IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1533
DCA Case No. 2D08-1047

SUSAN NADER,

Appellant,

v.

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

Appellee.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this Amended Answer Brief, Respondent/Appellee, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department." Petitioner/Appellant, Susan Nader, will be referred to as the "Appellant." The Department has attached an appendix hereto pursuant to Rule 9.220, Florida Rules of Appellate Procedure. Appellant's Appendix exhibits will be referred to as "P.A.___." The Department's Appendix exhibits will be referred to as "R.A._____" and documentary evidence submitted at the administrative review hearing below will be referred to as "DDL-___."

ISSUES PRESENTED ON APPEAL

CERTIFIED QUESTION I.

DOES A LAW ENFORCEMENT OFFICER'S REQUEST THAT A DRIVER SUBMIT TO A BREATH, BLOOD, OR URINE TEST, UNDER CIRCUMSTANCES IN WHICH THE BREATH ALCOHOL TEST IS THE ONLY REQUIRED TEST, VIOLATE THE IMPLIED CONSENT PROVISIONS OF SECTION 316.1932(1)(A)(1)(A) SUCH THAT THE DEPARTMENT MAY NOT SUSPEND THE DRIVER'S LICENSE FOR REFUSING TO TAKE ANY TEST?

CERTIFIED QUESTION II.

MAY A DISTRICT COURT GRANT COMMON LAW CERTIORARI RELIEF FROM A CIRCUIT COURT'S OPINION REVIEWING AN ADMINISTRATIVE ORDER WHEN THE CIRCUIT COURT APPLIED PRECEDENT FROM ANOTHER DISTRICT COURT BUT THE REVIEWING DISTRICT COURT CONCLUDES THAT THE PRECEDENT MISINTERPRETS CLEARLY ESTABLISHED STATUTORY LAW?

STATEMENT OF THE CASE AND FACTS

On August 26, 2007, Officer Baker of the Tampa Police Department observed Appellant's vehicle remain stationary at an intersection through a couple of light cycles. (DDL-3). Upon making contact with Appellant, Officer Baker noted the odor of an alcoholic beverage on her breath; bloodshot, glassy eyes; and slurred, thick-tongued speech. (DDL-3). Appellant was unsteady on her feet and she was unsure of her location. (DDL-3). Shortly thereafter, at 1:29 a.m., Officer Wilson of the Tampa Police Department's DUI unit came into contact with Appellant as a result of the traffic stop conducted by Officer Baker. (DDL-3). Officer Wilson observed the same indicia of impairment as observed by Officer Baker. (DDL-4). Appellant thereafter attempted to perform Field Sobriety Exercises, but could not complete them. (DDL-4). Due to her level of impairment, Appellant was unable to follow simple instructions. (DDL-4).

Officer Wilson then arrested Appellant for DUI and transported her to central breath testing also known as "cbt." (DDL-4). Officer Wilson's report indicates, "At cbt she refused to take a breath test." (DDL-4). Officer Wilson then completed a refusal affidavit pursuant to section 322.2615(2), Florida Statutes, indicating he had requested, but Appellant had refused, "to submit to a breath, urine, or blood test to determine the content of alcohol in his or her blood or breath or the presence of chemical or controlled substances therein." (DDL-3).

There exists no evidence whatsoever that Appellant was asked to submit to urine or blood testing, in addition to breath testing. The record simply reflects that Appellant was taken to central breath testing where she refused a **breath** test. (DDL-4).

Appellant's driving privilege was suspended for refusing to submit to a **breath** test after having been read the implied consent warning. Appellant thereafter requested an administrative formal review hearing, but did not present any evidence whatsoever for the hearing officer's consideration. The suspension of Appellant's license was sustained by Hearing Officer April Bynum by order dated December 7, 2007.

The Appellant appealed the hearing officer's decision to the Thirteenth Circuit Court's appellate division by petition for writ of certiorari. On February 6, 2008, the circuit court reluctantly granted the Appellant's petition because it felt bound by Department of Highway Safety and Motor Vehicles v. Clark, 974 So. 2d 416 (Fla. 4th DCA 2007).

