

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 VEHICLES

vs. WILLIAM HERNANDEZ

FLORIDA DEPARTMENT OF
HIGHWAY SAFETY AND
MOTOR VEHICLES

vs. GEORGE F. MCLAUGHLIN

Petitioner(s)

Respondent(s)

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBIN F. LOTANE
General Counsel

HEATHER ROSE CRAMER
Fla. Bar No.0901600
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
P.O. BOX 540609
Lake Worth, FL 33454
Telephone: (561) 357-4169
heathercramer@flhsmv.gov

DOUGLAS DEREK SUNSHINE
Fla. Bar No. 935263
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway, A-432
Tallahassee, FL 32399-0504
Telephone: (850) 617-3101
dougsunshine@flhsmv.gov

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii-iv
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1-3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5-15
CONCLUSION	16
CERTIFICATE OF SERVICE AND FONT SIZE	17

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE NO.</u>
<u>Alford v. Finch</u> , 155 So.2d 790 (Fla. 1963)	13
<u>Am. Home Assurance Co. v. Plaza Materials Corp.</u> , 908 So.2d 360, 376 (Fla. 2005)	13
<u>City of Orlando v. Central Florida Police Benevolent Association</u> , 595 So.2d 1087, 1089 (Fla. 5th DCA 1991)	14
<u>Cohen v. School Board of Dade County, Florida</u> , 450 So.2d 1238, 1240 (Fla. 3d DCA 1984)	11
<u>Conahan v. Department of Highway Safety and Motor Vehicles</u> , 619 So.2d 988 (Fla. 5th DCA 1993)	8
<u>Daniels v. State</u> , 587 So.2d 460 (Fla. 1991)	11
<u>Department of Highway Safety and Motor Vehicles v. Pelham</u> , 979 So.2d 304 (Fla. 5th DCA 2008)	2,3,7,8,13,14
<u>Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association, Inc.</u> , 612 So.2d 646, 654 (Fla. 1st DCA 1993)	14
<u>Gulfstream Park Racing Ass'n v. Tampa Bay Downs</u> , 948 So.2d 599 (Fla. 2006)	13
<u>Hernandez v. Department of Highway Safety and Motor Vehicles</u> , 995 So.2d 1077 (Fla. 1st DCA 2008)	3,7,8,14,15,16
<u>Hernandez v. Department of Highway Safety and Motor Vehicles</u> , Case No.: 2007-CA-10621 (Fla. 4 th Cir. Ct. Jan. 29, 2008)	3
<u>Hess v. Walton</u> , 898 So.2d 1046, 1049 (Fla. 2nd DCA 2005)	7
<u>Ivey v. Chicago Ins. Co.</u> , 410 So.2d 494, 497 (Fla. 1982)	12

<u>Lowry v. Parole and Probation Commission,</u> 473 So.2d 1248, 1249 (Fla. 1985)	13
<u>McLaughlin v. Department of Highway Safety and Motor Vehicles,</u> 2 So.3d 988 (Fla. 2d DCA 2008)	2,3,7,15,16
<u>McLaughlin v. Department of Highway Safety and Motor Vehicles,</u> Case No.: 2007CA-001672 Order Denying Petition for Writ of Certiorari (Fla. 10 th Cir. Ct. Sept. 18, 2007)	1
<u>Magaw v. State,</u> 537 So.2d 564 (Fla. 1989)	13
<u>Massey v. David,</u> 979 So.2d 931 (Fla. 2008)	12
<u>Mays v. State,</u> 717 So.2d 515 (Fla. 1998)	13
<u>Public Employees Relations Commission v. Dade County Police</u> <u>Benevolent Association,</u> 467 So.2d 987 (Fla. 1985)	11
<u>Roberson v. Fla. Parole & Probation Comm'n,</u> 444 So.2d 917 (Fla. 1983)	13
<u>Smith v. City of Gainesville,</u> 93 So.2d 105 (1953)	9
<u>St. Petersburg Bank & Trust Co. v. Hamm,</u> 414 So.2d 1071, 1073 (Fla. 1982)	13
<u>State v. Goode,</u> 830 So.2d 817 (Fla. 2002)	13
<u>State of Florida, Department of Highway Safety and</u> <u>Motor Vehicles v. Killen,</u> 667 So.2d 433(Fla. 4th DCA 1996)	11,14
<u>State of Florida, Department of Highway Safety and Motor</u> <u>Vehicles v. Bender,</u> 497 So.2d 1332 (Fla. 2d DCA 1986)	10,11
<u>State of Florida, Department of Highway Safety and Motor Vehicles</u> <u>v. Robert G. Abbey, Jr.,</u> 745 So.2d 1024, 1025 (Fla. 2d DCA 1999)	10
<u>State v. Dunmann,</u> 427 So.2d 166 (Fla. 1983)	11

