 215,217,224) Parmer was told, however, that although HRS recommends the use of distilled water, the use of tap water was not prohibited. (R. 216) According to instruction, he too took an instrument out of service when it

proved not to be operating properly. (R. 218) Parmer testified that all maintenance checks were performed prior to Defendant Folsom's test. (R. 219) The reason Parmer would rather not use tap water to mix his working solutions is to avoid problems with defense attorney's. (R. 222)

Next, Patrick Demers, a forensic chemist was called to the stand. (R. 227) He testified about forensic assay's. (R. 232) An "assay" is a standard or quality control check. (R. 232) He also testified about the need to certify test solutions and label them according to expiration date. (R. 233) He also theorized that if a test solution was mixed to low but the instrument was reading high, the result could be offset so as to yield a correct reading. (R. 233) He further talked about the need to use gas chromatography to establish the accuracy of the standard solutions. (R. 232,234) Demers said that precision refers to repeatability and that accuracy refers to ability to hit a known value ("bull's eye"). (R. 246) He further testified that even when solutions are made within a laboratory, .100 standards often come up reading .104 or .096. (R. 248) He talked all about testing distilled water for interferons (R. 250) and the need to house the solutions in the right kind of bottles. (R. 253,254) Mr. Demers did not believe that the way the working solutions are mixed in Florida would lead to a scientifically reliable result. (R. 255,258) He also said that a person using form 1514 would need special training in order to complete it. (R. 259)

Upon cross-examination by the State, Demers said that one of his quarrels with the breath testing system in Florida is that there are no standards run through the instrument to compare with the results of the person under test. (R. 267) He also questioned the scientific reliability of a test run between two maintenance checks where the last check revealed a problem. (R. 268) He thought that the Intoxilyzer should be certified. (R. 268) He didn't like that the technicians at the local agencies handled the mixing of the simulator solutions. He thought that the standards should be manufactured in a scientific environment and then distributed statewide. (R. 269) The standards should be mixed according to standards traceable to the National Bureau of Standards. (R. 270) Demers acknowledged that Dr. Rarick said that a gas chromatography is used to prepare the stock solutions in Florida and that such would comport with the type of scientific standards you would expect to find in a forensic laboratory such as his. (R. 271,272) He had no reason to believe, according to Dr. Rarick's testimony, that the stock solutions as sent out to the agencies are not within scientifically acceptable standards. (R. 274) Demers further agreed that it is permissible for agencies to expand upon their rules and that he had no special knowledge that the HRS forms alone would not be adequate. (R. 276) He had not seen the degree of information disseminated through the classes. (R. 276)

Finally, on cross-examination, Demers spoke about tap water and dissolved gasses in the water and how the water from each city would have to be tested individually to see if it had any reagents in it. (R. 279)

Finally, Dr. Rarick was recalled to the stand. He testified that the Intoxilyzer Model 5000 is calibrated at the manufacturer and that they do it with a wet bath simulator with solutions tested on a gas chromatograph against standards traceable to the National Bureau of Standards. (R. 288) The only thing the field technician does is verify that the calibration is still in effect. (R. 289) He said that Florida holds the instruments to a five one-thousandths of 1 percent (for a value of .10) standard for error. (R. 289) If the instrument cannot hold onto that kind of tolerance, then something is wrong. (R. 289) Moreover, even if Florida were to purchase its standards from Demers, there would be no way of ensuring what happened to it during shipping. (R. 289) Rarick further testified that if a technician mixes what he thinks a .10 and actually gets a .10 reading, then the probability that the instrument is working properly goes up. (R. 290) The monthly maintenance is a calibration check to see if what happened when the instrument was originally placed there is still in effect and still within five one-thousandths of 1 percent. (R. 290) That is a "pretty strict tolerance to be referred to as a screening test". (R. 290)

Upon examination by the court, Dr. Rarick said that the reason Florida does not use premixed solution is because it is difficult or impossible to get the person that actually mixed it to come to court in Florida and, further, that such premixed solutions have often proved not to reflect what they were supposed to be. (R. 292,293) The vast majority of states do not use premixed solutions and do not run controls with their breath tests. (R. 293) Other states that douse premixed solutions have difficulties with them. (R. 293)

On further examination by the State, Dr. Rarick said that use of a "control" is not the accepted practice in breath testing. (R. 295) He admitted that he and Demers are both in agreement that Florida's stock solutions follow all normal practices of a foresenic laboratory. (R. 295) In Rarick's opinion, Demers was trying to apply very precise forensic laboratory levels of quality control to a field procedure which is not and never has been intended to substitute for a forensic laboratory. (R. 296,297) He felt that a tolerance of plus or minus .005 is pretty small with a breath test which is only accurate plus or minus 10 percent with a human subject. (R. 297) He also indicated that tap water is often used during demonstratins and that out of hundreds of tests he has yet to find any interfering compounds in the water. (R. 297)

Dr. Rarick did not think very highly of Officr Water's testimony. He thought it inconceivable, however, that his level of knowledge was reflected by his testimony. (R. 299) However, he said that if indeed the stock solutions were giving erroneous results, he would be getting phone calls "all over the place". (R. 299)

The reasons HRS does not put expiration dates on the stock solution bottles is because when an improper result is obtained, the instrument is to be taken out of service to investigate why. (R. 300) Rarick further expounded upon the sufficiency of the procedures employed when a solution is the cause of an inaccurate test. (R. 301) Although Mr. Demer's method would be more reliable in determining that the solution wasn't the problem, (although it still could be the solution) certification of a solution at a laboratory doesn't apply at the site of the test. (R. 301) Normally, Rarick has found that the problem is not with the solution but with the temperature of the simulator. (R. 301,302) If a technician were to mix the working solution with the meniscus at the top of the solution (rather than at the bottom) such would probably not throw the test out of line (although he would correct the procedure). (R. 302,303)

Under further examination by the court, Dr. Rarick said that all of the operators are instructed to notify the State Attorney if there is a problem found during the monthly maintenance check.