The Department then appealed the circuit court's decision by petition for writ of certiorari to the Second District Court of Appeal. The Second District Court reversed the circuit court's decision on February 20, 2009, and found that even if Appellant had been asked to submit to a "breath, blood, or urine" test, such request was in compliance with Florida's implied consent law. Appellant now

contests the decision of the Second District Court of Appeal, which conflicts with the Fourth District Court's opinion in Department of Highway Safety and Motor Vehicles v. Clark, 974 So. 2d 416 (Fla. 4th DCA 2007).

STANDARD OF REVIEW

It has long been established that a party asserting a law is unconstitutional has the burden of clearly demonstrating, beyond a reasonable doubt, that the law is invalid. See Lasky v. State Farm Insurance Co., 296 So. 2d 9, 15 (Fla. 1974). It is axiomatic that all doubts as to constitutionality are to be resolved in favor of the statute. See State v. Yocum, 186 So. 448, 451 (Fla. 1939). Indeed, the Florida Supreme Court has summarized these policies as follows:

> . . . we are aware of the strong presumption in favor of the constitutionality of statutes. It is well established that all doubt will be resolved in favor of the constitutionality of a statute. . . . and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. . . . (emphasis added) (citations omitted).

State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981); See also, State v. Burch, 545 So. 2d 279, 280 (Fla. 4th DCA 1989), approved, 558 So. 2d 1, 3 (Fla. 1990). Stated otherwise, "The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature unless it can be said that it positively and certainly is opposed to the Constitution. This is elementary." Greater Loretta Imp. Ass'n v. State ex rel Boone, 234 So. 2d 665, 671 (Fla. 1970).

Additionally, where the challenge is a facial challenge, as this one appears to be a plenary attack on the statutory scheme of sections 316.193 and 322.2615, Florida Statutes, the burden is even more difficult:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. (emphasis added).

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987). This standard has been applied in Florida, as well. See State v. De La Llana, 693 So. 2d 1075, 1078 (Fla. 2d DCA 1997); State v. Efthemiadis, 690 So. 2d 1320, 1322 (Fla. 4th DCA 1997).

According to the Florida Supreme Court, appellate courts are obligated, if it is reasonably possible, to interpret statutes in such a manner so as to uphold their constitutionality. Capital City Country Club v. Tucker, 613 So. 2d 448, 452 (Fla. 1993). Furthermore, even if a portion of a statute is found to be unconstitutional, providing the statute is reasonably severable, the rest of the statute concerned should not be invalidated. See, e.g., Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990); State v. Lee, 356 So. 2d 276, 283 (Fla. 1978). Indeed, "[i]t is the duty of the Court to give effect to those provisions which are constitutional." State v. Tirohn, 556 So. 2d 447, 449 (Fla. 5th DCA 1990). This is true whether or not the statute contains a severability clause. See Id.

SUMMARY OF ARGUMENT

Under her signature, Appellant's driver's license (as do all Florida drivers' licenses) states as follows, "Operation of a motor vehicle constitutes consent to any sobriety test required by law." (DDL-2). Because Appellant withdrew her consent at the time of her DUI arrest and refused a **breath** test, her license was suspended pursuant to section 322.2615, Florida Statutes. (DDL-1).

At the Appellant's administrative review hearing, Hearing Officer April Bynum considered the refusal affidavit (DDL-6) which had been submitted by law enforcement pursuant to section 322.2615(2), Florida Statutes, indicating Appellant had been advised that she needed to submit to a "breath, blood, or urine" test, but refused. Appellant presented no evidence whatsoever. Instead, Appellant merely argued that the reference to "urine" and "blood" in the refusal affidavit had somehow confused or coerced her into refusing a breath test at "cbt" also known as "central breath testing." (DDL-4). The hearing officer considered the evidence presented as well as argument of counsel and sustained the suspension of Appellant's driver's license.

Appellant appealed the hearing officer's decision to the Thirteenth Judicial Circuit's appellate division by petition for writ of certiorari. Although Appellant presented no evidence whatsoever of any confusion or coercion before the hearing officer and there was no evidence that she was actually asked to participate in

blood or urine testing in addition to breath testing, the circuit court granted her petition for writ of certiorari solely because it felt bound by Department of Highway Safety and Motor Vehicles v. Clark, 974 So. 2d 416 (Fla. 4th DCA 2007).

