IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-32
L.T. NO.: 4D06-2291

JAMES LESCHER,

Appellant/Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Appellee/Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT/APPELLEE'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, Respondent/Appellee, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department." Petitioner/Appellant, James Lescher, will be referred to as "Petitioner" or "Lescher." References to the Record on Appeal will be referred to as "R.__".

STATEMENT OF THE CASE AND FACTS

The Department accepts Petitioner's concise Statement of the Facts as non-argumentative and representative of the proceedings below.

SUMMARY OF THE ARGUMENT

Driver license reinstatement and eligibility requirements as established by the Florida legislature are regulatory and remedial in nature and do not entail punishment for criminal behavior. Therefore, they are not invalidated by the prohibition against *ex post facto* laws. The Fourth District Court of Appeal's certified question:

> Does the amendment to s. 322.271(4) which eliminated hardship driver's licenses effective July 1, 2003, violate the prohibition against ex post facto laws as to persons who could have applied for a hardship license before the amendment became effective?

Lescher v. Department of Highway Safety and Motor Vehicles, 946 so.2d 1140, 1142 (Fla. 4DCA 2002), must be answered in the negative.

ARGUMENT

AS AMENDED JULY 1, 2003, SECTION 322.271(4), FLORIDA STATUTES DOES NOT VIOLATE ARTICLE 1 SECTION 10 OF THE UNITED STATES AND FLORIDA CONSTITUTIONS AS IT IS PROSPECTIVE IN ITS APPLICATION AND DOES NOT VIOLATE THE PROHIBITION AGAINST EX POST FACTO LAWS.

Petitioner's driver license is permanently revoked pursuant to s. 322.28(2)(e), Florida Statutes (2000), as a result of four DUI convictions. As Petitioner notes, section 322.271(4) was amended July 1, 1998 to eliminate the ability for an individual permanently revoked for four DUI convictions to receive a hardship license. Subsequently, the amendment to s. 322.271(4), Fla. Stat. (1998) was held by this Court to be unconstitutional as it violated the single subject rule. Dep't of Highway Safety and Motor Vehicle v. Critchfield, 842 So.2d 782 (Fla. 2003) reh'g denied June 11, 2003.

However, Florida case law holds that single subject violations in legislative acts are cured, and the acts themselves prospectively revived, when the Legislature re-adopts the statutes as the official law of Florida. Once reenacted as a portion of the Florida Statutes, a chapter law is no longer subject to challenge on the grounds that it violates the single subject requirement of Article III, Section 6, of the Florida Constitution. See Loxahatchee

River Envtl. Control Dist. v. School Bd., 515 So.2d 217 (Fla. 1987); State v. Combs, 388 So.2d 1029 (Fla. 1980) (the single subject requirement of article III, section 6, only applies to "chapter laws," and sections of the Florida Statutes need not conform to the requirement); State v. Johnson, 616 So.2d 1, 2 (Fla. 1993).

The Court's decision, Critchfield, rendered on March 13, became final upon denial of the Department's motion for rehearing on June 11, 2003. In the interim, the 2003 Legislature readopted the 2002 statutes through HB 1017, which was signed by the Governor May 21, 2003. It was designated ch. 2003 25, Laws of Florida and became law on that date. Under §5 of ch. 2003 25, the law takes effect "on the 60th day after adjournment sine die" of the session in which it was enacted. Chapter 2003 25 was enacted in the regular session ending May 2, 2003. Thus, the effective date of the re-adoption of the 2002 statutes is July 1, 2003. In short, Critchfield became final after the re-adoption bill became law, but before its effective date. Thus, ch. 98 223 is revived and operates prospectively as of July 1, 2003. Dep't of Highway Safety and Motor Vehicles v. Gaskins, 891 So.2d 643 (Fla. 2d DCA 2005)("[t]he legislature cured the defect when it 'reenacted the 1999 version of the Florida Statutes, effective July 1, 2003.'"

