IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

JAMES LESCHER,

Petitioner,

vs.

FLORIDA DEPARTMENT OF HIGHWAY SAFETY
AND MOTOR VEHICLES,

Respondent.
CASE NO.: SC07-32

L.T. NO.: 4D06-2291

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT
COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

Respectfully submitted,

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PRELIMINARY STATEMENT

Petitioner, JAMES LESCHER, was the applicant in an administrative proceeding before the Department of Highway Safety and Motor Vehicles Division of Driver's Licenses Bureau of Administrative Reviews, the Petitioner before the Circuit Court, and was the Petitioner before the Fourth District Court of Appeal. Petitioner will be referred to as "Petitioner" or by name. Respondent, the Department of Highway Safety and Motor Vehicles, was the administrative agency, the Respondent before the Circuit Court, and the Respondent before the Fourth District Court of Appeal. Respondent will be referred to as "Respondent" or "Department of Highway Safety and Motor Vehicles".

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, which can be found at James Lescher v. Department of Highway Safety and Motor Vehicles, 946 So2d 1140 (Fla. 4th DCA 2006), (App. A).

On December 1, 2000, the Petitioner, JAMES LESCHER, had his Florida driver's license permanently revoked pursuant to F.S. §322.28(2)(e). This permanent revocation was based on his convictions for Driving Under the Influence, contrary to F.S. §316.193. Specifically, the Petitioner was convicted of Driving Under the Influence in 1979, 1983, 1991 and 2000.

On August 3, 2005, at the Bureau of Administrative Review, 6801 Lake Worth Road, Suite 200, Lake Worth, Florida 33467, Petitioner made an application to reinstate his driving privilege. On August 3, 2005 a hearing was held before Hearing Officer Donna George at the Department of Highway Safety and Motor Vehicles. At that hearing, counsel for the Petitioner argued that the Petitioner should be eligible to obtain a hardship license based on the recent Supreme Court ruling in Florida Department of Highway Safety and Motor Vehicles v. Robert P. Critchfield, 842 So.2d 782 (Fla. 2003) (rehearing denied June 11, 2003), holding that Chapter 98-223 violates the single subject

requirement of the Florida Constitution. Hearing Officer Donna George conducted a record review and issued an Order denying Petitioner's requested relief (App. B).

Petitioner made his timely petition for Writ of Certiorari to the Circuit Court of the Fifteenth Judicial Circuit. From the opinion of the Circuit Court denying the requested relief (App. C), Petitioner sought certiorari review in the Fourth District Court of Appeal.

On December 20, 2006 the Fourth District Court of Appeal issued an Order Denying Petitioner's Writ of Certiorari, and certified a question of great public importance to this Court in James Lescher v. Department of Highway Safety and Motor Vehicles, 946 So2d 1140 (Fla. 4th DCA 2006)(App. A). The Petitioner then filed a Notice to Invoke Discretionary Jurisdiction with this court. On February 9, 2007 this court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The application of F.S. 322.28 and F.S. 322.271 as amended to persons whose offense for DUI was committed before the Legislators changed the law eliminating the opportunity to apply for a hardship driver's license, violates the constitutional ban on expost facto laws. The legislator's stated intent that the Department of Highway Safety and Motor Vehicles authority under Chapter 322 to permanently revoke the driver's license upon conviction for DUI offenses is an "administrative remedy" must be rejected. Using the seven factors the United States Supreme Court used in Hudson v. U.S., 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed. 2d 450 (1997), there is clear proof that the statutory scheme mandating a permanent driver's license revocation is punitive in purpose and effect and therefore in the nature of criminal punishment subject to the constitutional ban on expost facto laws.

A law violates the prohibition against expost facto laws if two conditions are met; (1) it is retrospective in effect and (2) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. Dugger v. Williams, 593 So2d 180 (Fla. 1991). The amendment to Sections 322.28 and 322.271 eliminating Petitioner's opportunity to apply

for a hardship driver's license operated retrospectively to a class of drivers who received permanent revocations for an offense that occurred before the amendments effective date and the amended statute forbidding hardship permits was more onerous than the law in effect on Petitioner's offense date. The application of F.S. 322.28 and 322.271 in denying Petitioner's request for a hardship permit violates the expost facto provision of the Florida Constitution, Article I, Section 10.