(R. 304) He saw no reason to preserve the results of erroneous results because such would require the courts to look at numerous bits of results and have to pass upon whether a switch was on or off. (R. 307)

Under examination by the defense, Dr. Rarick said that any certification is good at the instant of certification at the site of certification and is arguably not good anywhere else. (R. 309) If something is wrong with your stock solution, you are not going to get the right result. (R. 310) A breath test is not a forensic laboratory result but is reliable as a field breath test as contemplated under Florida Statute 316. Such does not say that HRS will certify forensic laboratories to perform the tests. (R. 314)

On August 22, 1991, the trial court issued its Order on State's Motion to Strike Defendant's Motion in Limine and Defendant's Motion in Limine/to Suppress. (R. 352-354) On August 26, 1991, the trial court issued an addendum to its previous Order. (R. 355,356) On August 27, 1991, the court issued a Supplemental Order on the defendant's motions which, relucently, followed the Reisner decision and granted all of the defendant's motions in limine. The trial court set out three issues for consideration by this Court:

> DO THE CURRENT METHODS OF HRS MONTHLY AND YEARLY MAINTENANCE ACCURACY CHECK COMPLY WITH THE REQUIREMENTS OF SECTION 316.1932(F)(1), FLORIDA STATUTES, AND/OR THE FLORIDA

ADMINISTRATIVE PROCEDURES ACT, SECTION 125.50 et seq., FLORIDA STATUES, AND IF NOT, DOES THIS PRECLUDE THE STATES USE OF BREATH TESTING INSTRUMENTS IN A CRIMINAL TRIAL?
(Answered NO and YES by the trial court below)

MAY THE DEFENDANT RAISE THESE ISSUES IN THE CONTEXT OF A CRIMINAL PROSECUTION IN THE COUNTY COURT?
(Answered YES by the trial court below)

MAY THE DEFENDANT RAISE THESE ISSUES IN THE CONTEXT OF A CRIMINAL PROSECUTION IN THE COUNTY COURT?
(Answered YES by the trial court below)

The Second District framed and certified these questions to this Court as follows:

1. ARE FLORIDA ADMINISTRATIVE CODE RULES 10D-42.023 AND 10D-42.024 [AS THEY EXISTED PRIOR TO AUGUST 1, 1991] VOID FOR VAGUENESS, AND IF SO, DOES THIS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?
(Answered NO in the first part only)

II. DO THE CURRENT METHODS OF HRS'S MONTHLY AND YEARLY MAINTENANCE ACCURACY CHECKS COMPLY WITH THE REQUIREMENTS OF SECTION 316.1932(1)(f)1, FLORIDA STATUTES, AND IF NOT, DOES THIS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?
(Answered YES in the first part only)

III. MAY THE DEFENDANT RAISE THESE ISSUES IN THE CONTEXT OF A CRIMINAL PROSECUTION IN THE COUNTY COURT?
(By implication, answered YES)

The instant review follows after the Second District certified the above questions to this Court.

SUMMARY OF THE ARGUMENT

Traditional constitutional concepts of void for vagueness have nothing to do with Petitioner's various motions to declare the HRS rules governing the Intoxilyzer 5000 unconstitutional. If anything, the rules on their face and as applied by HRS meet adequate definitions of accuracy and reliability. In any event, Intoxilyzer results are still admissible in a criminal trial because the State can meet traditional predicates of admissibility for scientific evidence.

Nothing in Section 316 calls for either annual or monthly checking of Florida's Intoxilyzer. Anything above that constitutes icing on the scientific cake. Current HRS methods more than meet evidential requirements for the introduction of scientific evidence of infrared breath test results.

Nothing in the Florida Constitution or Florida Statutes invests a county court with jurisdiction over administrative rules that having nothing to do with proscribing criminal conduct. Common notions of administrative law dictate that challenges to rules be first addressed to the administrative body and then to the district courts of appeal. Such promotes judicial economy and does not deprive Appellees of their right to a speedy trial. Merely labeling the HRS rules "procedural" does not mean that the county court has subject matter jurisdiction to pass upon their adequacy.

ARGUMENT

ISSUE I

IS FLORIDA ADMINISTRATIVE CODE RULE 10D-42.023 VOID FOR VAGUENESS, AND IF SO, DOES THIS PRECLUDE THE STATE'S USE OF BREATH TESTING INSTRUMENTS IN A CRIMINAL TRIAL? (Answered YES by the court below)

For the sake of brevity and clarity, Appellant herein relies on its previous arguments as advances in its Motion to Strike below and incorporates them herein by reference. (R. 345,346) Additionally appellant adds the following.

