IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-2330
L.T. CASE NO.: 1D08-1424

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Petitioner,
vs.

WILLIAM HERNANDEZ,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, Petitioner shall be referred to as "Petitioner" or "Department." Respondent shall be referred to as the "Respondent" or "Hernandez." Reference to the appropriate pages of the Petitioner's Appendix attached to the Initial Brief on the Merits, shall be made by A. followed by the exhibit number.

STATEMENT OF THE CASE AND FACTS

Respondent, Hernandez, was arrested on August 27, 2007, and charged with the offense of driving under the influence of alcohol, (hereinafter "DUI"). Hernandez was subsequently requested to submit to a breath test, as authorized pursuant to s. 316.1932, Florida Statutes (2007)(the implied consent statute). S. 316.1932 authorizes a law enforcement officer to request a breath, blood or urine test under certain conditions after a driver is lawfully arrested. Hernandez refused to submit to the test. The Department administratively suspended his driver's license and the Respondent requested a formal review of this administrative suspension with the Bureau of Administrative Review pursuant to s. 322.2615, Florida Statutes (2007). (A. 3). S. 322.2615, Florida Statutes, (2007), is the statute that provides for a review of the administrative suspensions resulting from either an unlawful breath test result or a refusal to submit to a breath, urine, or blood test.

At the formal review hearing, the hearing officer did not consider the

lawfulness of Hernandez's arrest, and upheld the suspension of his driver's license. Hernandez sought review in the circuit court through a petition for writ of certiorari as provided for under s. 322.31, Florida Statutes (2007). In that petition, Hernandez argued that since s. 316.1932 requires a lawful arrest before a driver can be asked to submit to a breath test, the hearing officer erred by not considering the lawfulness of his arrest. (A. 3, 4).

The circuit court discussed the scope of the hearing officer's review under s. 322.2615. Prior to October 1, 2006, the scope of the hearing officer's review of an administrative suspension arising out of an alleged refusal to submit to testing included consideration of (1), whether the arresting officer had probable cause to believe that the driver was driving or in actual physical control of a motor vehicle while under the influence of an alcoholic beverage or controlled substance, (2) whether the driver was lawfully arrested for DUI, (3), whether the driver was advised that if they refused to submit to a breath, blood or urine test, their driving privilege would be suspended, and whether after having been so advised, the driver refused such test. S. 322.2615, *Fla. Stat.* (2005). Effective October 1, 2006, the legislature removed the separate consideration of whether a driver was lawfully arrested for DUI. The circuit court found, therefore, that the lawfulness of

Hernandez's arrest was not a consideration before the hearing officer. (A. 3). Hernandez filed a petition for certiorari review in the First District Court of Appeal. (A. 4).

In its review of this case, the First District Court of Appeal agreed with the decision rendered by the Fifth District Court of Appeal in *Dep't of Highway Safety and Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008), *rev. denied*, 984 So. 2d 519 (Fla. 2008) wherein that court found that s. 322.2615 and s. 316.1932 must be read *in pari materia*. The First District Court of Appeal recognized that, although the legislature amended the scope of review under s. 322.2615, it did not amend the requirements of s. 316.1932 that the request for a breath sample must be incident to a lawful arrest. The district court found, therefore, that since "s. 316.1932 unambiguously provides that a driver has impliedly consented to submit to a breath or blood test only when such is incidental to a lawful arrest...the circuit court here erred when it held that the DHSMV hearing officer did not err when it failed to consider the legality of Hernandez's arrest." *Hernandez* at 1079. The district court then certified the following question as a matter of great public importance:

> CAN THE DHSMV SUSPEND A DRIVER'S LICENSE FOR REFUSAL TO SUBMIT TO A BREATH TEST, IF THE REFUSAL IS NOT INCIDENT TO A LAWFUL ARREST? IF NOT, IS DHSMV HEARING OFFICER REQUIRED TO ADDRESS THE LAWFULNESS OF THE ARREST AS PART OF THE REVIEW PROCESS? (A. 4).