Id. at 644, quoting, State, Dep't of Highway Safety & Motor Vehicles v. Fountain, 883 So.2d 300, 301 (Fla. 1st DCA 2004)). Even more recently in State v. Rothauser, 934 So.2d 17 (Fla. 2d DCA 2006), the Second District held that Florida follows the "codification" rule under which a single subject violation during the enactment of a law is cured by the legislature's later act of adopting the law as an official statute that is published in the Florida Statutes.

A. PROSPECTIVE APPLICATION OF S. 322.271(4)

On August 3, 2005, when Petitioner applied for early reinstatement of his driving privilege, he was statutorily not eligible to receive a hardship license. § 322.271(4), Fla. Stat. (2005). There is no statutory authority permitting the Department to reinstate the Petitioner's driving privilege. Cantrall v. Dep't of Highway Safety and Motor Vehicles, 828 So.2d 1062 (Fla. 2d DCA 2002)(upheld the cancellation of a restricted driver license issued to a driver four times convicted of DUI in violation of § 322.271(4), Florida Statutes (1999)). In Cantrall, the Second District held:

> Florida follows the general rule that a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law

> as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted. In Ziffrin [Inc. v. United States, 318 U.S. 73 (1943)], the United States Supreme Court reasoned that just as a change in the law between a [jury trial] and an appellate decision requires the appellate court to apply the changed law, so, by like token, a change of law pending an administrative hearing or act must be followed in relation to a permit for the doing of a future act. Otherwise, said the [C]ourt, the administrative body would be issuing a permit contrary to existing legislation. Lavernia v. Dep't of Prof'l Regulation, Bd. Of Med., 616 So.2d 53, 53-54 (Fla. 1st DCA 1993) (citations omitted).

Id. at 1063. See Hill v. Dep't of Highway Safety and Motor Vehicle, 891 So.2d 1202 (Fla. 4th DCA 2005).

By amending section 322.271(4), the Legislature made a determination that in order to be eligible to drive and receive a restricted driver license one must not have four or more convictions of section 316.193 or former section 316.1931 on his/her driving record. The law simply added a new qualification, or disqualification, to the privilege of obtaining a restricted Florida driver license. The law and requirements for reinstatement pursuant to section 322.271(4) were properly applied to Petitioner as written at the time he applied for reinstatement. Petitioner's privilege of reinstatement changed when the Legislature

changed the terms and conditions of the privilege of getting a restricted license after four or more convictions for DUI. Petitioner is required to satisfy the conditions to qualify for reinstatement at the time he is reinstated.

B. NO EX POST FACTO VIOLATION EXISTS

This Court addressed the constitutional prohibition on ex post facto laws in Goad v. Florida Dept. of Corrections, 845 So.2d 880 (Fla. 2003), by concluding that, "[a] law violates the ex post facto clauses of the United States and Florida Constitutions when it increases the punishment for a criminal offense after the crime has been committed." Id. at 882. "The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.'" Goad, at 882, citing Kansas v. Hendricks, 521 U.S. 346, (1997), quoting Allen v. Illinois, 478 U.S. 364, 368,(1986). "We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings. If so, we ordinarily defer to the legislature's stated intent." Hendricks, 521 U.S. at 361. When attempting to discern legislative intent, courts must first look at the actual language used in the statute. See Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla. 2000). Whether a particular punishment is criminal or

civil is a matter of statutory construction. Hudson v. US, 522 U.S. 93 (1997).

Here, as in Goad, the legislative intent under Florida's motor vehicle laws is abundantly clear:

> It is declared to be the legislative intent to:
>
> (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state.
>
> (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies.
>
> (3) Discourage repetition of criminal action by individuals against the peace and dignity of the state, its political subdivisions, and its municipalities and impose increased and added deprivation of the privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

§322.263, Fla. Stat. (2005). Further, Section 322.42 expressly encourages liberal construction of the statutory provisions of chapter 322, and states as follows:

> This chapter shall be liberally construed to the end that the greatest force and effect may be given to its provisions of the promotion of public safety.