In Clark, the Fourth District found that the driver **may** have been confused by a form indicating that she must submit to a "breath and/or urine and/or blood" test or suffer the statutory consequences of refusal. As a result, the Fourth District quashed the driver's license suspension for refusing to submit to a breath test. The Department appealed to the Second District Court and requested second-tier review by petition for writ of certiorari, arguing that the mere presence of the words "urine" and "blood" in the implied consent warning does not constitute an illegal demand for urine or blood testing. When a driver is given the option of urine or blood testing in addition to breath testing, no illegal demand for urine or blood testing has occurred.

The Second District Court of Appeal completely disagreed with the Fourth District's opinion in Clark and correctly found that even if Appellant was told she must submit to a "breath, blood or urine" test, such did not constitute a misstatement of the implied consent law. The only difference between Clark and the instant case is that the Clark court felt the driver may have been confused by the implied consent warning, which is statutorily mandated; while in the case *sub*

judice, the Thirteenth Judicial Circuit found, "no indication that [Appellant] felt that she was also obligated to take either or both of the other two tests." The facts are the same but the conclusions reached are different.

Although the Thirteenth Circuit Court felt bound by Clark, the Second District Court was not bound by the erroneous decision of its sister court and was free to render a decision in compliance with clearly established statutory law. The Clark court penalizes law enforcement for following section 322.2615(2), Florida Statutes, *verbatim*. The Second District Court would have been remiss to deny certiorari and allow the precedent set by the Fourth District Court in Clark to remain controlling law, binding on all circuit courts in the state, despite its clear misinterpretation of Florida's statutory law.

The standard of review for a district court of appeal reviewing a decision of a circuit court in its appellate capacity is whether the circuit court violated a clearly established principle of law resulting in a miscarriage of justice. Combs v. State, 436 So. 2d 93, 96 (Fla. 1983). The district courts' "second-tier" review is similar to common law certiorari review. Fla. Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000). In determining whether the lower court violated an established principle of law, the district court may consider, among other things, recent controlling case law, rules of court, statutes, and constitutional law. See Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003).

The Department herein argues that the decision of the Second District Court should be affirmed and the Fourth District's decision in Clark should be disapproved. Appellant has failed to demonstrate any error in the Second District's opinion upholding the decision of the hearing officer below. This Honorable Court should affirm and clarify any conflict in favor of the Second District's interpretation and application of sections 316.1932 and 322.2615, Florida Statutes.

ARGUMENT

I. A LAW ENFORCEMENT OFFICER'S REQUEST THAT A DRIVER SUBMIT TO A BREATH, BLOOD, OR URINE TEST, UNDER CIRCUMSTANCES IN WHICH THE BREATH ALCOHOL TEST IS THE ONLY REQUIRED TEST, DOES NOT VIOLATE THE IMPLIED CONSENT LAW OF SECTION 316.1932(1)(A)(1)(A) NOR RENDER THE DRIVER'S LICENSE SUSPENSION FOR REFUSING TO TAKE A BREATH TEST INVALID.

First, no driver is ever presumed guilty by the Department from the moment he or she is arrested. When law enforcement determines that a driver should be arrested for DUI based on the indicia of impairment, the driver is thereafter requested to submit to sobriety testing. Under the signature of the driver, all Florida drivers' licenses state as follows, "Operation of a motor vehicle constitutes consent to any sobriety test required by law." (DDL-2). Because Appellant withdrew her consent at the time of her DUI arrest and refused a **breath** test, her license was suspended pursuant to section 322.2615, Florida Statutes. (DDL-1).

Appellant requested a formal review of her license suspension within ten days of her arrest. At the formal review hearing, the hearing officer admitted into evidence documentation submitted by law enforcement to support its suspension of Appellant's license. Pursuant to section 322.2615(2), law enforcement **shall** submit a copy of the notice of suspension, the driver's license of the person arrested, and a report of the arrest, including an affidavit stating the officer's grounds for belief that the person arrested was in violation of section 316.193. Section 322.2615(2), requires law enforcement to submit documentation within five days of a DUI arrest. The documentary evidence submitted to the Department by law enforcement constitutes the State's *prima facie* case against the driver.

Pursuant to Scritchfield v. DHSMV, 648 So. 2d 1246 (Fla. 2d DCA 1995) and DHSMV v. Stewart and Henry, 625 So. 2d 123 (Fla. 5th DCA 1993), the driver bears the burden of subpoenaing any and all witnesses against him and in his favor, including the arresting officer, to challenge the evidence against him. Of course, the driver is under no obligation whatsoever to provide the hearing officer with any evidence at all and may simply choose to argue the merits of the State's case.