Although the opinion in this case was initially certified as a matter of great public importance, a week prior to the opinion in this case, a contrary opinion was rendered by the Second District Court of Appeal in *McLaughlin v. Dep't of Highway Safety and Motor Vehicles*, 2 So. 3d 988 (Fla. 2d DCA 2008). Due to the conflict with the decision rendered in *Pelham, supra*, the Second District Court of Appeal certified conflict to this Court. Thus the question to be decided is before this Court based upon both a certified question as to a matter of great public importance and as a conflict among the district courts of appeal.

SUMMARY OF THE ARGUMENT

S. 322.2615, Florida Statutes, sets out the procedures for the review of an administrative driver's license suspension based upon an unlawful breath or blood alcohol level, or a refusal to submit to a breath, blood or urine test. There are no provisions contained in that section which establish the circumstances under which a citizen can be asked to submit to a breath, blood, or urine test. There are also no

provisions for what type of testing procedures are to be followed or what types of tests may be requested. This section contains only the procedural mechanism for reviewing an administrative suspension imposed based upon either an unlawful breath or blood alcohol level, or a refusal to submit to a breath, blood, or urine test.

The section which sets out the provisions for when a breath, blood, or urine test may be requested is s. 316.1932, commonly referred to as the implied consent statute. This section also addresses the types of tests which may be administered and by whom the tests may be administered. Although this statute establishes the administrative suspensions that can be imposed, this section does not provide any procedures for a review of the administrative suspension set out in this section. These procedures are contained in s. 322.2615. As a result of the above, s. 322.2615 and s. 316.1932 must be read *in pari materia*. Therefore, as part of his or her review of an administrative driver's license suspension, a hearing officer must consider whether there has been compliance with s. 316.1932, including whether the driver was lawfully arrested prior to being asked to submit to any test.

ARGUMENT

STANDARD OF REVIEW

The questions at issue before this Court require this Court to construe the statutory provisions related to Florida's implied consent law. The standard of review, therefore is *de novo*. *Aramark Unif. and Career Apparel, Inc.v. Easton*, 894 So. 2d 20, 23 (Fla. 2004); *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 194 (Fla.2007).

ISSUES PRESENTED

1. CAN THE DEPARTMENT SUSPEND A DRIVER'S LICENSE BASED UPON A REQUEST TO SUBMIT TO A BREATH, BLOOD, OR URINE TEST UNDER THE PROVISIONS OF S. 322.2615 ALONE ABSENT COMPLIANCE WITH S. 316.1932[1].
2. IF NOT, MUST A HEARING OFFICER, WHEN CONDUCTING A REVIEW OF SUCH A SUSPENSION, CONSIDER WHETHER THE REQUEST TO SUBMIT WAS MADE IN COMPLIANCE WITH S. 316.1932, WHICH SPECIFICALLY REQUIRES THAT A REQUEST FOR BREATH OR URINE CAN ONLY BE MADE AFTER A LAWFUL ARREST.

[1]Although the only section raised by the Department in this appeal is s. 316.1932, the Respondent would suggest that the same reasoning that applies to the need for compliance with s. 316.1932 would be equally applicable to s. 316.1933, which provides for the taking of blood in cases of death or serious bodily injury.

As fully set out by the Department, effective October 1, 2006, s. 322.2615 was amended. Prior to that amendment, the hearing officer at a formal review of an administrative driver's license suspension hearing had a three pronged standard of review. S. 322.2615(7) required the hearing officer to consider, (1) whether the arresting officer had probable cause to believe that the driver was driving or in actual physical control of a motor vehicle while under the influence of an alcoholic beverage or controlled substance, (2) whether the driver was lawfully arrested for DUI, and (3) either whether the driver had an unlawful blood alcohol level, or whether the driver was advised that if they refused to submit to a breath, blood or urine test, their driving privilege would be suspended, and whether after having been so advised, the driver refused such test. S. 322.2615, *Fla. Stat.* (2005). As also set out by the Department, as part of the October 1, 2006, amendment, the portion of the scope of review requiring that the hearing officer specifically find a lawful arrest **for DUI** was removed. Throughout its brief, the Department mistakenly characterizes this action as removing the lawfulness of arrest requirement from the hearing officer's consideration. The only consideration removed, however, was the requirement that a hearing officer determine whether a driver was under lawful arrest **for DUI** as a separate consideration.