ARGUMENT

DOES THE AMENDEMENT TO SECTION 322.271(4), FLORIDA STATUTES WHICH ELIMINATED HARDSHIP DRIVER'S LICENSES EFFECTIVE JULY 1, 2003, VIOLATE THE PROHIBITION AGAINST EXPOST FACTO LAWS AS TO PERSONS WHO COULD HAVE APPLIED FOR A HARDSHIP LICENSE BEFORE THE AMENDMENT BECAME EFFECTIVE?

Prior to the 1998 amendment of F.S. §322.271(4), a person convicted four or more times of violating F.S. §316.193, the Driving Under the Influence Statute, was granted the right to petition the Department of Highway Safety and Motor Vehicles for a hardship license after five years from the date of revocation. The amendment to F.S. §322.271(4) in 1998 eliminated the previously existing right to petition the Department of Highway Safety and Motor Vehicles for a hardship license. This Honorable Court in Department of Highway Safety and Motor Vehicles v. Robert Critchfield, 892 So. 2d 782 (Fla. 2003) (rehearing denied June 11, 2003) held that Chapter 98-223 amending §322.271(4) violates the single subject requirement of the Florida Constitution. The 1998 amendments to F.S. §322.271, F.S. §322.26 and F.S. §322.28, have been determined to be unconstitutional. This Honorable court determined that this Chapter Law violated our

constitutional requirements of law. Critchfield at 842 So.2d 782.

Petitioner's driver's license was permanently revoked on December 1, 2000. In denying Petitioner's application to reinstate his driver's license on a hardship basis, the Respondent relied on Section 322.28, Florida Statutes enacted on July 1, 2003. (App. B). The application of F.S. 322.28 and F.S. 322.271 as amended to persons whose offense was committed before the legislators changed the law eliminating the opportunity to apply for a hardship license, violates the constitutional ban on expost facto laws. Under both the Florida and United States Constitutions, lawmakers may not enact laws that increase the punishment for a criminal offense after the crime has been committed. See U.S. Constitution Article I §10("No State shall….pass any….ex post facto law…."); article I §10, Florida Constitution ("No….expost facto law…shall be passed"). The constitutional prohibition on ex post facto laws applies only to criminal legislation and proceedings. Goad v. Florida Department of Corrections, 845 So2d 880 (Fla. 2003); Westerheide v. State, 831 So2d 93 (Fla. 2002).

As stated in Goad v. Florida Department of Corrections, 845 So2d 880 (Fla. 2003),"The categorization of a particular proceeding as civil or criminal is first of

all a question of statutory construction" citing Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed 2d 501 (1997) (quoting Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed 2d 296 (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, 117 S.Ct. 2072. When attempting to discern legislative intent, courts must first look at the actual language used in the statute. Goad citing Joshua v. City of Gainesville, 768 So2d 432 (Fla. 2000).

Chapter 322 is devoted to driver's licenses. Section 322.02 authorizes the Department of Highway Safety and Motor Vehicles with the administration and function of the enforcement of the chapter. Section 322.02(2), Florida Statutes (2007). Based on the legislative intention as stated in the introductory section of the chapter, §322.02, the Department of Highway Safety and Motor Vehicle function is administrative.

In denying Petitioner's Writ of Certiorari, the majority cited Smith v. City of Gainesville, 93 So2d 105 (Fla. 1957) for the proposition that the revocation of a driver's license for DUI is an administrative remedy and is not punishment. Lescher v. Department of Highway Safety

and Motor Vehicles, 946 So2d 1140 (Fla. 4th DCA 2006). However, in the fifty years since the decision in Smith, Chpater 322 has been amended with substantive law a number of times.

While "the civil label is not dispositive," the Legislature's stated intent should only be rejected where the challenging party 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 v. Florida Department of Corrections, 845 So2d 880 (Fla. 2003)citing Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed 2d 296 (1986) (quoting United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed 2d 742 (1980)). See also Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed 2d 450 (1997) (noting that "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty").