<u>State, Dept. of Highway Safety and Motor Vehicles v. Grapski,</u> 696 So.2d 950 (Fla. 4th DCA 1997)	11
<u>Sun Bank/South Florida, N.A. v. Baker,</u> 632 So.2d 669, 671 (Fla. 4th DCA 1994)	13
<u>The Shelby Mutual Insurance Company of Shelby Ohio v. Smith,</u> 556 So.2d 393, 397 (Fla. 1990)	13
<u>Thompson v. Department of Highway Safety & Motor Vehicles,</u> 692 So.2d 272 (Fla. 5th DCA 1997)	10
<u>Thornhill v. Kirkman,</u> 62 So.2d 740 (Fla. 1953)	8, 9
<u>Tropical Coach Line, Inc. v. Carter,</u> 121 So.2d 779, 781 (Fla. 1960)	12
<u>White v. State,</u> 714 So.2d 440, 443 (Fla. 1998)	12
<u>Zarsky v. State,</u> 300 So.2d 261 (Fla. 1974)	9

FLORIDA STATUTES

Section 316.193, Florida Statutes	5, 6, 12, 13
Section 316.1932, Florida Statutes	2, 3, 4, 6, 7, 14, 15
Section 322.2615, Florida Statutes	2, 3, 4, 5, 6, 7, 8, 12, 14, 15
Section 322.263(1), Florida Statutes	9, 10
Section 322.42, Florida Statutes	10
Chapter 322, Florida Statutes	10, 11
Chapter 2006-290, § 45, Laws of Florida,	5, 6, 8

PRELIMINARY STATEMENT

In this brief, Petitioner, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the “Petitioner” or “Department.” Respondents, William Hernandez and George McLaughlin, will be referred to as “Respondents” or individually as “Hernandez” or “McLaughlin.” References to Petitioner’s Appendix, attached to the Initial Brief on the Merits, will be referred to as “A. ___” followed by the appropriate exhibit number.

STATEMENT OF THE CASE AND FACTS

Following Respondents’ arrests for driving under the influence, they requested formal administrative reviews of their license suspensions pursuant to section 322.2615(1)(b)3., Florida Statutes. After evidentiary hearings, the hearing officers determined by a preponderance of the evidence that sufficient cause existed to sustain Respondents’ suspensions. Respondents filed Petitions for Writ of Certiorari with their respective circuit courts challenging the Department’s Final Orders of License Suspension. On September 18, 2007, the Tenth Judicial Circuit Court rendered an Order Denying Petition for Writ of Certiorari, which upheld the Department’s administrative suspension of McLaughlin’s driver’s license. McLaughlin v. Department of Highway Safety and Motor Vehicles, Case No.: 2007CA-001672 Order Denying Petition for Writ of Certiorari (Fla. 10th Cir. Ct. Sept. 18, 2007) (A.1). In rejecting McLaughlin’s argument regarding the

lawfulness of the stop and arrest, the circuit court certified the following question as one of great public importance:

DOES THE REQUIREMENT OF A LAWFUL ARREST PURSUANT TO THE IMPLIED CONSENT LAW OF §316.1932, APPLY TO DRIVER'S LICENSE SUSPENSION PROCEEDINGS CONDUCTED UNDER §322.2615, FLORIDA STATUTES?