The hearing officer, at a formal review hearing, must still consider whether the driver "had an unlawful blood-alcohol level or breath-alcohol level of .08 or

higher as provided in s. 316.193[2]" or whether the driver "refused to submit to any such test after being requested to do so..." s. 322.2615(7), *Fla. Stat.* (2007). As addressed in the beginning of s. 322.2615, the suspension for a refusal must be pursuant to a refusal to "submit to a **lawful** breath, blood, or urine test." (emphasis added). S. 322.2615(1) (b)1.a., *Fla. Stat.* (2007). There is no definition of what constitutes a "lawful" breath, blood, or urine test contained in s. 322.2615. Likewise, there are no requirements set out in s. 322.2615 as to when a breath, blood, or urine test may be requested and/or how such a test is to be conducted. S. 322.2615 merely provides the review procedures required under *Mackey v. Montrym*, 443 U.S. 1, 10 (1979), *Dixon v. Love*, 431 U.S. 105, 112 (1977), and *Bell v. Burson*, 402 U.S. 535, 539 (1971) when a driver's license is administratively suspended pursuant to the provisions of s. 316.1932.

The Due Process Clause found in the Fourteenth Amendment to the United States Constitution clearly applies to any action by the state to cancel, revoke or suspend a driver's license. *Mackey* at 10, fn 7. Since a driver has a constitutionally protected property interest in his or her driver's license, a license cannot be

[2]Contrary to the Department's assertion that all reference to s. 316.193 has been removed from s. 322.2615, the scope of review still makes reference to s. 316.193 when addressing an unlawful breath alcohol level.

canceled, suspended or revoked without due process of law. *Mackey* at 10. In the context of a citizen's right to a driver's license, the due process requirement is an application of the general proposition that relevant constitutional restraints limit the State's power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." *Bell, supra* at 539. The constitutional guarantee of the Fourteenth Amendment's right of procedural due process has always been understood to embody a presumptive requirement of notice and a **meaningful** opportunity to be heard before the state acts to deprive a citizen of his property. *Mullane v. Central Hanover Trust Co.* 339 U.S. 306, 313, 94 L. Ed 865, 872, 70 S. Ct. 652 (1950). Thus, notwithstanding the removal of the specific reference to s. 316.1932 in the amended statute, s. 322.2615 remains inextricably intertwined with s. 316.1932. The Department makes no effort to even attempt to explain how s. 322.2615 can be read without consideration of s. 316.1932. If the hearing officer is not permitted to consider compliance with s. 316.1932, then s. 322.2615 would fail to afford the right to a meaningful review as required.

Under s. 316.1932, a driver does not have to submit to a breath or urine test unless they are lawfully arrested for **some** offense. *See Dep't of Highway Safety and Motor Vehicles v. Whitely*, 846 So. 2d 1163 (Fla. 5th DCA 2003)(wherein the court found that since s. 316.1932 only requires "a lawful arrest" a driver could be

under lawful arrest for anything so long as there is cause to believe that the offense was committed while under the influence of an alcoholic beverage and that the person was in actual physical control of a motor vehicle.). An arrest based upon an unlawful stop is invalid and unlawful. *Richardson v. State*, 291 So. 2d 253, 255 (Fla. 1st DCA 1974). Therefore, notwithstanding the removal of the specific reference to a lawful arrest **for DUI** from the scope of review, issues regarding the lawfulness of the seizure and subsequent arrest of the a driver must still be considered at a formal review hearing under the scope of review regarding a test result obtained pursuant to s. 316.1932, or the refusal to submit to a test authorized under s. 316.1932.