The United States Supreme Court in Hudson used seven factors as "guide posts" to determine whether a civil statute actually imposes a remedy that is in the nature of criminal punishment. As stated in Goad:

> In determining whether a civil statute is in reality punitive in nature, we must consider: (1)whether the sanction

> involves an affirmative disability or restraint; (2) whether it has historically been regarded as 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. *Hudson*, 522 U.S. at 99-100, 118 S.Ct. 488 (relying on *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)).

Goad at 884 (Fla. 2003).

Therefore, to answer the certified question presented, this Court must address whether the revocation of a driver's license for DUI and the inability to obtain a hardship permit is punitive in either purpose or effect to transform what was intended as a civil remedy into a criminal penalty.

A. THE STATUTORY SCHEME IS PUNITIVE IN PURPOSE AND EFFECT

1. THE SANCTION INVOLVES AN AFFIRMATIVE DISABILITY OR RESTRAINT

Section 322.28(2)(e) states in pertinent part:

> The Court shall permanently revoke a driver's license or driving privilege of a person who has

> been convicted four times for violation of §316.193…..
> If the Court has not permanently revoked such driver's license or driving privilege within 30 days after imposing sentence, the department shall permanently revoke……
> No driver's license or driving privilege may be issued or granted to any such person…….

It is clear from the language of section 322.28(2)(e) that the permanent revocation is definite, immediate, and automatic at a time of sentencing on a conviction for a fourth DUI. The July 1, 2003 enactment of sections 322.271 and 322.28 eliminated the prior opportunity to petition for a hardship permit. In the absence of any opportunity to comply with the previously stated requirements of obtaining a hardship permit, the sanction is an affirmative disability and restraint to do without a permit.

2. DRIVER'S LICENSE REVOCATION HAS HISTORICALLY BEEN REGARDED AS A PUNISHMENT

As far back as 1959 in Miami v. Aronivitz, 114 So2d 784 (Fla. 1959) this Court used language consistent with the license revocation being penal:

> We judicially know that as originally contemplated the driver's license requirement was enacted primarily as a source of revenue to finance the maintenance of the State Department of Public Safety. Time has proven, however, that because of the severe penalties attendant upon serious traffic violations, including suspension or revocation of driver's

> license, this requirement has become an essential segment of our laws for the control and prevention of traffic accidents and fatalities. The public records reveal that during the first six months of the current calendar year over two and one-half million driver's licenses had been issued in Florida. It is a privilege to hold a license to drive. It is a severe handicap to be compelled to do without one. Suspension or revocation of driver's licenses is one of the most effective measures to compel observance of the traffic laws.

More recent, in Daniels v. State, 716 So2d 827 (Fla. 4th DCA 1998)the Fourth District Court characterized the revocation of a driver's license as a penalty. In Daniels the defendant entered a plea of guilty to drug possession and moved to withdraw his plea because he had not been informed that as a result of his plea his driver's license would be revoked under Section 322.055(1), Florida Statutes (1997). In the opinion Judge Gross writes:

> Florida Rule of Criminal Procedure 3.170(k) requires the trial court to determine that a defendant's plea is voluntary. One aspect of a voluntary plea is that the defendant understand the reasonable consequences of his plea, including "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." Fla.R.Crim.P. 3.172(c) (1); Ashley v. State, 614 So.2d 486, 488 (Fla. 1993). However, a trial court is required to inform a defendant only of the direct consequences of plea, and is under no duty to advise the defendant

> of any collateral consequences. See State v. Ginebra, 511 So2d 960, 961 (Fla. 1987); State v. Fox, 659 So2d 1324, 1327 (Fla. 3rd DCA 1995), rev. den., Fox v. State, 668 So.2d 602(Fla. 1996). In Zambuto v. State, 413 So.2d 461, 462(Fla. 4th DCA 1982), this court adopted the fourth circuit's definition of a "direct consequence" of a plea:
>
> > "The distinction between "direct" and "collateral" consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, PatuxentInstitution, 475 F.2d 1364, 1366 (4th Cir.) cert. denied, 414 U.S. 1005, 94 S. Ct.362, 38 L.Ed. 2d 241(1973)."
>
> In this case, the two year license revocation mandated by Section 322.055(1) was definite, immediate, and automatic upon Daniels' conviction. The revocation was a "consequence" of the plea under Ashley and a "penalty" contemplated by Rule 3.172(c)(1).