The essence of the void for vagueness doctrine makes it clear that the matters raised by the defense have nothing to do with that doctrine. It is fundamental to our system of jurisprudence that everyone be given notice of what conduct will render them subject to prosecution in terms that can be understood by a man of common intelligence and will not subject them to arbitrary and capricious prosecution. Perkins v. State, 576 So. 2d 1310, 1313 (Fla. 1991); Warren v. State, 572 So. 2d 1376, 1377 (Fla., 1991). What proscribed conduct is hidden from the ordinary man in the administrative scheme?

By virtue of the provisions of §§316.193 Fla. Stat. (1989), a citizen cannot drive or be in actual physical control of a vehicle when he is impaired or has a blood alcohol level of .10% or above. That is certainly clear enough. There is no law in

Florida forbidding driving or being in actual physical control of a vehicle and subsequently registering a .10% blood alcohol on an Intoxilyzer, which has been inspected monthly and annually for accuracy and annually for reproducibility. The crime occurs when a person drives or is in actual physical control of a vehicle with an actual blood alcohol level above the legal limit. The tests are simply one form of evidence of the violation, but they are not part of the violation.

In State v. Muller, 798 S.W. 2d 315 (Tex. Ap. - Houston [1st Dist.] (1990), the defendant made a similar motion. He argued that the statues and regulations in that state did not provide sufficient notice of the certification requirements for breath testing equipment or for the operators of the equipment. In rejecting this position the Court said that the involved provision,

> unlike penal statues, does not define an offence. As such, it was not necessary, for the legislature to draft it so it includes fair notice of proscribed behavior, as penal statutes require. See Langford, 532 S.W.2d at 94. Instead, the statute's purpose is to prescribe appropriate methods to determine intoxication.

798 S.W. 2d at 320. The same is true in the cases at bar.

The void for vagueness doctrine deals with the norms to which a citizen is expected to conform. These motions deal with nothing even remotely close to such conduct. They deal with the sufficiency of an evidentiary predicate.

The Petitioners and some courts who have considered this matter, read a great deal into the decision in State v. Cumming 365 So. 2d 153 (Fla. 1978). It is true that in that case the Court found administrative regulations void for vagueness, but that has little or nothing to do with the issues in the cases at bar.

In Cumming the defendant was prosecuted under a state statute proscribing the possession without a permit of certain wild animals. In order to determine when and where it was improper to possess the animals without a permit the relevant administrative regulations had to be considered. Since they were vague it could not be reasonably ascertained what conduct constituted a violation of the law. Thus, as is typical of the void for vagueness doctrine, Cumming dealt with the regulation of the conduct of citizens not the gathering of evidence

Other decisions have applied the void for vagueness doctrine to administrative regulations, but they have consistently involved rules which proscribed conduct by individuals. City of St. Petersburg v. Pinellas County Police Benevolent Association, 414 So. 2d 293 (Fla. 2d DCA 1982) [involved a code of conduct for police officers] See also, Jones v. City of Hialeah, 294 So. 2d 686 (Fla. 3d DCA 1974); Richter v. City of Tallahassee, 361 So. 2d 205 (Fla. 1st DCA 1978). Respondent has been unable to find any authority nor have the Petitioners presented any authority finding that these principles apply to an evidentiary predicate.

Given the purpose of the void for vagueness doctrine that comes as no surprise. For these reasons this Court is respectfully asked to disagree with decision in State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA 1991) and affirm the decision of the district court.

Should this Court still be willing to address the very merits of this issue, Respondent offers the following.

The claim of vagueness is directed to two provisions of the administrative code.

Fla. Admin. Code Rule 10D-42.023 provides:

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

Fla. Admin. Code Rule 10D-42.024(1) (c) provides: "Chemical tests, instruments and devices used in the breath test method shall be inspected at least one each calendar month by a technician to ensure general cleanliness, appearance, and accuracy. (emphasis added).

In State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA 1991) while the court apparently accepted the application of the void for vagueness doctrine to evidentiary predicates, it did not find either of the foregoing provisions invalid. The court held that the provisions were valid only because Form 1514 (Sept. '82), which is to be used in preventive maintenance checks, was incorporated into the rules and was sufficiently explicit.

Respondent respectfully suggests, however, that even in the absence of the involved form the regulations are sufficient. The initial reasons for this conclusion are general principles of statutory construction that apply as well to administrative regulations. First, such laws are cloaked in the presumption of constitutionality. State v. Kinner, 398 So. 2d 1360 (Fla. 1981); and Hillsborough County Aviation Authority v. Taller and Cooper, Inc., 245 So. 2d 100 (Fla. 2d DCA 1971); Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 762 (Fla. 1st DCA 1979). Second, these provisions are to be construed if possible in a way that avoids conflict with the Constitution. See e.g. State v. Rodriquez, 365 So. 2d 157, 160 (Fla. 1978).

In applying these general principles this Court must first consider whether there is any requirement that the agency establish any standards for monthly and annual inspections for "accuracy" or annual inspection "reproducibility." If there is not then any argument that the terms are vague is without merit

unless the Petitioners could successfully demonstrate that the use of these terms somehow taints the entire statutory and administrative scheme, which they have failed to do. To resolve this matter the enabling legislation must be considered.

§§316.1932 (1) (f) (1) Fla. Stat. (1989), provides:

> The tests determining the weight of alcohol in the defendant's blood shall be administered ... 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.