The Fifth District Court of Appeal confirmed this legal analysis in *Dep't of Highway Safety and Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008) *rev. denied*, 984 So. 2d 519 (Fla. 2008). In *Pelham*, the Department argued that the lawfulness of the police action was not legally relevant to the administrative proceedings related to the administrative driver's license suspension. In denying the Department's petition, the district court began its legal analysis by recognizing that,

> "[t]he obligation to submit for testing for alcohol and chemical substance impairment emanates from section 316.1932, Florida Statutes (2007). This statute, sometimes referred to as the Implied Consent Law, provides that any person who accepts the

> privilege of operating a motor vehicle in this state is deemed to consent to testing to determine the 'alcoholic content of his or her blood or breath *if the person is lawfully arrested*...'(citations omitted). The statute further states that the test 'must be incidental to a lawful arrest and administered at the request of a law enforcement officer...' *Id.* Thus, a lawful arrest must precede the administration of the breath test. *State, Dep't of Highway Safety and Motor Vehicles v. Whitely*, 846 So. 2d 1163 (Fla. 5th DCA 2003)." *Id.* at 305, 306.

The district court then acknowledged that it must consider the impact of the amendment to s. 322.2615.

The district court considered the plain language of the statute which authorizes a law enforcement officer to suspend a driver's license of a person who refused to submit to a *lawful* breath test. S. 322. 2615(1)(a)and(1)(b)1.a., *Fla. Stat.* (2007). The district court also considered the house staff report relied on by the Department which stated that the amendment negated the need for the Department to show that a lawful arrest for s. 316.193 occurred. The district court concluded that because s. 322.2615 does not establish any obligation on the part of a driver to submit to testing, this section cannot be construed in isolation. Instead, the court found it must consider s. 322.2615 and s. 316.1932 *in pari materia*. The court found therefore, "…the conclusion is inescapable that a suspension may not be predicated on refusal to take a test that is the product of an unlawful arrest." *Id.* at

306.

The district court supported its conclusion relying on the fact that s. 322.2615 only supports a suspension pursuant to a "lawful" test, that the suspension must be based upon statutory notice, and that the notice must state that the refusal involves a "lawful" test. Although there is no definition of a "lawful" test, the district court found that, at a minimum, a "lawful" test is one that drivers are required to take under s. 316.1932. Thus, reasoned the district court, the request must be incidental to a lawful arrest. *Id.* at 306.

Lastly, the district court addressed the legislative staff report. The district court found, that even if it did accept the staff analysis as the intent of the legislature, the district court could not "rewrite the statutory scheme to do what the legislature failed to accomplish expressly." *Id.* at 307. The district court ultimately found that the lawfulness of the detention is often inextricably intertwined with the consideration of probable cause as well as the lawfulness of the suspension and whether there is sufficient cause to sustain the suspension. The district court also found that if the legislature intended to authorize the Department to suspend a driver's license for refusal to submit to a test without regard for the lawfulness of police action preceding the request, the legislature must expressly say so. *Id.* at

308.

In its decision in the case at bar, the First District Court of Appeal correctly agreed with this analysis. In citing to *Pelham*, the district court also specifically noted the reasoning in *Pelham* that the lawfulness of the arrest must be considered as "such a conclusion is mandated because under the 'statutory scheme, the lawfulness of the suspension is central to any determination that there is sufficient cause to sustain it'" *Hernandez* at 1079. Contrary to the assertions of the Department, the First District Court did not improperly apply rules of statutory construction in finding that the lawfulness of arrest was to be considered by the hearing officer. Instead, the district court recognized that s. 316.1932 "unambiguously" provides that the implied consent provisions only apply after a lawful arrest, and that based upon that "clear statement of law," the circuit court erred. *Id.* at 1079.

The fact that provisions contained in s. 322.2615 apply to a test requested pursuant to s. 316.1932 has also been recognized by the Third District Court of Appeal in *Dep't of Highway Safety and Motor Vehicles v. Possati*, 866 So. 2d 737 (Fla. 3d DCA 2004). In *Possati*, the district court begins its analysis of the circuit court's review of the formal review hearing under s. 322.2615 by noting, "[t]his

case is controlled by section 316.1932, Florida Statutes (2001), which provides that anyone who accepts the privilege of operating a motor vehicle under Florida law thereby consents to submit to a breath test for the purpose of determining the alcohol content of his or her breath, **provided that the person is lawfully arrested** by an officer ....." (emphasis added) *Id.* at 739, 740. Notwithstanding the recent amendments, this reasoning would still be applicable as the legislature did not amend s. 322.2615 to include its own "implied consent" provisions.