McLaughlin sought certiorari review before the Second District Court of Appeal of the circuit court's Order Denying Petition for Writ of Certiorari. On November 14, 2008, the Second District issued an Order that affirmed the Department's interpretation of the amendment to section 322.2615, Florida Statutes, holding that the hearing officer's scope of review is limited to those issues enumerated in section 322.2615(7) and the lawful arrest requirement in section 316.1932 is not to be read *in pari materia* with the provisions in section 322.2615 because the provisions of section 322.2615 are clear on their face. McLaughlin v. Department of Highway Safety and Motor Vehicles, 2 So.3d 988 (Fla. 2d DCA 2008) (A.2). In reaching its conclusion, the Second District rejected the holding of the Fifth District Court of Appeal in Department of Highway Safety and Motor Vehicles v. Pelham, 979 So.2d 304 (Fla. 5th DCA 2008), review denied, 984 So.2d 519 (Fla. 2008), which found to the contrary that the lawful arrest issue remains in the hearing officer's scope of review because the provisions of section 322.2615 must be read *in pari materia* with the lawful arrest

requirement in section 316.1932. The Second District in McLaughlin, also certified a conflict with Pelham.

On January 29, 2008, the Fourth Judicial Circuit Court rendered its Opinion denying Hernandez's Petition for Writ of Certiorari, which upheld the Department's administrative suspension of Hernandez's driver's license. Hernandez v. Department of Highway Safety and Motor Vehicles, Case No.: 2007-CA-10621 (Fla. 4th Cir. Ct. Jan. 29, 2008) (A.3). On March 25, 2008, Hernandez filed a Petition for Writ of Certiorari to the First District Court of Appeal. Subsequent to the Second District's holding in McLaughlin, the First District, on November 21, 2008, filed its Opinion in Hernandez v. Department of Highway Safety and Motor Vehicles, 995 So.2d 1077 (Fla. 1st DCA 2008) (A.4). The First District aligned itself with the Fifth District's holding in Pelham and certified the following questions as matters 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?

On March 19, 2009, this Court accepted jurisdiction to review the conflict and certified questions. The Department is now filing its Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal correctly 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 to create an ambiguity that does not exist because the plain language of section 322.2615 limits the hearing officer's scope of review to the three issues enumerated in the statute.

ARGUMENT

THE PROVISIONS OF SECTION 322.2615 ARE SUFFICIENTLY CLEAR ON THEIR FACE SUCH THAT SECTION 322.2615 CANNOT BE READ *IN PARI MATERIA* WITH SECTION 316.1932 TO CREATE AN AMBIGUITY THAT DOES NOT EXIST.

Prior to October 1, 2006, the hearing officer's scope of review at a formal review conducted pursuant to section 322.2615, Florida Statutes, required a determination that the driver was placed under lawful arrest for a violation of section 316.193. § 322.2615(7), Fla. Stat. (2005). However, section 322.2615(7), Florida Statutes (2006), as amended by Chapter 2006-290, § 45, Laws of Florida, effective October 1, 2006, states the following with regard to hearings held pursuant to section 322.2615, Florida Statutes:¹

(7) In a formal review hearing under subsection (6) or an informal review hearing under subsection (4), the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to the following issues:

* * *

(b) If the license was suspended for refusal to submit to a breath, blood, or urine test:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was

¹ The statute was amended to remove the lawful arrest requirement from the scope of review as it relates to suspensions for both driving with an unlawful blood alcohol level and refusal. §§322.2615(7)(a) and (b), Fla. Stat.

suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.

2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months. (Emphasis supplied).

In addition, Chapter 2006-290, §45, Laws of Florida, amended section 322.2615 to remove references to arrest, as well as removing the references to sections 316.193 and 316.1932, Florida Statutes, throughout.

Thus, the legislature has expressly stated that the issues before the hearing officer shall be limited to the three issues set out above and specifically removed the consideration of the lawfulness of the arrest from the scope of review of the hearing officer. By the plain wording of the statute, the lawfulness of the arrest is not to be considered by the hearing officer.