If there were such a requirement, the language of the rule would be sufficient to provide adequate definition. The controlling principle in such cases is that the words must be given their plain and ordinary meaning. Perkins v. State, 576 So. 2d 1310, 1313 (Fla. 1991); S.E. Fisheries v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984); State v. Cormier, 375 So. 2d 852 (Fla. 1979); Board of Optometry v. Society of Ophthalmology, 538 So. 2d 878, 886 (Fla. 1st DCA 1988). The common meaning of these terms is well established.

"Accuracy" means "freedom from mistake: correctness" or "conformity to truth or to a standard or model: exactness."

Webster's New Collegiate Dictionary 8 (1980). It is also defined as "describes a measurement that is free from mistakes." A. Godman, Barnes & Noble Thesaurus of Science 10 (Barnes & Nobles Books 1981). "Responsibility" is defined as "to present again" or "copy". Webster's New Collegiate Dictionary 975 (1980).

Simply by considering these common definitions one can reasonably conclude that: (1) the inspector must determine on a monthly and annual basis whether the instruments are free from error and conform to truth in the result they produce; (2) on an annual basis the inspectors must also determine whether the instrument is capable of producing that same accurate result repeatedly. The common meaning of the involved terms is clear. There is no more need to give a more precise definition for the involved terms by rule, than there would be for the agency to pass a rule saying that "cleanliness" means the instrument must not be covered with dust in its interior workings.

Nevertheless, basic rules of construction compel the conclusion that there are specific standards for these terms. The most basic of these rules is that all the relevant administrative regulations must be considered. "Effect must be given to every part of the section and every part of the statute as a whole." State v. Rodriquez, 365 So. 2d 157, 159 (Fla. 1978).

Fla. Admin. Code Rule 10D-42.022(1) provides, in pertinent part:

> Evidential breath testing involves methods which measure the alcohol content of deep lung samples of breath with sufficient accuracy for evidential purposes and to be used pursuant to the provisions of Section 316.1932 (1) (b) 1, 316,1934 (34), 327.352(d), and 327.353(3), Florida Statutes, and for which instructors have been trained as stipulated in 10D-42.027. (emphasis added).

Rule 10D-42.022(3) (b), defines accuracy for purposes of initial certification of instruments as follows:

> The Department shall conduct the following tests for precision, accuracy (systematic error), blank reading, the blood to breath correlation:
>
> (b) 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 50 simulator tests at each concentration. The systematic error is the difference between the mean measured value and the known values expressed as a percentage of the known value.

The provisions in dispute must be construed along with these provisions.

It is obvious that the rules contemplate that the statistical standard that instruments must meet before they are considered reliable is the one set forth above. What is the

standard of accuracy on subsequent periodic examinations? Certainly it is necessary for the instrument to stay accurate, which means that it must meet at least those initial standards. Thus when the rules are construed together it is apparent that they do provide a standard of accuracy even for subsequent periodic examinations.

The fact that 50 tests are initially required does not mandate that 50 tests be performed for monthly or yearly inspections. In fact, no specific number of tests would be required as long as that initial statistical standard was applied. See State v. Kouracus, Case No. 72835-SF (Volusia Cty Ct. Opinion Filed March 12, 1991)

This conclusion is bolstered by another rule of construction expressed in Board of Optometry v. Society of Opthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988); the interpretation of statues and regulations by the agency administering them over a long period of time is entitled to great weight unless it is "clearly erroneous" and inconsistent with the legislative intent as determined by the court. See also Pan Am World Airways v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983); Biscayne Kennel Club v. Board of Business Regulation, 276 So. 2d 823 (Fla. 1973).

Dr. Rarick testified that HRS allows for no more than a .005% variation in its annual and monthly maintenance checks.

HRS has always maintained these standards. All maintenance personnel at the local level as well as at the inspector level adhere to this standard. Such standards are taught and tested through the various courses approved by HRS. The HRS maintenance forms are only used to record the results of the maintenance checks. Stock solutions are prepared to "forensic standards" using gas chromatography with standards traceable to the Nation Bureau of Standards. Class A glassware is used at the local level and procedures are taught whereby the local technician is required to find the cause for an error and, when such cannot be found, to inform the State Attorney of the difficulty. Even if a "meniscus" is not precisely achieved or tap water used in a simulator test, Petitioners never demonstrated any case where such caused an Intoxilyzer to go out of calibration or, for that matter, yield an inaccurate test result on a DUI suspect. It is clear that HRS has been interpreting the statutes and rules as calling for the application of these standards and procedures in testing and there is no argument that it is a clearly erroneous interpretation. The understanding of the agency is entitled to great weight.

Basis principles of statutory construction compel the conclusion that, even in the absence of any form or any specific method for doing monthly and annual tests, the regulations are sufficiently specific. All monthly and annual inspections in

this state under the current rules must be sufficient so that the inspector or maintenance individual can affirm with a high degree of confidence (i.e. reasonable scientific certainty), regardless of the methods of inspection that: (1) the test results they get are correct - that the reading secured at the time of testing truly reflects the offender's blood alcohol level at that time; (2) the test results were within +/-5% at known concentrations of 0.100% weight per volume and 0.20% weight per volume at the last inspection; (3) the instrument consistently meets these standards. For these reasons this Court is respectfully asked to disagree with the contrary conclusion of the Court in State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA 1991) that the regulations are dependent on Form 1514 (Sept. '82) to avoid condemnation for vagueness.