This analysis is also consistent with the Fifth District Court of Appeal's analysis in *Dep't of Highway Safety and Motor Vehicles v. Farr*, 757 So. 2d 550 (Fla. 5th DCA 2000). In *Farr*, the district court was called upon to review a decision of the circuit court regarding whether a driver must be afforded an opportunity to contact counsel prior to a breath test. In finding that there was no such requirement, the district court recognized that the suspension of a driver's license for refusing a breath test arises from an agreement between the driver and the State as set out in s. 316.1932. Accordingly, the court found that the suspension could be sustained under s. 322.2615.

The Respondent recognizes that there is a compelling interest in providing maximum safety for all persons who use the public roadways. This compelling interest, however, does not override the due process requirements for the deprivation of a driver's license or a driver's rights to protection from an unlawful search and/or seizure. None of the cases cited by the Department make such a finding.

In *Thornhill v. Kirkman*, 62 So. 2d 740 (Fla. 1953), the issue before this Court was whether a driver was entitled to a presuspension notice and hearing prior to a suspension of their driver's license due to their involvement as a driver in an accident resulting in the death or personal injury of another. In discussing whether a summary suspension could be imposed, this Court noted that the ability to drive was a privilege as opposed to a right. *Id.* at 742. In finding that a presuspension hearing was not required, this Court found that the provision for a postsuspension hearing was sufficient to meet the requirements of due process. *Id.* at 742. This Court did not find, however, that there was no property interest in the privilege to drive. Likewise, this Court made no finding that a privilege to drive could be suspended without an opportunity for a hearing. To the contrary, this Court recognized that the right to due process did attach to a summary suspension of the

privilege to drive.

Similarly in *Smith v. City of Gainesville*, 93 So. 2d 106 (Fla. 1953), the issue before this Court was whether the imposition of a driver's license revocation after a conviction for driving under the influence constituted a double punishment and an improper delegation of authority to the court. In considering this issue, this Court recognized that the State could regulate motor vehicle operators. This Court noted that this involved "the power to make proper provision for the suspension or revocation of a driver's license under appropriate conditions, and upon the occurrence of stipulated situations." *Id.* at 106. This Court went on to state,

> "While in *Carnegie v. Department of Public Safety*, Fla. 1952, 60 So. 2d 728 (sic), we held that a driver's license cannot be revoked arbitrarily or capriciously, we have nonetheless consistently followed the rule, which appears to be unanimous throughout the country, to the effect that upon proper showing in accord with the prevailing statutes a motor vehicle operator's license may be revoked." *Id.* at 106.

Again, this Court did not find that there is no property interest in the privilege to drive, or that the ability to terminate the privilege to drive is unrestricted. Neither *Thornhill* nor *Smith* authorize the termination of a driver's privilege to drive when

that termination is based upon actions by the State that are contrary to the statutory provisions authorizing the termination, or otherwise unlawful. The issue before this Court is not the ability of the State to regulate the privilege to drive, but the ability of the State to override the basic principles of due process.

The Department's reliance on the staff analysis and this Court's decision in *Massey v. David*, 979 So. 2d 931 (Fla. 2008), is not well founded in this case. As recognized by this Court in *Kasischke v. State*, 991 So. 2d 803 (Fla. 2008)[3], citing *GTC, Inc. v. Edgar*, 967 So.2d 781, 789 n. 4 (Fla.2007), this Court is not unified in its view of the use of legislative analysis in determining legislative intent. *Id.* at 810. In *Kasischke*, this Court additionally found that even if the staff analysis can be considered as reflecting the intent of the legislature, when it is not conclusive, it provides no assistance. This is the case in the matter before this Court. The only intention set out in the staff analysis was to remove the requirement that hearing officer must find a lawful arrest for a violation of s. 316.193. The decisions of the district courts in *Hernandez* and *Pelham* do not suggest an inconsistent result. The staff analysis does not address, however, s. 316.1932 or the requirements