The plain language of Chapter 322 sets forth the Legislature's intent that the Department's function is administrative and its mission is to promote and protect the public safety. The provisions of Chapter 322 provide a civil remedy toward that end. The Legislature's stated intent must not be rejected unless Petitioner presents "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate 'the state's intention' that the proceeding be civil." Goad, 845 So.2d at 884, citing Allen, 478 U.S. at 369. Under the guideposts established in Hudson, and reviewed by this Court in Goad, Petitioner has failed to establish the proof necessary to support a finding that s. 322.271(4) Florida Statutes is so punitive in nature as to transform what is clearly intended as a civil remedy into a criminal penalty.

In determining whether a civil statute is in reality punitive in nature, this Court held in Goad that it must consider: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to

which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. Goad, 845 So.2d at 884 citing Hudson, 522 U.S. at 99-100.

First, the sanction imposed does not involve an affirmative disability or restraint as normally understood. See Hudson, 522 U.S. at 104. While Petitioner is no longer qualified to receive a hardship license, this is "certainly nothing approaching the punishment of imprisonment." Id. quoting Flemming v. Nester, 363 U.S. 603 (1960).

Second, limitations on the privilege to operate a motor vehicle have never historically been viewed as a punishment. On the contrary, a Florida driver license has long been held to be a privilege, not a right and revocation of the privilege is not regarded as a punishment of the offender. Smith v. City of Gainesville, 93 So.2d 105 (1953) ("revocation of a driver's license is not regarded as punishment of the offender. Under the applicable statute, it is an administrative remedy for the public protection that mandatorily follows conviction for certain offenses…"). Dep't of Highway Safety and Motor Vehicles v. Vogt, 489 So. 2d 1168, 1171 (Fla. 2d DCA 1986); Dep't of Highway Safety and Motor Vehicles v. Grapski, 696 So.2d 950

(Fla. 4th DCA 1997) quoting Smith v. City of Gainesville, 93 So. 2d 105, "[w]hen made mandatory by statute, revocation of a license is an administrative function . . . .". State v. Walters, 567 So.2d 49 (Fla. 2d DCA 1990); Davidson v. MacKinnon, 656 So.2d 223, 224 (Fla. 5th DCA 1995) (Citing Freeman v. State, 611 So.2d 1260 (Fla. 2d DCA 1992), stated that the purpose of statute providing for revocation of a driver's license upon conviction for driving while intoxicated is to provide an administrative remedy for public protection and not for punishment of the offender.).

The First District Court of Appeal in Dep't of Highway Safety and Motor Vehicles v. Gordon, 860 So.2d 469 (Fla. 1st DCA 2003) overturned an order requiring a revocation period different from that mandated by statute based on a plea agreement[1] reached in the DUI criminal case. In Gordon, the court held that any bargain a defendant may strike in a plea agreement in a criminal case has no bearing on administrative consequences that flow from the

[1] A conflict currently exists between the First and Fourth District Courts of Appeal as to whether a driver license revocation is a collateral consequence of a guilty plea. Interestingly, the Fourth District in Daniels v. State, 716 So.2d 827 (Fla. 4th DCA 1998), held that it is a collateral consequence warranting a plea withdrawal while the First District held that it is not a collateral consequence. State v. Bolware, 28 Fla. L. Weekly D2493 (Fla. 1st DCA Oct. 31, 2003). The issue is currently pending before this Court. Bolware v. State, 924 So.2d 806 (Fla. 2006)

defendant's actions. In rejecting the circuit court's holding that the Department was an agent of the state and therefore bound by the plea agreement Gordon entered into with the state attorney's office, the court reiterated the holdings above that "the administrative revocation of a driver's license for DUI is not "punishment" of the offender rather it is an administrative remedy for the public protection that mandatorily follows conviction for certain offenses." citing Dep't of Highway Safety and Motor Vehicles v. Grapski, 696 So.2d at 951 quoting Smith v. City of Gainesville, 93 So.2d at 107 and Vogt, 489 So.2d at 1170.

In 1998, the Fifth District Court of Appeal held that a statute which denied enrollment in the Medicaid program to a provider if the provider had been convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct did not violate the prohibition against ex post facto laws. Rowe v. Agency For Health Care Administration, 714 So.2d 1108 (Fla. 5th DCA 1998). The court rejected Rowe's argument that the application of the statute, which was enacted after his convictions for conspiracy and money laundering, violated the prohibition against ex post facto laws. The court recognized that the statute did not

increase the penalty imposed upon Rowe for his crimes, but instead, simply limited his privilege to participate in the state's Medicaid program. Id.