If a formal review hearing is not requested by the driver within ten days of arrest, the Department will proceed with an informal review of the documentation submitted by law enforcement to determine whether sustaining the driver's license

suspension is justified. If the suspension is sustained, the driver must refrain from driving until he or she is eligible for a hardship license. These actions are not taken to punish the driver, but to provide for public safety.

Once arrested for DUI, a drunk driver is typically asked to take a breath test. Urine and blood testing are not typically requested of drunk drivers. If the driver refuses to submit to a breath test, he is then read the **statutorily mandated** implied consent warning advising him of the consequences of his refusal. If the drunk driver still refuses despite being fully aware of the consequences, then law enforcement prepares a refusal affidavit pursuant to section 322.2615(2), documenting the fact that the driver refused a "breath, urine or blood" test after being read the implied consent warning. The refusal affidavit is described in Perry as follows:

> The Department developed a refusal affidavit form for use by law enforcement to ensure compliance with the procedures of the implied consent statute. When properly executed, this affidavit is evidence that the implied consent warnings were given, including notice of the automatic suspension of driving privileges for one year to eighteen months for refusing to take a blood, breath or urine test, and that **the driver was requested to submit to one of those tests**, but refused to submit.

Perry at 1279 (emphasis supplied, footnote omitted).

In the typical case, the refusal affidavit is corroborated by other documentary evidence in the record. In the instant case, it is corroborated by the

DUI report (DDL-4) which indicates that the Appellant was taken to central breath testing where she refused to take a **breath** test. The DUI report was considered by the administrative hearing officer who upheld the suspension of Appellant's license for refusing a **breath** test. Notably, there exists no evidence whatsoever that any other test was requested and/or refused. Had another test been requested, Appellant could have testified to this effect, or questioned Officer Wilson about it. Instead, the State's *prima facie* case was completely unrebutted.

Appellant had the opportunity to present evidence that she was confused or somehow coerced into refusing a breath test, but chose not to do so. Appellant thus waived any prior review of these allegations and cannot now present any new evidence to this effect. Argument of counsel is not evidence. If there was any question as to the issue of coercion, this was answered below at Appellant's formal administrative review hearing where the hearing officer weighed the evidence, which was presented, and upheld Appellant's license suspension.

A. The request to submit to a lawful breath test is not negated by law enforcement offering the driver additional options not required by law.

The first question certified by the Second District Court of Appeal has been the subject of numerous circuit court cases statewide in which affidavits have been submitted by law enforcement for use in the formal administrative hearings wherein drivers have sought review of the license suspensions resulting from their

DUI arrests. These affidavits are submitted pursuant to section 322.2615(2), Florida Statutes, which provides in relevant part as follows:

> ... the law enforcement officer **shall** forward to the department, within 5 days after the date of arrest, a copy of the notice of suspension, the driver's license of the person arrested, and a report of the arrest, including an affidavit stating the officer's grounds for belief that the person arrested was in violation of section 316.193; **the results of any breath or blood test or an affidavit stating that a breath, blood or urine test was requested by a law enforcement officer or correctional officer and that the person arrested refused to submit**....
>
> (emphasis supplied).

Thus, law enforcement officers statewide are correctly following Florida's statutory law by submitting refusal affidavits stating that a **breath, blood or urine** test was requested and the person arrested refused to submit to any such test(s).

The Second District correctly found that even if Appellant was told she must submit to a "breath, blood or urine" test, such did not constitute a misstatement of the law. Appellant was not told she must submit to a breath and blood test as in Martin v. Department of Highway Safety and Motor Vehicles, 15 Fla. Law Weekly Supp. 347 (11th Cir. 2007), nor was she told that she must submit to a breath, blood and urine test, thereby indicating she must take three tests. As the Second District noted,

> "The only possible anomaly in the warnings provided to [the drivers] was the fact that instead of being asked to submit to a breath-alcohol test, the documents supporting the suspension suggest [the drivers] may have been asked to submit to a 'breath, blood, or urine' test. We cannot agree with the reasoning in Clark that this type of language in the standard report form establishes that a driver was or might have been misled into thinking that a more invasive test may be required. The use of 'or' plainly suggests the driver has a choice of one of the three tests and is free to choose the breath test if the driver prefers the least invasive method. See, e.g., Sparkman v. McClure, 498 So. 2d 892, 895 (Fla. 1986) (explaining that the use of the word 'or' is generally construed in the disjunctive and, when used in a statute or rule, normally indicates that alternatives were intended). Notably, there is no evidence in these cases that either [Nader or McIndoe] was confused, that they requested clarification, or that they asked specifically for a breath test and were denied that request."