[3]Although this Court does not cite *Massey v. David*, 979 So. 2d 931 (Fla. 2008) in *Kasischke, Kasischke* was decided subsequent to *Massey.*

surrounding when and how a breath, urine or blood test would be requested or obtained. (A. 5). Thus, even if this Court were to consider the staff analysis as the final word on the legislative intent in this case, this Court would have to essentially rewrite s. 322.2615 to include these missing provisions in order to find that the Department's argument is correct.

Although the construction of a statute by the administrative agency charged with its enforcement may be entitled to great weight and persuasive force, when the Department is not relying on any "departmental expertise" in its construction of a statute, its interpretation is no longer entitled to deference.
Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, 250 (Fla.1987); *Dep't of Ins. v. Ins. Svcs. Office*, 434 So. 2d 908, 912 (Fla. 1st DCA 1983); *Schoettle v. Dep't of Admin., Div. of Retirement*, 513 So. 2d 1299, 1302 (Fla. 1st DCA 1987); *Doyle v. Dep't of Bus. Regulation*, 794 So. 2d 686, 690 (Fla. 1st DCA 2001)*; Miami-Dade County. v. Gov't Supervisors Ass'n of Fla, OPEIU AFL-CIO, LOCAL 100*, 907 So. 2d 591, 594 (Fla. 3d DCA 2005) . There is no special expertise necessary to interpret the issues raised in the case at bar. Further, the Department is not permitted to rewrite a statute or ignore its plain meaning. *PAC for Equality v. Dep't of State, Fla. Elections Com'n*, 542 So. 2d 459, 460 (Fla. 2d

DCA 1989). An agency's construction is not entitled to deference if the agency has erroneously interpreted a provision of the law. *PW Ventures, Inc. v. Nichols,* 533 So.2d 281, 283 (Fla.1988); *United Faculty of Fla. v. PERC*, 898 So. 2d 96, 100 (Fla. 1st DCA 2005). Thus, the Department's interpretation of the provisions of s. 322.2615 at issue in this case is not entitled to deference.

The legislature is presumed to know the law. *Dickinson v. Davis*, 244 So. 2d 262 (Fla. 1969). Therefore, this Court must presume that the legislature knew what they were doing when they did not include separate provisions in s. 322.2615 providing for when and how a breath, blood, or urine sample can be requested. In *Dankert v. State*, 859 So. 2d 1221 (Fla. 2d DCA 2003), the Second District Court of Appeal recognized this premise. The district court was called upon to determine at what point the statute of limitations set out in s. 775.15(2)(b), Florida Statutes, relating to a charge of lewd and lascivious conduct was triggered. In finding that the plain language of the statute required the charges to be dismissed against the defendant, the district court stated, "[w]e share the State's dismay in the result of this decision, which is to release a man convicted by a jury of sexually abusing a child. However, when this court is called upon to apply a statute, it must be guided by the language of the statute itself rather than by the popularity of the result of the

statute's proper application to the facts. Here we cannot rewrite the clear provisions of section 775.15(7) to require corroboration of a reported offense, nor may we ignore the statutory language that allows an alleged violation to trigger the running of the statute of limitations. Any such requirement must be added by the legislature, not by this court."

The fact that the legislature could have eliminated any nexus between s. 316.1932 and s. 322.2615 and provided for a self contained administrative provision is evidenced by the previous passage of s. 322.2616. S. 322.2616, which authorizes an administrative driver's license suspension for persons under 21 who have consumed alcohol, contains all the provisions necessary to address the administrative suspension of a driver's license under those conditions. In addition to the hearing provisions, s. 322.2616(16) states that anyone who accepts the privilege to drive agrees to be subject to the provisions of that section which provides administrative sanctions for a driver under 21 who has a breath test result of .02 or greater. S. 322.2616(1)(b) limits when a test may be requested. This section also states, "[a] law enforcement officer who has probable cause to believe that a motor vehicle is being driven by or is in the actual physical control of a person who is under the age of 21 while under the influence of alcoholic beverages or who has any blood-alcohol level or breath-alcohol level may lawfully detain such

person and may request that person to submit to a test to determine his or her blood-alcohol or breath-alcohol level." S. 322.2616(17) sets out what type of breath testing equipment must be used under that section. Had the legislature intended for s. 322.2615 to be all-inclusive, it could have made it so at the time of the recent amendment. Clearly, the legislature did not do so.