In Reisner the Court felt that the only way the regulations can be upheld is by virtue of the fact that they incorporated Form 1514 (Sept. '82). On that basis the Court found that the regulations were not unconstitutional. The same is true in the instant case and that finding alone should be sufficient to reject Petitioners position that the regulations are void for vagueness.

The second part of this certified question, although not addressed by Petitioners, asks whether the Intoxilyzer results may still be admissible in court even if the HRS rules are,

somehow, found to be vague. It is impossible to jump from a judgment about the rules to the conclusion that the State can never meet traditional predicates for the admissibility of scientific evidence. It has long been established that results of tests given for the detection and quantification of alcohol in a defendant's blood stream are admissible quite apart from specific statues relating to admissibility. In Pardo v. State, 429 So. 2d 1313 (Fla. 5th DCA 1983), the court recognized that:

> . . . the ability of consumed alcohol to impair normal human facilities is an accepted fact and that the reliability of certain chemical testing of blood is scientifically well established and, therefor, the result of such test, when relevant, is, under general law, admissible in evidence.

No valid distinction can be made between blood testing techniques and those used for the testing of breath. In California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984), the High Court gave its blessing to the inherent accuracy of an Intoxilyzer that was used in California. Thereto, the instrument had met national accuracy and reliability standards as does the instrument that is the subject of this appeal. Accordingly, the statutes should not be read to constitute a "limitation on the admissibility of any competent evidence that would otherwise be admissible in any civil or criminal case in the absence of those statutes." Pardo, at 1315.

This Court has already provided an answer to this question in State v. Lendway, 519 So. 2d 725 (Fla. 1988) (and other cases cited in support therein). Though Lendway was written in the context of blood sample testing, as described above, such is equally applicable to breath testing. Thus, where the administrative rules might be deemed inadequate the test results are still admissible if the State can establish the "traditional predicates for admissibility" for scientific evidence.

The traditional test of admissibility of scientific evidence employed by the courts is based upon the test structured by the Court in Frye v. United States, 293 F.2d 1014 (D.C. Cir. 1923), although the Supreme Court of Florida has never actually mentioned Frye by name in adopting the structure. See Graham, Handbook of Florida Evidence, §§704.2, n.9 (1987) and cases cited. In the case of State v. Bender, 382 So. 2d 697 (Fla. 1980), this Court recognized the test to be applied in cases involving intoxilyzer results. In Bender, this Court stated that the results of blood alcohol tests are admissible without compliance with HRS rules if "the traditional predicate is laid, which establishes the reliability of the test, the qualifications of the operator, and the meaning of the test's results by expert testimony." Id. at 700. See also Stevens v. State, 419 So. 2d 1058 (Fla. 1982) (court should admit scientific tests and experiments only when reliability of results widely recognized).

Since the decision in Bender, other Florida courts have allowed for the admission of blood alcohol analysis where there was a failure to comply with HRS regulations, finding that the State could still use the results as evidence while losing the benefit of statutory presumptions. See State v. Walther, 519 So. 2d 1731 (Fla. 1st DCA 1988); State v. Lendway, supra. Both Lendway and Walther, however, involved DUI manslaughter prosecutions where medical blood draws were performed, thereby ignoring Florida's implied consent statutes.

Further, in Correll v. State, 523 So. 2d 562 (Fla. 1988), this Court stated, "that because the test employed here had previously been utilized in criminal trials, there was nothing to suggest to the prosecutor the need to assemble experts to demonstrate the scientific validity of the method", citing State v. Harris, 152 Ariz. 150, 730 P.2d 859 (Ct App. 1986). This Court held that "when scientific evidence is to be offered which is of the same type that has already been received in a substantial number of Florida cases, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicting that there may not be general scientific acceptance of the technique employed." Correll at 567. cf. Quinn v. State, 549 So. 2d 208 (Fla. 2d DCA 1989) (abuse of discretion to reject proffered testimony of defendant's

expert, which would prove basis for jury to possibly find defendant's BAL below statutory minimum).

This Court again addressed the admissibility of blood draws where HRS regulations were not met in State v. Strong, 504 So. 2d 758 (Fla. 1987). The Strong court echoed the reasoning of the Bender court, and recognized that the implied consent scheme was meant to protect drivers required to give blood samples. Id. at 759. However, the Strong court also noted that compliance with the implied consent scheme merely served to relieve the State of establishing the traditional scientific predicate. Id.

From Bender to Strong, it appears the courts would remain unwavering in refusing to extend application of the traditional predicate to cases where implied consent is implicated. Subsequent to Strong, however, the Second District Court of Appeal extended the applicability of the traditional predicate to a case where implied consent was at issue. In State v. Quartararo, 522 So. 2d 42 (Fla. 2d DCA 1988), the court was confronted with a blood draw taken at the request of a law enforcement officer, thereby implicating implied consent. Although the blood draw did not comply with Florida Statutes, §§316.1933, the Quartararo court allowed for the admissibility of the blood test's results upon establishment of traditional scientific predicates. Id at 44. The Quartararo court expressly stated: "[W]e do not believe that the legislature intended

Section 316.1933 to have the effect of an exclusionary rule requiring suppression of evidence which has been constitutionally obtained by the State." Id. The Fifth District Court of Appeal affirmed a trial court's admission of a blood alcohol test in a case involving a legal blood draw, and in doing so cited Quartararo. Robertson v. State, 569 So. 2d 861 (Fla. 5th DCA 1990) (question certified to Florida Supreme Court as matter of great public importance).