The administration of one test does not preclude the administration of another test. See sections 316.1932(1)(a)1.a. and 316.1932(1)(a)1.b. Here, the arrest affidavit (DDL-3) indicates that Appellant had bloodshot and watery eyes, her speech was slurred and she was "thick tongued." Appellant was also unsteady on her feet, she was unsure of her location and displayed additional indicia of impairment when performing field sobriety exercises. (DDL-4). Glassy, bloodshot eyes, slurred speech, lethargy, and swaying are all indicia of impairment for a driver under the influence of a controlled substance. See Brown v. Department of Highway Safety and Motor Vehicles, 2 Fla. L. Weekly Supp. 135 (Fla. 9th Cir.

Ct., Sept. 27, 1993); Tuell v. Department of Highway Safety and Motor Vehicles, 9 Fla. L. Weekly Supp. 29 (Fla. 17th Cir. Ct., Nov. 20, 2001). Based on such indicia of impairment, both breath and urine testing may be warranted.

In Trauth and Llamas v. Department of Highway Safety and Motor Vehicles, Case Nos. 04-149AP/06-026AP (Fla. 11th Jud. Cir. Ct., October 17, 2006), the Eleventh Circuit found that "only breath and/or urine tests could have been requested pursuant to Florida law" and held that the drivers' refusals could not support their license suspensions because they had been improperly informed that they needed to consent to blood testing. In contrast, there is absolutely no evidence whatsoever that Appellant was ever told she needed to consent to a blood test. At worst, she was given the option of taking a urine or blood test rather than a breath test.

In Todd J. Wheeler v. State, Department of Highway Safety and Motor Vehicles, Case No. 07-036 AP (Fla. 11th Jud. Cir. Ct., Feb 6, 2007), the Eleventh Circuit held that, "Mr. Wheeler was asked for a breath test and supplied a breath test. No request for a blood sample was ever made. **The reading of implied consent does not automatically act as an illegal demand for a blood test where no blood test has been requested by the officer**." (Emphasis added). As in Wheeler, Appellant here argues that simply because the words "urine" and "blood" are mentioned in the implied consent warning, then there exists an illegal demand

for those tests. As in Wheeler, Appellant here also makes unfounded and unsupported assertions that a blood or urine test was requested although the record is completely devoid of any such evidence. Where no such tests were requested, the resulting suspension for refusal to submit to breath testing must be upheld. See also, Mauricio Cardenal v. Department of Highway Safety and Motor Vehicles, Case No. 06-599 AP, Fla. 11th Jud. Cir. Ct, April 27, 2007); Christine MacLeod v. Department of Highway Safety and Motor Vehicles, Case No. 09-043 AP, (Fla. 11th Jud. Cir. Ct., September 3, 2009); Christopher M. Chestnut v. Department of Highway Safety and Motor Vehicles, Case No. 09-082 AP (Fla. 11th Jud. Cir. Ct., September 3, 2009); Adam Darnaby v. Department of Highway Safety and Motor Vehicles, Case No. 09-029118 (Fla. 17th Jud. Cir. Ct., October 6, 2009).

In King v. Department of Highway Safety and Motor Vehicles, Case No.: 08-CA-11804 (Fla. 13th Cir. Ct., 2008), the Thirteenth Judicial Circuit recently rejected the identical argument made by the Appellant. While acknowledging Clark, the court held that the Petitioner failed to provide anything from the administrative hearing demonstrating that law enforcement did in fact give the Petitioner an implied consent warning requesting that he submit to a breath, blood or urine test or, if such a warning was indeed given as alleged, that the Petitioner was misled into thinking he would have to submit to a more invasive test.