Daniels, 716 So.2d at 828-29.

Appellant recognizes that Daniels is in conflict with State v. Bolware, So2d (Fla. 1st DCA 2003), 28 Fla.L.Weekly D2493 (Fla. 1st DCA 2003) on the issue of whether the consequence is direct or collateral and this Court has granted review (See Bolware v. State, 924 So2d 806 (Fla. 2006)). However, that would not effect the

determination that the revocation was a penalty regardless of whether it was direct versus collateral consequence.

In 2001 the Fourth District Court used the same analysis in Whipple v. State, 789 So2d 1132 (Fla. 4th DCA 2001) allowing Whipple to withdraw his guilty plea to DUI based on the failure to be advised by counsel of the license revocation. Again, the license revocation is determined to be a penalty that was definite, immediate and automatic effect on the range of the defendant's punishment.

3. THE DRIVER'S LICENSE REVOCATION COMES INTO PLAY ONLY ON A FINDING OF SCIENTER

The term scienter is frequently used to signify a defendant's guilty knowledge. Section 322.28, Florida Statutes (2007) addresses the periods of suspension or revocation of driver's licenses. The section provides that after a first conviction for DUI, the revocation shall be for 6 months to one year, and that on the second, third and fourth violations i.e. convictions, the period of revocation increase with a lifetime revocation following a fourth DUI conviction. Section 322.28(2), Florida Statutes (2007). The statutory scheme for driver's license revocation requires a criminal conviction for DUI. The conviction for DUI attaches either after a knowing and

voluntary plea of guilty at which time a defendant accepts responsibility and admits to the facts that gave rise to the arrest and therefore supports the conviction, or after a defendant exercise the right to go to trial and is confronted with the facts that support a conviction.

4. DRIVER'S LICENSE REVOCATIONS UNDER THE STATUTORY SCHEME PROMOTE THE TRADITIONAL AIMS OF PUNISHMENT-RETRIBUTION AND DETERRENCE

As discussed above, the current revocation statutes provide for periods of suspension or revocation that increase in length depending on the presence of prior convictions for DUI. The statutory scheme requires the Court to impose the suspension at the time of sentencing and if not done at that time the statute mandates that the Department of Highway Safety and Motor Vehicles impose the suspension within 30 days of the sentencing. (See Section 322.28(2)(e), Florida Statutes (2007)).

Recognizing that the Department of Highway Safety and Motor Vehicles will argue that this action is administrative in nature and not as punishment, the Petitioner would disagree. The current statutory scheme provides the Department of Highway Safety and Motor Vehicles the authority to suspend "administratively" a persons driver's license at the time of arrest for DUI. Section 322.2615, Florida Statutes (2007). This section

authorizes a law enforcement officer arresting someone for DUI to take the driver's license at the time of arrest, issue a Uniform Traffic Citation which is a 10 day temporary permit, and issue a Notice of Suspension. The driver has the option of contesting this suspension at an informal or formal review by requesting such from the Department of Highway Safety and Motor Vehicles. (See Section 322.2615, Florida Statutes (2007)).

Separate and apart from the administrative suspension, Section 322.28 addresses periods of suspension after conviction for DUI. Section 322.28 provides for increased periods of suspension for prior convictions based on an offender's driving record. Since DUI is considered an enhancement crime, (See §316.193, Florida Statutes(2007))a defendant is informed at the time of sentencing that subsequent convictions will result in increased penalties, the driver's license suspension being one of them. (See Section 322.28(2)(a)(2), Florida Statute(2007) wherein it states a second conviction within a period of five (5)years shall result in a five (5) year suspension, and 322.28(2)(a)(3) a third suspension within 10 years of a prior conviction shall result in a ten (10) year suspension and 322.28(2)(e) a fourth offense the Court shall permanently revoke the license without the opportunity to

apply for a hardship permit.) This escalation of time of suspension serves both purposes of punishment to those who have offended and as a deterrence to those who fear the penalty of loss of license.