The determination of an ex post facto law is similar to the analysis applied in determining double jeopardy. In Borrego v. Agency For Health Care Administration, 675 So.2d 666 (Fla. 1st DCA 1996), the First District Court of Appeal held that the suspension of a physician's license to practice medicine did not violate the constitutional prohibition against double jeopardy as the license to practice medicine is considered a privilege granted by the sovereign, which may be withdrawn to "preserve the public health, morals, comfort, safety and the good order of society." See State ex rel. Munch v. Davis, 143 Fla. 236, 196 So. 491, 493-94 (1940).

Like participation in a Medicaid program or a medical license, a Florida driver license has long been held to be a privilege, not a right. See Smith, 93 So.2d at 107. In Borrego, the court recognized that the United States Supreme Court has characterized as remedial the "revocation of a privilege voluntarily granted." Helvering v. Mitchell, 303 U.S. 391, 399 & n. 2, 58 S. Ct. 630, 633 & n. 2, 82 L.Ed. 917, 922 & n. 2 (1938). The removal of the driver's license and the qualifications established to receive a

restricted license ensures the public's protection and is not intended, nor does it operate as, a punishment of the driver.

In 1993, this Court stated "there is no property interest in possessing a drivers license. Rather, driving is a privilege, and the privilege can be taken away or encumbered as a means of meeting a legitimate legislative goal." Lite v. State, 617 So.2d 1058, 1060 (Fla. 1993). This Court, in citing its prior decision in City of Miami v. Aronovitz, 114 So.2d 784 (Fla. 1959), stated "the requirement of obtaining a driver's license and the exercise of the privilege of driving over the public highways, together with the correlative loss of the privilege under certain conditions, is a reasonable regulation of an individual right in the interest of the public good."

Third, the provisions of s. 322.271(4) do not come into play only on a finding of scienter. On the contrary, Petitioner's knowledge of his convictions for DUI is irrelevant to his qualification or disqualification for the hardship license. Fourth, while disqualification from receiving a hardship license may deter some individuals from driving under the influence, "all civil penalties have some deterrent effect," and "deterrence may serve civil as

well as criminal goals." Goad, 844 So.2d at 884 quoting Hudson, 522 U.S. at 102, 105.

The Court of Appeals of Michigan analyzed a similar statute under ex post facto claims. Taylor v. Sec'y of State, 216 Mich. App. 333, 548 N.W.2d 710 (1996). The Michigan statute required applicants for a group A vehicle designation not to have suffered suspension or revocation of their driving privileges within 36 months preceding application. Relying upon Hawker v. New York, 170 U.S. 189 (1898), which involved a New York law that prohibited felons from becoming licensed to practice medicine, the court held that

> the questioned statutes are directed to health and safety considerations as opposed to punishment. While there may be incidental punitive aspects from the perspective of persons in petitioner's situation, [the statutes] merely adopt new requirements for licensure for those seeking to operate certain commercial motor vehicles. Were the Ex Post Facto Clause held to prohibit such enactments, the state would forever be unable to adopt new regulations other that those that would apply after the death of every living person at the time of enactment.

Taylor, 548 N.W.2d at 712-713.

Fifth, while the disqualification under s. 322.271(4) occurs as a result of four convictions for the crime of DUI, the purpose of the disqualification is to further

public safety by permanently removing multiple DUI offenders from Florida's roadways. Finally, denying hardship eligibility to an individual who has been convicted four or more times of DUI cannot be deemed excessive. The Second District Court of Appeal addressed this issue when it concluded that, "we agree that section 322.28 is not penal in nature but rather is designed to protect the public from drunken drivers and should be liberally construed to further the public safety purposes of the state." Dep't of Highway Safety and Motor Vehicles v. Bender, 497 So.2d 1332, 1334 (Fla. 2d DCA 1986). In Bender, the court addressed both the Petitioner's and the dissent's position that the increased period of license revocation for multiple DUI convictions imply a punitive nature. The Second District stated, "[t]he legislature has consistently indicated its intent to provide greater protection to the public from persons who had accumulated multiple DUI convictions . . . Such a declaration of existing law is both logical and reasonable. Obviously, the public is more susceptible to harm from one who has a pattern of driving under the influence." Id. at 1334.