Despite this clear legislative intent to remove the arrest as an issue in the formal review hearing and to remove references to section 316.1932, Florida Statutes, throughout the statute, both the First and Fifth District Courts of Appeal have incorrectly reinserted the lawful arrest requirement back into the hearing officer's scope of review by holding that section 316.1932, Florida Statutes, which

references both a lawful arrest and section 322.2615, Florida Statutes, must be read *in pari materia*. Hernandez v. Department of Highway Safety and Motor Vehicles, 995 So.2d 1077 (Fla. 1st DCA 2008); Department of Highway Safety and Motor Vehicles v. Pelham, 979 So.2d 304 (Fla. 5th DCA 2008), review denied 984 So.2d 519 (Fla. 2008). In doing so, the First and Fifth District Courts of Appeal have ignored the clear legislative intent to remove the arrest as an issue in the formal review hearing and to remove references to section 316.1932, Florida Statutes, throughout the statute.

In Pelham, the court stated, “[w]e remain mindful of our obligation to effectuate legislative intent when we are given clear indication of what is intended. If the legislature intends to authorize DHSMV to suspend a driver’s license for refusal to take a test, without regard to the validity of the police action preceding the request, then it should say so expressly.” Pelham, 979 So.2d at 308. As the Court in McLaughlin properly held, in fact, the Legislature has clearly established its intent to remove the lawfulness of the arrest issue from Florida’s administrative license suspension hearings. The language of section 322.2615 is not ambiguous; it permits the hearing officer to address only those three issues enumerated in the statute to the exclusion of all other issues, including the lawfulness of the arrest. McLaughlin, 2 So.2d at 992 (citing Hess v. Walton, 898 So.2d 1046, 1049 (Fla. 2^d DCA 2005) (explaining that a statute is ‘ambiguous’ when its language may permit

two or more outcomes). Section 322.2615 is sufficiently certain on its face that courts have no justifiable basis to invoke the rules of statutory construction. Nevertheless, the district courts in Hernandez and Pelham have incorrectly applied the rules of statutory construction to create an ambiguity that simply does not exist.

In Conahan v. Department of Highway Safety and Motor Vehicles, 619 So.2d 988 (Fla. 5th DCA 1993), the Court held that the suspension procedures in section 322.2615 make it clear that the interest in a driver license is a privilege and that the risk of an erroneous deprivation is slight in light of the statutory requirements and that the public interest in highway safety is great. Section 322.2615(7)(b), Florida Statutes (2006), as amended by chapter 2006-290, § 45, Laws of Florida, eff. Oct. 1, 2006, authorizes the Department's actions in this case.

It is evident that the Legislature has a compelling interest in providing maximum safety for all persons who use Florida's public roadways. The State of Florida's interest was eloquently recognized by this Court in Thornhill v. Kirkman, 62 So.2d 740 (Fla. 1953):

We think there is ample warrant for the legislature to treat a driver's license as privilege, subject to suspension or revocation for cause. The owner of such a license holds it subject to reasonable regulation. His interest in the highway is common to that of every other user for whom the highways are constructed and there must be reasonable regulations to require or guide him in the use of them subject to the privilege of every other citizen to use them for the same purpose. If he cannot demean himself as a careful user, considerate of the right of

others to do likewise, he becomes a public nuisance and should be excluded temporarily or permanently from their use. In this holding we do not overlook the right and liberty of appellant to use the highways as guaranteed by the Bill of Rights. At the same time none of these liberties are absolutes but all may be regulated in the public interest. It would produce an intolerable situation on the public highways to subscribe to a theory that they could not be summarily regulated in the interest of the public. So long as summary regulations are reasonable and reasonably executed we will not disturb them.

Id. at 742. See also, Smith v. City of Gainesville, 93 So.2d 105, 106 (1953), (“[W]e aligned ourselves with those authorities which hold that a driver's license is a privilege, subject to proper regulations. It does not endow the holder thereof with an absolute property right in the use of the public highway.”) citing Thornhill v. Kirkman, 62 So.2d 740 (Fla. 1953). The Legislature can exercise its police powers to protect the users of Florida’s roadways. Zarsky v. State, 300 So.2d 261 (Fla. 1974). Here, the Legislature has utilized its powers to regulate public safety by restricting the scope of the hearing officer in an administrative hearing to solely those issues in the statute.