Instead, the legislature has continued to extend to the motorists of this state a greater protection and right to privacy by retaining the provisions of the implied consent statutes. *See Sambrine v. State,* 386 So. 2d 546, 548 (Fla. 1980); *State v. Langsford*, 816 So. 2d 136 (Fla. 4th DCA 2002). If the legislature did not intend the results set out in the statutes as they are currently written, then the appropriate remedy is for the legislature to amend the statute. *Seagrave v. State,* 802 So. 2d 281 (Fla. 2001). "The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary." *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978). As noted by the First District Court of Appeal in *State v. Wershow,* 343 So. 2d 605 (Fla. 1st DCA 1977), under our constitutional system, courts cannot legislate. In *Wershow*, the district court recognized that it could not construe the statute at issue in a manner even to uphold its constitutionality when to do so required the court to rewrite the statute. *Id.* at 607.

The Department suggests that the decisions rendered by the First District

Court of Appeal in *Hernandez* and the Fifth District Court of Appeal in *Pelham* rendered the amendments made by the legislature a nullity. This argument overlooks the difference between the extra requirement that the hearing officer find a lawful arrest specifically for a violation of s. 316.193, and the requirement that the hearing officer consider the breath test result or a refusal in light of the provisions set out in s. 316.1932. Furthermore, if due to the failure to properly amend s. 322.2615, the legislature failed to execute a meaningful amendment, as set out above, it is the responsibility of the legislature to correct that error.

S. 322.2615, cannot be considered in a vacuum, notwithstanding the staff analysis, or the specific amendments made by the legislature. Separate statutory provisions which address the same or a related subject must be read *in pari materia*. *E.A.R. v State*, 4 So. 3d 614 (Fla. 2009) citing *Fla. Dep't of State v. Martin,* 916 So.2d 763, 768 (Fla.2005). S. 322.2615(1)(a) states that the driver's license of a person with an "unlawful" breath alcohol level of .08 or higher shall be suspended by a law enforcement officer on behalf of the Department. S. 322.2615(1)(b) states that the suspension under paragraph (a) for refusal must be pursuant to the refusal to submit to a "lawful" breath, blood, or urine test. S. 322.2615(6)(b) requires notice to the state attorney's office of the subpoenas issued and served for the administrative formal review hearing. In addition, as noted above, the scope of

review under s. 322.2615 (7) still refers to an unlawful breath test as provided in s. 316.193. These provisions establish that s. 322.2615 is still related to s. 316.1932 and 316.193 and belie the argument that the legislature intended to completely divorce the administrative proceedings from s. 316.1932 and 316.193 as argued by the Department. Thus, s. 322.2615 must continue to be read *in pari materia* with s. 316.1932.

CONCLUSION

The First District Court of Appeal correctly decided that under the current statutory provisions, a hearing officer must consider the lawfulness of a stop, seizure, and resulting arrest in considering whether an administrative suspension should be sustained. This Court therefore should affirm the decision of the First District Court of Appeal and answer the first certified question in the negative and the second question in the affirmative.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Heather Rose Cramer, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, P.O. Box 540609, Lake Worth, Florida 33454 and Douglas D. Sunshine, FHP Legal Advisor, Office of General Counsel, Department of Highway Safety & Motor Vehicles, 2900 Apalachee Parkway, A-432 MS 02, Tallahassee, Florida 32399-0500, attorneys for the Petitioner , by Federal Express, this the 7th day of May, 2009.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Times New Roman with type size 14.

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