5. THE BEHAVIOR TO WHICH THE LICENSE SUSPENSION APPLIES IS ALREADY A CRIME

The driver's license suspension pursuant to Section 322.28 applies to convictions for violations of §316.193 the DUI statute. The behavior to which the suspensions apply are crimes ranging from the traffic crime of a first offense to felony crimes for fourth offenses or third offense within a ten (10) year period of a prior conviction. Section 316.193, Florida Statutes (2007).

6. ALTERNATIVE PURPOSE

The Respondent will argue that the driver's license suspension is an administrative remedy for the public protection. Petitioner may accept that based on the argument above that at the time of arrest for DUI under §322.2615 a law enforcement officer takes the driver's license and issues a Notice of Suspension. The DUI suspect may challenge the suspension at a hearing, but if probably cause exists the license is suspended for up to one year. This action protects the public and puts the citizen on notice. However, Petitioner would disagree

that an additional suspension for the crime of DUI that is mandated and takes effect upon conviction and that time of suspension increases pursuant to the offender's prior record is anything other than a penalty. The analogy can be made to sentencing guidelines points. An offender receives points for prior convictions which directly relates to the range of sentence the Court is to consider. Likewise, prior convictions for DUI dictate the mandatory driver's license suspension.

7. IT APPEARS EXCESSIVE IN RELATION TO THE ALTERNATIVE PURPOSE ASSIGNED

If Petitioner is correct in assuming that the alternative purpose assigned to the permanent driver's license suspension mandated by a fourth conviction for DUI is an administrative remedy for the public protection, a permanent revocation without the opportunity to petition for a hardship permit is excessive. Prior to the 1998 amendments to the statutory scheme, a citizen with a permanent revocation was entitled to petition the Department of Highway Safety and Motor Vehicles for a Hardship permit after complying with strict statutory requirements. If a citizen satisfied a specific period of NO driving, maintained enrollment in a supervisory program for substance abuse, and maintained their sobriety, then

and only then would the Department of Highway Safety and Motor Vehicles consider a petition for Hardship permit. (See 322.271 and 322.28, Florida Statutes (1997)). To deny a citizen who could satisfy strict requirements of sobriety from ever obtaining a hardship permit is excessive. A lot has changed in the 50 years since Smith v. City of Gainesville including the statutory scheme, society, issues regarding substance abuse and treatment, and the dependence on mobility. To forever deny the opportunity to petition for a hardship permit despite a showing a compliance with necessary safeguards for the public's protection is excessive and clearly punishment.

The foregoing arguments support the conclusion, with clear proof, that the statutory scheme mandating a permanent drivers license revocation without the opportunity to petition for a hardship permit is so punitive in both purpose and effect it negates the legislative label that the intent is administrative. Using the seven factors enumerated in Hudson v. U.S, 522 U.S. 93, 118 S. ct.488, 139 L.E2450(1997) as guidepost the foregoing argument clearly supports that the statutory scheme mandating license revocation impose a remedy that is in the nature of criminal punishment.

B. SECTION 322.271 AS APPLIED VIOLATES THE EXPOST FACTO PROVISION OF THE FLORIDA CONSTITUTION, ARTICLE I 10.

> In Florida, a law or its equivalent violates the prohibition against ex post facto laws if two conditions are met; a) it is retrospective in effect; and b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. Art. I, §10, Fla. Const.; ***Waldrup v. Dugger***, 562 So.2d 687, 691 (Fla. 1990). There is no requirement that the substantive right be "vested" or absolute, since the ex post facto provision can be violated even by the retroactive diminishment of access to a purely discretionary or conditional advantage. Waldrup, 562 So.2d at 692. Such might occur, for example, if the legislature diminishes a state agency's discretion to award an advantage to a person protected by the ex post facto provision. This is true even when the person had no vested right to receive that advantage and later may be denied the advantage if the discretion otherwise is lawfully exercised. ***Id.*** In other words, the error occurs not because the person is being denied the advantage (since there is no absolute right to receive it in the first place), but because the person is denied the same level of access to the advantage that existed at the time the criminal offense was committed.

Dugger v. Williams, 593 So2d 180 (Fla. 1991)(emphasis added).

In Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), Waldrup the prisoner, had been sentenced for crimes

committed in 1980 and 1982. In 1983, the legislature amended F.S. §944.275 to decrease the possible award of incentive gain-time, which in turn, had the effect of possibly increasing Waldrup's sentence. In evaluating whether the amendment as applied to Waldrup violated the ex post facto clause, the Honorable Court applied the two prong test: 1) whether the law was retrospective in its effect; and 2) whether it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. The Supreme Court concluded that the change in the statute operated retrospectively because it applied to a large class of inmates whose offense occurred before its effective date. The Supreme Court concluded under the second prong that the statute was ex post facto because it was more onerous than the law in effect on the date of the offense. This was true even though a prisoner had but a "mere expectancy" in the availability of incentive gain time. See Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed 2d 17 (1981) (a law need not impair a "vested right" to violate the ex post facto prohibition, it need only make the punishment more onerous than the law in effect at the time the offense was committed). This is because "a prisoner's eligibility for reduced imprisonment is a

significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence imposed". 450 U.S. at 32, 101 S. Ct. at 966. The Supreme Court stated that "It is well established that a penal statute violates the ex post facto clause if, after a crime has been committed, it increases the penalty attached to that crime". Waldrup at 691 citing Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981).

In 1996 the Florida Supreme Court in Gwong v. Singletary, 683 So.2d 109 (Fla. 1996) applied a two prong test when reviewing whether an amendment to Florida Administrative Code Rule 33-11.0065 (1996) retroactively denied approximately 20,000 prisoners, who have 85% or less of their prison sentence remaining the ability to earn incentive gain-time. Citing Waldrup v. Dugger and Weaver v. Graham this Honorable Court determined that the amended rule (1) applies to a class of inmates who committed their offenses before the amendment's effective date and (2) the amendment acts to enhance the measure of punishment because it eliminates the ability of certain inmates to earn incentive gain time credits. Therefore, this Honorable Court concluded that it violates the ex post facto prohibition. Gwong at 114.

Petitioner's drivers license was permanently revoked December 1, 2000. The amendment to F.S. §322.271(4) in 1998 eliminated the right to petition the Department of Highway Safety and Motor Vehicles for a hardship license. The Supreme Court determined the amendments to F.S. §322.271, §322.26 and §322.28 to be unconstitutional. Critchfield 842 So.2d 782. New law was enacted amending §322.28 which took effect July 1, 2003 eliminating the right to petition for a hardship permit. The affect of the July 1, 2003 amendment to §322.28 violates the ex post facto prohibition. Applying the two prong test to Petitioner's case, it is clear under the first prong that the change in the statute operated retrospectively because it applied to a class of drivers who received a lifetime revocation for an offense that occurred before the amendments effective date. Under the second prong, the amended statute was ex post facto because it was more onerous than the law in effect on the date of the offense. In Petitioner's case, the law in effect on the date of his offense granted the right to petition the Department of Highway Safety and Motor Vehicles for a hardship permit after five years. After the statute was enacted July 1, 2003 the right to petition for a hardship permit was eliminated. As stated in Gwong "this is true even though a

prisoner had but a “mere expectancy” in the availability…(a law need not impair a “vested right” to violate the ex post facto prohibition)”. Gwong at 112. Therefore, even though Petitioner had not satisfied the five year suspension period necessary to apply for a hardship before the statute was amended, he had an “expectancy” in a right to petition for a hardship permit.

The application of F.S. §322.28 in denying Petitioner’s request for a hardship permit violates the ex post facto provision of the Florida Constitution, Article I, Section 10. Thus, Petitioner was not statutorily ineligible to petition Depart for reinstatement which the Department of Highway Safety and Motor Vehicles should have granted in its administrative discretion.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities cited herein, Petitioner respectfully requests this Honorable Court reverse the decision of the Fourth District Court and answer the certified question by holding that the amendment to Section 322.271(4), Florida Statutes which eliminated hardship driver's licenses violates the prohibition against expost facto law as it applies to persons convicted prior to July 1, 2003 and quash the Order under review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished to the Department of Motor Vehicles Bureau of Administrative Reviews, Attn: Heather Rose Cramer, 6801 Lake Worth Road, 2nd floor, West Palm Beach, FL 33461 by mail, this 3rd day of April, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point style and complies with the font requirements of Rule 9.210.

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