

**IN THE SUPREME COURT OF FLORIDA**

**CASE NOS.:** SC08-2330; SC08-2394

Lower Tribunal No(s).: 1D08-1424; 2D07-4891

FLORIDA DEPARTMENT OF  
HIGHWAY SAFETY AND  
MOTOR VECHILES

vs. WILLIAM HERNANDEZ

FLORIDA DEPARTMENT OF  
HIGHWAY SAFETY AND  
MOTOR VECHILES

vs. GEORGE F. McLAUGHLIN

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Petitioner(s)

Respondent(s)

**ON DISCRETIONARY REVIEW FROM  
THE FIRST AND SECOND DISTRICT COURTS OF APPEAL**

**RESPONDENT'S ANSWER BRIEF ON THE MERITS**

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## **PRELIMINARY STATEMENT**

In this brief, the Petitioner, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the “Petitioner” or “Department.” The Respondent, George F. McLaughlin, will be referred to as “Respondent” or individually. References to the Respondent’s Appendix, attached to the Answer Brief on the Merits, will be referred to as “A.\_\_\_\_” followed by the appropriate exhibit number.

## **STATEMENT OF THE CASE AND FACTS**

The Respondent accepts the statement of the case and facts provided by the Petitioner in the Petitioner's initial brief on the merits but would also provide additional facts. In order to make a complete determination as it would relate to the facts of this case, the Respondent is including as appendix "A" a copy of the police report and citation that would have been part of the underlying Department of Highway Safety and Motor Vehicles review hearing. The police report clearly indicates that the Respondent was inside of his residence and the officer entered without permission when the Respondent was arrested for the DUI offense. (Appendix A). As a result, the arrest of the Respondent was clearly an unlawful arrest.

## **SUMMARY OF THE ARGUMENT**

The Second District Court of Appeal incorrectly held that the provisions of Section 322.2615 are sufficiently certain on their face so that they cannot be read *in pari materia* with Section 316.1932. An ambiguity clearly exists in that Section 316.1932 specifically states that a person is deemed to have provided his consent for the approved chemical tests "If the person is lawfully arrested." Further, Section 316.1932 states, "The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer."

## ARGUMENT

**THE PROVISIONS OF SECTION 322.2615 ARE  
UNCLEAR ON THEIR FACE BASED ON A CLEAR  
READING OF SECTION 316.1932 AND WHEN  
READ *IN PARI MATERIA* A LAWFUL ARREST  
MUST BE PART OF THE DETERMINATION  
TO BE MADE IN ORDER TO BE CONSTITUTIONAL.**

In the argument of the Initial Brief on the Merits, the Petitioner indicates that the Legislature has clearly intended to remove the arrest as an issue in the Formal Review Hearing. However, such is simply not the case based on Section 316.1932, Florida Statutes, in that Section 316.1932 still requires a lawful arrest as part of the implied consent. In fact, Section 316.1932, Florida Statutes, requires a lawful arrest in two separate sentences and if the Legislative intent was to remove the arrest as an issue in a Formal Review Hearing, which deals specifically with implied consent, the Legislature would have removed the requirement of a lawful arrest for purposes of the Implied Consent Statute.

The decisions rendered by the Court in Department of Highway Safety and Motor Vehicles vs. Pelham, 979 So.2d 304 (Fla. 5<sup>th</sup> DCA 2008) review denied 984 So.2d 519 (Fla. 2008), and Hernandez v. Department of Highway Safety and Motor Vehicles, 995 So.2d 1077 (Fla. 1<sup>st</sup> DCA 2008) has clearly indicated that the two sections have to be read *in pari materia* because Section 322.2615 does not have any provisions that otherwise require a driver to take a lawful test. The lawfulness of the test must be contained within the provisions of 316.1932, Florida

Statutes, and therefore to make any assertion that Section 322.2615 does not require a lawful arrest would render it to be unconstitutional. Section 322.2615 would otherwise have no provision establishing a requirement for a driver to take a chemical test and you have two Florida Statutes requiring two different analysis.

To allow the Administrative Hearing to procede through the Department of Highway Safety and Motor Vehicles without considering the lawfulness of the arrest as required in Section 316.1932, would in fact violate the Forth Amendment and the Fifth Amendment of the United States Constitution, particularly in light of the facts of the present case. The Respondent was arrested inside his residence without a warrant and without any of the exceptions that are authorized within the Florida Statutes. While understanding that a driver's license is a privilege, subject to suspension or revocation for cause, the enabling provision of 316.1932 requires a lawful arrest under the Implied Consent Law.

While the Legislature can exercise its police powers to protect the users of Florida's roadways, it cannot do so at the expense of the individual's rights as protected by the United States Constitution. The United States Supreme Court in Arizona vs. Gant, 07-542(U.S.4-21-2009) has recently dealt with how far a search incident to a lawful arrest exception to the warrant requirement may be extended in a vehicle, stating that the State's interest can only be justified within certain enumerated exceptions. In the present case, there is no justifiable exception to an unlawful arrest of an individual within his home for purposes of an administrative proceeding. The Petitioner in the Initial Brief suggests on page ten "The plain language of chapter 322 sets forth the Legislature's intent that the Department's function is administrative and it's mission is to promote and protect the public safety. The provisions of chapter 322 provide a civil remedy toward that end." Hopefully, the Petitioner is not suggesting that Section 322.2615, Florida

Statutes, is now sanctioning illegal law enforcement conduct or simply choosing to ignore illegal law enforcement conduct in order to effectuate public safety. That type of analysis would in fact fly in the face of the Forth Amendment and the Fifth Amendment of the United States Constitution and would clearly violate Section 316.1932, Florida Statutes. Contrary to the Petitioner's position, rejecting the Second District Court's holding in McLaughlin v. Department of Highway Safety and Motor Vehicles, 2 So.3d 988 (Fla.2d DCA 2008) and approving the decision issued in Hernandez as well as this Court's previous rejections of Certiorari in Pelham, such would not override the clear Legislative intent, in that Section 316.1932, Florida Statutes, was never amended and a driver is still only subject to the Implied Consent Law based a lawful arrest. This Court would not be Legislating in contravention of what the Florida Legislature has enacted, it would rather be interpreting the Statutes in an effort to place them in a position to be constitutional in interpretation. As a result, this Court should approve the decision in Hernandez and reverse the decision in McLaughlin.

## CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to reverse the Second District Court of Appeal's decision in McLaughlin and affirm the First District Court of Appeal's decision in Hernandez.

Respectfully submitted,

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**/xc**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to Heather Rose Cramer, Department of Highway Safety and Motor Vehicles, P.O. Box 540609, Lake Worth, Florida 33454 and Douglas Sunshine, Department of Highway Safety and Motor Vehicles 2900 Apalachee Parkway, A-432, Tallahassee, Florida, 32399-0504 by Regular U.S. Mail and/or Hand Delivery on this \_\_\_\_\_ day of May, 2009.

\_\_\_\_\_  
TONY C. DODDS, ESQUIRE

**I HEREBY CERTIFY** that the font size used in the Respondent's Answer Brief on the Merits is Times New Roman 14 point.

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TONY C. DODDS, ESQUIRE