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. (2008). State of Florida, Department of Highway Safety and Motor Vehicles v. Robert G. Abbey, Jr., 745 So.2d 1024, 1025 (Fla. 2d DCA 1999); Thompson v. Department of Highway Safety & Motor Vehicles, 692 So.2d 272 (Fla. 5th DCA 1997). Further, section 322.42, Florida Statutes, 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.

State of Florida, Department of Highway Safety and Motor Vehicles v. Bender, 497 So.2d 1332 (Fla. 2d DCA 1986). 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.

It is the duty of the courts and the department to follow the provisions of Chapter 322. State, Dept. of Highway Safety and Motor Vehicles v. Grapski, 696 So.2d 950 (Fla. 4th DCA 1997), citing State of Florida, Department of Highway Safety and Motor Vehicles v. Bender, 497 So.2d 1332, 1334 (Fla. 2d DCA 1986). The Department's interpretation of section 322.2615 is entitled to great weight and persuasive force by this Court. See Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985)("[R]eviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence."); Cohen v. School Board of Dade County, Florida, 450 So.2d 1238, 1240 (Fla. 3d DCA 1984)("[T]he construction of a statute or regulation by the administrative agency charged with its enforcement and interpretation is entitled to great weight and persuasive force, and the courts will not depart from that interpretation unless it is clearly erroneous."). Moreover, the last expression of the legislature will prevail in cases of conflicting statutes. State of Florida, Department of Highway Safety and Motor Vehicles v. Killen, 667 So.2d 433, 435 (Fla. 4th DCA 1996), citing State v. Dunmann, 427 So.2d 166 (Fla. 1983), *receded from on other grounds*, Daniels v. State, 587 So.2d 460 (Fla. 1991).

In making a judicial effort to ascertain the legislative intent implicit in a statute, the courts are bound by the plain and definite language of the statute and

are not authorized to engage in speculation. If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended. Tropical Coach Line, Inc. v. Carter, 121 So.2d 779, 781 (Fla. 1960). However, even if the statute were ambiguous, staff analysis for the bill that amended section 322.2615(7) in 2006 (House Bill 7079) states that the legislative intent was to “...negate the need for DHSMV to show during the administrative review of a driver license suspension that a lawful arrest for a violation of § 316.193, F. S. occurred in order to suspend the driver’s license.” House of Representatives Staff Analysis, HB 7079 CS, P.25. (April 26, 2006) available online at (<http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h7079e.SIC.doc&DocumentType=Analysis&BillNumber=7079&Session=2006>).

(A.5).

This Court recently reiterated the importance of legislative staff analyses in the judicial determination of legislative intent in its recent decision in Massey v. David, 979 So.2d 931 (Fla. 2008) wherein this Court specifically stated that “this history is an ‘invaluable tool’ in construing the provisions of a statute.” Citing Ivey v. Chicago Ins. Co., 410 So.2d 494, 497 (Fla. 1982); see also White v. State, 714 So. 2d 440, 443 n.5 (Fla. 1998) (noting that legislative staff analyses are “one

touchstone of the collective legislative will” (quoting Sun Bank/South Florida, N.A. v. Baker, 632 So.2d 669, 671 (Fla. 4th DCA 1994)). Consistent with this most recent enunciated precedent, this Court acknowledged that it has utilized legislative history on numerous occasions in attempting to discern the intent of the Legislature, citing Gulfstream Park Racing Ass’n v. Tampa Bay Downs, 948 So.2d 599 (Fla. 2006); State v. Goode, 830 So.2d 817 (Fla. 2002); Mays v. State, 717 So.2d 515 (Fla. 1998); Magaw v. State, 537 So.2d 564 (Fla. 1989); Roberson v. Fla. Parole & Probation Comm’n, 444 So.2d 917 (Fla. 1983); Alford v. Finch, 155 So.2d 790 (Fla. 1963). The majority of this Court accordingly found Justice Cantero’s dissenting view contrary to longstanding Florida jurisprudence.²

It is a fundamental rule of statutory construction that legislative intent is the polestar of judicial construction, and that courts must honor legislative intent. The Shelby Mutual Insurance Company of Shelby Ohio v. Smith, 556 So.2d 393, 397 (Fla. 1990); Lowry v. Parole And Probation Commission, 473 So.2d 1248, 1249 (Fla. 1985); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla.