Of greater significance is this clear finding in Drury v. Harding, 461 So. 2d 104 (Fla. 1984).

> At the time that Chapter 82-155 took effect on July 1, 1982 the Florida Administrative Cod contained existing HRS 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 added).

Drury at 107. The rules have not changed to any great degree since 1982. Accordingly, the decision of this Court in Drury effectively disposes of the question of whether the rules are sufficient to substitute for the traditional predicate of reliability.

In addition to recognizing the safeguards provided for drivers under Florida's implied consent law, this Court in Bender

also stated that the overall purpose of Florida's implied consent law "is to address the problem of drunk drivers on our public roadways and to assist in implementing Section 316.193 which provides that driving while intoxicated is unlawful." State v. Bender, 382 So. 2d 697, 699 (Fla. 1980). Accordingly, the recent decisions of the Florida courts, specifically Quartararo and Robertson, have enunciated results that reflect the overall purpose of the statutory scheme, as opposed to the purpose of those few sections which provide for compliance with HRS testing techniques. See Bender, 381 So. 2d at 699.

Based on the foregoing, no convoluted leap of legal logic could ever jump from the premiss that because the rules fail to meet the requirements of 316.1932 the results of the breath test are inaccurate. It is not the perceived inadequacy of the rules that violate Petitioners right to a fair trial but the erroneous introduction of inaccurate results that gives rise to a constitutional infirmity. Failure of the rules to allow for truncated predicates for admissibility does not mean that the Intoxilyzer results can NEVER be proved accurate. Accordingly, no conceptually sound reason exists for the total exclusion of Petitioner's Intoxilyzer tests.

ISSUE II

DO THE CURRENT METHODS OF HRS MONTHLY AND YEARLY MAINTENANCE ACCURACY CHECK COMPLY WITH THE REQUIREMENTS OF SECTION 316.1932(F) (1), FLORIDA STATUTES, AND/OR THE FLORIDA ADMINISTRATIVE PROCEDURES ACT, SECTION 125.50. ET SEQ., FLORIDA STATUTES, AND IF NOT, DOES THIS PRECLUDE THE STATES USE OF BREATH TESTING INSTRUMENTS IN A CRIMINAL TRIAL?
(Answered Yes, in the first part, by the court below)

In the very first instance, it must be noted that absolutely nowhere in the three tier scheme of statutes governing DUI and tests to determine the alcohol content of a driver's blood is there any requirement that HRS conduct annual or monthly inspections of the Intoxilyzer 5000 breath testing instrument. Ergo, any argument that the HRS rules do not mean the statutory mandate must end right here.

Nonetheless, HRS, in an effort to ensure precision, accuracy and reliability have, by their own internal operating rules promulgated after a public hearing, provided for monthly maintenance checks under 10D-42.024(11)(d) (1986). In addition, running logs of all tests administered to DUI suspects are kept for inspection. 10D-42.024(132)(a,b) (1986). 10D-42.024(d) and (e) (1986) further provide that the running logs shall be inspected monthly by a technician in order to ensure that proper records are maintained and that HRS can appoint individuals to

"ascertain that the aforementioned rules and procedures are being adhered to by the individual agencies conducting chemical analysis of breath under Chapter 316 and 327, Florida Statutes". The rules also contain educational criteria for breath test technicians and for the instructors who train them. 10D-42.025 thru .027. Moreover, the HRS appointed inspectors meet with scientific personnel and Dr. Rarick in order to work out scientifically acceptable measures for testing the accuracy, precision, and reliability of Intoxilyzer's throughout the State. Thus, it is HRS's group of specially trained and scientifically oriented individuals who have worked out testing procedures in excess of what 316.1932 mandates in order to ensure accuracy and reliability. Form 1514 was a promulgated and is used in order to carry out the testing procedures envisioned by the scientific personnel.

10D-42.022 (1986) defines "precision" and "accuracy" and, by delineating the number of tests to be performed, "reliability". With such standards in mind, the HRS inspectors and scientific personnel came up with a standardized method for testing accuracy and reliability on an annual and monthly basis. Form 1514 merely helps the inspectors and maintenance technicians implement the rules. Thus, the question becomes whether the lack of specific rules governing all the aspects of breath testing that the Petitioner's would like addressed means that HRS has failed to meet 316.1932 standards for "reliability of result".

The answer cannot be "yes". The HRS inspectors are not mere hacks who willy nilly apply standards they see fit to their inspection methods. The legislature delegated to HRS the job of ensuring the accuracy of the instruments because the Department, rather than the legislature, is uniquely equipped to develop such techniques and procedures. The individuals under Dr. Rarick must pass certain educational and training criteria before assuming responsibilities as inspectors. Thus, like blood analysts, they re able to formulate scientifically sound methods for determining accuracy and reliability. Such methods are put to the test at least 13 times a year as well as when the instrument performs its own self diagnoses before each breath test. Thus, it can only be concluded that the HRS rules, together with the methods employed by the inspectors and other maintenance technicians, go far beyond the mandate of 316.1932.