Section 322.271(4) imposes additional requirements on a person seeking to obtain a hardship license by requiring

that applicants not have been convicted four or more times of DUI preceding the application. While Petitioner argues that this is an excessive punishment, in fact, it is an exercise of the state's power to enhance public safety and determine the proper use of the roadways. Bender, 497 So.2d at 1334.

Under the foregoing Goad analysis, Petitioner has failed to present the proof necessary to meet his burden of showing that section 322.271(4) is so punitive as to transform this clear legislatively intended civil remedy into a criminal penalty. Here, there is no violation of ex post facto principles as the denial of Petitioner's application for a hardship license was administrative, not punitive, in nature. The Courts of this State consistently have held that driving is a privilege and the restriction or removal of that privilege is not punitive but, instead, an administrative remedy for public protection. Grapski, supra. Thus, Petitioner's reliance upon Gwong v. Singletary, 683 So.2d 109 (Fla. 1996) is unavailing. In that case, as well as in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), cited by the dissent Lescher below, 946 So.2d at 1144, this Court held that changes in law and administrative rule had the effect of possibly increasing the prisoner's sentence. As the majority opinion

recognized, Lescher, 946 So.2d at 1142, this resulted in making the punishment more onerous than the law in effect at the time the offense was committed. As stated above, license restrictions are not punishment and, therefore, ex post facto considerations do no apply.

Section 322.271(4) was amended to eliminate the eligibility of a driver convicted four or more times of section 316.193 or former section 316.1931 to receive a restricted license. It is the expressed intent of the Florida legislature that person convicted four or more times for DUI, as a danger to the public safety, not be permitted to receive a hardship license. The purpose and intent of the amendment to s. 322.271(4) is to protect the public who use the state's roads and highways from the menace of recurrent intoxicated drivers. Smith, 93 So. 2d 105 (Fla. 1957). As the court said in Smith:

> This certainly is as it should be. It would appear to us to be utterly absurd to hold that a man should be allowed to fill his automobile tank with gasoline and his personal tank with alcohol and weave his merry way over the public highways without fear of retribution should disaster ensue, as it so often does. The millions who lawfully use the highways are entitled to protection against the potential tragedy ever lurking, inherent in this type of law breaking. It is this aspect of protecting the public, rather than as punishment for the offender, that courts have

> unanimously recognized as justification for revoking drivers' licenses upon conviction of certain offenses. True the recalcitrant law violator might feel the pain of the loss of a valuable privilege. However, the imposition of pain is not the objective of this law. On the contrary, its primary purpose is to relieve the public generally of the sometimes death-dealing pain recklessly produced by one who so lightly regards his licensed privilege.

Smith, 95 So.2d at 106-107

This Court should not recede from the long-standing public safety goals set forth by Florida's legislature in Chapter 322 and the principles enunciated by the Court in Smith v. City of Gainesville. As the population of Florida increases and the number of visitors increases every year, these public safety goals and principles are even more important today than when they were first articulated. The reinstatement and eligibility requirements, as established by the Department, are regulatory and remedial in nature and do not entail punishment for criminal behavior, they are not invalidated by the prohibition against ex post facto laws. Thus, the certified question must be answered in the negative.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court to affirm the Fourth District Court of

Appeal's Order Denying Petition for writ of Certiorari and answer the certified question in the negative by holding that the amendment to s. 322.271(4), Florida Statutes which eliminated hardship driver's licenses to persons convicted four or more times of DUI does not violate the prohibition against ex post facto laws as to persons who could have applied for a hardship license before the amendment became effective.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been mailed by United States mail to RICHARD W. SPRINGER, P.A., 3003 South Congress Avenue, Suite 1A, Palm Springs, Florida, 33461, this 27th day of April, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the font size used in the Department's Answer Brief On The Merits is Courier New 12 point.

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HEATHER ROSE CRAMER
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