² Justice Cantero’s dissenting view espoused, much like the Fifth DCA in Pelham, that “[t]o the extent the majority relies on a legislative staff analysis to conclude otherwise, I submit, as I have before, that such analyses, written by unelected staff members, “add nothing to an investigation of legislative intent.” Citing Am. Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360, 376 (Fla. 2005) (Cantero, J., concurring in part and dissenting in part)); Gulfstream Park Racing Ass’n v. Tampa Bay Downs, Inc., 948 So.2d 599, 609 (Fla. 2006) (Cantero, J., specially concurring) (same).

1982); Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association, Inc., 612 So.2d 646, 654 (Fla. 1st DCA 1993); City of Orlando v. Central Florida Police Benevolent Association, 595 So.2d 1087, 1089 (Fla. 5th DCA 1991).

The Legislature must be presumed to be aware of the provisions of section 316.1932 when it amended section 322.2615. Killen, *supra*, 667 So.2d at 436. The Hernandez and Pelham opinions would render the Legislature's removal of the lawfulness of the arrest requirement a meaningless nullity. If the lawfulness of the arrest was addressed in a specific question under the scope of review of sections 322.2615(7)(a) and (b), the removal of that question from the scope of review also removes the need to address the issue from that statute. If not, there would be no purpose behind the legislature removing this language and still requiring the hearing officer to examine the lawfulness of the arrest.

Florida's substantial interest in highway safety is greatly promoted by section 322.2615. By amending section 322.2615, the Legislature clearly intended to divorce the administrative hearing from the strictures of the criminal trial for DUI, not just by removing the arrest as an issue in the hearing, but also by removing the references to sections 316.193 and 316.1932. In the criminal arena, a refusal is still of no legal significance without a lawful arrest. §316.1932(1)(a)1.a., Fla. Stat. (2008). However, the Legislature has expressly stated that at an

administrative formal review conducted pursuant to section 322.2615, the arrest is not to be considered by the hearing officer. To reject the Second District Court's holding in McLaughlin and answer the First District's first certified question in Hernandez in the negative would override clear legislative intent and frustrate the legislature's objective to remove drunk drivers from Florida's roadways. This Court would be legislating in contravention of what the Florida Legislature has specifically and expressly intended by amending section 322.2615 to eliminate the lawfulness of the arrest from the hearing officer's scope of review.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court affirm the Second District Court of Appeal's decision in McLaughlin and answer the First District Court of Appeal's first certified question in Hernandez in the affirmative and consequently find the second certified question to be moot.

Respectfully submitted,

ROBIN F. LOTANE
General Counsel

HEATHER ROSE CRAMER
Fla. Bar No.0901600
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
P.O. Box 540609
Lake Worth, Florida 33454
Telephone: (561) 357-4169
heathercramer@flhsmv.gov

DOUGLAS DEREK SUNSHINE
Fla. Bar No.935263
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway, A-432
Tallahassee, Florida 32399-0504
Telephone: (850) 617-3101
dougsunshine@flhsmv.gov

CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits has been mailed by United States mail to Tony C. Dodds, Esquire, 1628 S. Florida Avenue, Lakeland, Florida, 33803 and Susan Z. Cohen, Esquire, 233 East Bay Street, Suite 1125, Jacksonville, Florida 32202, on this ____ day of April, 2009.

I HEREBY CERTIFY that the font size used in the Department's Initial Brief is Times New Roman 14 point.

HEATHER ROSE CRAMER
Assistant General Counsel

DOUGLAS DEREK SUNSHINE
Assistant General Counsel