Query, why would only annual or monthly standards be necessary to ensure reliability of result? Why not weekly or daily checks? The answer, simply put, is that such checks cannot produce any more ironclad a guarantee of accuracy than existing regimens. Blood analysts do not undergo proficiency testing every month yet their methodology might differ substantially between individuals. Nonetheless, the results obtained between proficiency checks are not routinely suppressed due to a specific lack of rules governing periodic maintenance of the testing

instruments. Herein, Intoxilyzers are tested by trained personnel in nothing short of a systematic fashion many times a year in excess of any standard announced in 316.1932. Thus, it cannot possibly be concluded, by any leap of constitutional logic, that the literally excessive testing methods employed by HRS do not fully comply with the legislative directives of 316.1932.

The State readvances its argument in Issue I, above, for the proposition that even if the current methods of annual and monthly testing do not meet the requirements of Section 316.1932(f)(1), Intoxilyzer results are still admissible if traditional predicates for scientific evidence are met. After all, Petitioners can point to nothing inaccurate about their individual tests so as to render them per se inadmissible regardless of the predicate shown.

ISSUE III

THE COUNTY COURT WAS NOT THE PROPER FORUM BECAUSE THE COUNTY COURT WAS WITHOUT SUBJECT MATTER JURISDICTION. LACK OF JURISDICTION ASIDE, THE PETITIONERS' MUST SEEK ADMINISTRATIVE RELIEF PRIOR TO OBTAINING JUDICIAL DETERMINATION OF THEIR CLAIMS. (Certified question restated)

The state constitution provides that "[t]he county courts shall exercise the jurisdiction prescribed by general law." Art. V §§(b), Fla. Const. The constitution further specifies the jurisdictions of the county courts with more particularity under Article V, Section 20(c)(4). Neither section contains authority under which the court below could have properly considered the validity of the H.R.S. Rules. Thus, the county courts do not have constitutionally authorized subject matter jurisdiction to entertain challenges to the validity of administrative rules.

Statutory jurisdiction for judicial review of administrative actions is provided under the Administrative Procedure Act, ch. 120, Fla. Stat. (Sup. 1990). The required preliminary administrative steps will be detailed in the next section under this point on appeal. The only courts which have jurisdiction under the act to review administrative agency actions are the supreme court, "the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides" §§§§120.68(2), and under very limited

circumstances, the circuit courts are invested with power to act under §§§§120.73. The county courts, however, are not invested with jurisdiction in chapter 120 or under any other statutory provision to entertain challenges to administrative actions under any circumstances. *See also* §§34, Fla. Stat. (1989).

The trial court below made no particular findings with respect to its subject matter jurisdiction. Nonetheless, the court never actually passed upon the validity of the existing rules. Rather, the court accepted the rules as they are and decided that they were inadequate to ensure reliability and accuracy to a point sufficient to do away with traditional predicates. Thus, like ruling on an evidentiary issue, it necessarily determined that any question concerning the application of the rules is a procedural matter within the province of its jurisdiction.

The State does not challenge the conclusion that procedural aspects of the evidence code are properly considered by the county courts. However, no decision holds that questions's concerning the sufficiency of the HRS rules themselves is procedural in nature.

> Procedural law . . . has been described as the legal machinery by which substantive law is made effective. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.

Julian v. Lee, 473 So. 2d 736, 738 (Fla. 5th DCA 1985). The procedural aspect encompasses the actions of the court used to consider a claim that is properly before it, but procedural law does *not* serve to invest a court with jurisdiction. The claim itself, on the other hand, is substantive. The creation of the H.R.S. rules, their definitions, and their affect on the Petitioners constitute the substantive claims advanced below. Further, the attendant rights of the Petitioners are regulated by the requirement that administrative remedies be sought prior to obtaining judicial review (more detailed discussion of this issue *infra*). The supreme court establishes procedure, but "substantive law [is] the sole responsibility of the legislature". In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979).

It maybe argued that a defendant has a right during the course of his criminal prosecution to challenge, under the due process clause, the validity or sufficiency of a statue or rule he is charged with violating. In State v. Cumming, 365 So. 2d 153 (Fla. 1978), the defendant challenged the rules under which he had directly been charged. The instant Petitioner's, on the other hand, were not charged with violating H.R.S. Rules. Though it has been argued that there is no significant difference between the right to challenge a rule which is the basis of a criminal charge and a rule which allows the State to produce a major piece of evidence against a defendant, due process does not

necessarily allow Petitioner's to challenge the rules in the trial court.

"The fundamental requirements of due process are satisfied by reasonable opportunity to be heard." Florida Public Service Commission v. Triple "A" Enterprises, Inc., 387 S. 2d 940, 943 (Fla. 1980) (citation omitted); see also Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972); Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990). The Petitioners have a reasonable opportunity to be heard through the administrative process. Although due process guarantees the Petitioners 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 and . . . such method may be made exclusive by statute." Bath Club, Inc. v. Dade County, 94 So. 2d 110, 113-114 (Fla. 1981) (citations omitted). This is precisely what is provided under the Administrative Procedure Act, Chapter 120, Fla. Stat. (1989).

EXHAUSTION OF 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) (emphasis added).

Thus, the trial court below 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 of all, exhaustion of administrative remedies is in accordance with the provisions of the Administrative Procedure Act. Secondly, Petitioners 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). Thirdly, it can hardly be agreed that the methods employed by the instant Petitioners is 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 stae. 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 reach 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 this court as a result of this ruling.

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 efficiency 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 Rgulation, 501 So. 2d 674, 678 (Fla. 1st DCA 1987).

Petitioners will, no doubt, 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 still 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.

Nowhere can Petitioners point to a decision wherein "judicial economy" is sufficient a consideration to avoid the exhaustion of administrative remedies requirement.

The order below contains an observation that HRS has not promulgated rules, at a public hearing, governing annual and monthly checks for the accuracy and reliability of the

Intoxilyzer 5000 in violation of Section 316.1932(1)(f), Florida Statutes. 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).

In sum, the first certified question should be answered negatively. The county court is not a proper forum because county courts have no constitutional or statutory jurisdiction to entertain challenges to administrative rules. Furthermore, even if county courts had jurisdiction, administrative remedies must first be exhausted before judicial review is appropriate.

ISSUE IV

WHETHER THE COURT SHOULD BE MISLED INTO THINKING THAT THE EXISTING HRS RULES ARE INADEQUATE OR THAT ANY NEW RULES THIS COURT MAY CONTEMPLATE WILL EVER ENSURE THAT FUTURE BREATH TESTS PERFORMED ON DUI SUSPECTS WILL EVER BE MORE "ACCURATE" THAN UNDER THE EXISTING RULES?

The purpose of this issue is to help this Court focus on what REALLY is at stake herein and the role the HRS Rules play in ensuring an accurate breath test result.

Let's be clear here. The defense bar is not advocating some vast increase in regulatory detail for breath testing procedures so that the People can be ensured that those who test at .10 (now, .08) or above are more surely and swiftly punished for endangering life and limb by driving while impaired. If such were the case, an association of prosecutors or concerned legislators would have taken up the marque. Rather, the purpose behind the instant motions and issues, aside from avoiding conviction for the instant Petitioners, is to spur the development of greater detail and specificity so that there is an increased likelihood that some maintenance operator, annual inspector, or technician will be caught doing or not doing some function that a minutely detailed rule requires. The end result, of course, would likely be suppression of the breath test results and, consequently, loss of a drinking and driving related conviction

for the People. Anyone who has observed, let alone tried the average county court DUI, say nothing of a DUI manslaughter case, would be hard put not to agree that such a tactic is aggressively pursued in pretrial motions and on the merits before a jury. Respectfully, the legislature did not intend to make HRS, its procedures and Rules fertile ground for suppression of breath test results and fewer DUI convictions and punishments.

Much ado has been made of the apparently scurrilous role ordinary tap water somehow plays in reaping for the State countless many unfair DUI convictions (or so it seems). Tap water is cited as the culprit no less that 10 times within the space of eight pages of Petitioner's legal argument. See Brief of Petitioner at pages 9 through 17. Yet, utterly no evidence was ever offered, anecdotal or scientific, that ordinary tap water ever in the history of breath testing caused a technician to be fooled into thinking that his breath testing instrument was A.O.K. even though it was "reading high" and thereby convicting an innocent drunk driver. Ergo, Petitioner's argument throws nothing but cold water on the Rules.

Let's also be clear about another aspect of breath testing for criminal prosecution purposes. No matter how many rules, precautions, tests, or definitions this Court may require be drafted, absolutely nothing could ever ensure that the very instant before the next DUI subject is tested, the instrument

would somehow not go "haywire" and yield an inaccurate result. Although Petitioners would like to have all kinds of control tests performed and rigorous certification of simulator solutions and equipment, Dr. Rarick indicated that such certification is good only at the moment of certification and nowhere else. (R. 309) Nowhere in the enabling legislation is there any requirement that HRS promulgate rules to forensic detail. If field breath testing instruments were meant to become scientific forensic laboratories, the legislature would have so provided. Dr. Rarick so agreed. (R. 296,297) That Petitioners below never submitted a model of what they believed to be sufficient rules as actually practiced in any other jurisdiction of this country can only indicate that any further detail in the Rules will not ensure a greater a degree of "accuracy" and "reproducibility" than is currently enjoyed.

Evidence was offered in the trial court that sometimes local agency maintenance operators may not handle their Form 1514's correctly or that they may repeat a monthly maintenance test in order to achieve a .10 standard. Nonetheless, no evidence adduced ever indicated that an officer will somehow skew a simulation mixture upward or downward in alcohol concentration in order to force an errant Intoxilyzer into compliance. The evidence simply demonstrated that if a maintenance technical is not able to achieve a "bull's-eye", the instrument is brought to HRS and the state attorney's attention and the device taken out of service and

state attorney's attention and the device taken out of service and the defendant's so notified. On the same note, no evidence was offered that any state attorney's office in this State ever hid such information from a defendant or his attorney. Maintenance logs are always available for trial, just as are the maintenance operators and the breath technicians. Their methods and compliance with HRS Rules are subject to discovery and cross-examination. Thus, any notion that the Intoxilyzer's results are allowed to simply bowl over every DUI defendant is simply not true.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to D. P. Chanco, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 on this 28th day of October, 1992.

OF COUNSEL FOR RESPONDENT