The Fourth District's Clark decision penalizes law enforcement for correctly following statutory law and gives any drunk driver who **may** have been confused by the implied consent warning a free pass. Clark presumes that the general public does not understand the meaning of the word "or" and therefore, should not be given the option of taking any other test. As a result, Department of Highway Safety and Motor Vehicles v. Clark, 974 So. 2d 416 (Fla. 4th DCA 2007) is contrary to Florida law. In Perryman v. State, 242 So. 2d 762, 763 (Fla. 1st DCA 1971), the First District Court held that the task of blowing breath into a tube or similar devise for chemical testing is a simple one, "…even for a drunk…". It is likewise simple to understand the meaning of the word "or."

In the instant case, the Thirteenth Judicial Circuit specifically found, "There is no indication that [Appellant] felt that she was also obligated to take either or both of the other two tests." Nonetheless, the circuit court felt bound by Clark and reluctantly applied Clark to the instant facts although there was absolutely no evidence whatsoever of confusion or coercion in this instance. Thereafter, the Second District held that Appellant's suspension had been properly sustained by the hearing officer and found that providing the driver with additional alternative tests did **not** negate the officer's request for the required breath test. The Second District Court of Appeals completely disagreed with the Fourth District's opinion in Clark and found that, "While it was prudent, if not essential, for the circuit court

in [Nader, McIndoe] to follow the Fourth District's opinion in Clark, we conclude that decision was incorrectly decided."

Notably, in Clark, the Fourth District seems to contradict its own holding in Chu v. State, 521 So. 2d 330 (Fla. 4th DCA 1988), where the denial of a motion to suppress a blood test was affirmed because the blood test was determined to have been voluntarily provided in lieu of a breath or urine test. In Chu, the Fourth District found, "it is clear that a person arrested for DUI may volunteer or otherwise freely consent to give a sample of his/her blood for chemical testing purposes. A sample of such a person's blood may properly be withdrawn under these circumstances as well, quite apart from the implied consent statutes." Thus, the Fourth District made clear in Chu that the mere mention or request for a blood test is not, in and of itself, *per se* reversible error.

The Department would concede error if Officer Wilson had demanded a blood test of Appellant; however, such was not the case, nor was there any evidence to this effect. Similarly, the Department would concede a request for "breath, urine and blood" or "breath, blood and urine" would have been equally improper, but again, that is not what occurred in the instant matter. Unfortunately, the Fourth District's opinion in Clark opens the door for every drunk driver to claim confusion in order to avoid the consequences of refusing the lawful request for a breath test when given the option of "breath, urine or blood" testing. Clearly,

this was not the Legislature's intention when it enacted sections 316.1932 and 322.2615, Florida Statutes.

B. The refusal affidavit does not constitute evidence that Appellant was ever asked to submit to a urine or blood test, in addition to a breath test. Rather, it reflects that law enforcement properly followed statutory law by completing an affidavit indicating that a "breath, blood, or urine" test was refused.

The law is well settled that sections 316.1939(1)(d) and (e), Florida Statutes, [**Refusal to submit to testing; penalties]**, mandate penalties for drivers who refuse to submit to a chemical test of breath, blood, or urine, as described in section 316.1932, and **require** that a driver be informed of the following:

> (d) **Who was informed** that a refusal to submit to a **lawful test** of his or her **breath, urine, or blood**, if his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her **breath, urine, or blood**, is a misdemeanor; and,
>
> (e) Who, after **having been so informed**, refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer commits a misdemeanor in the first degree…
>
> (emphasis added).

Law enforcement makes no mistake whatsoever in following Florida's statutory law to the letter. Even when a driver testifies to some sort of confusion or coercion, the administrative hearing officer, as the trier of fact, must be the one

to weigh such testimony together with all the evidence and determine whether the license suspension should be sustained.

As the Second District Court of Appeal recently noted, the function of weighing evidence belongs to the hearing officer, and not the circuit court.

> But the circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supported the hearing officer's findings. State, Dep't of Highway Safety & Motor Vehicles v. Porter, 791 So. 2d 32, 35 (Fla. 2d DCA 2001). If the circuit court reweighs the evidence, it has applied an improper standard of review, which "is tantamount to departing from the essential requirements of law[.]" Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 845 (Fla. 2001); see also Dep't of Highway Safety & Motor Vehicles v. Kurdziel, 908 So. 2d 607 (Fla. 2d DCA 2005) (granting second-tier certiorari relief when circuit court improperly reweighed the evidence).

Department of Highway Safety and Motor Vehicles v. Stenmark, 941 So. 2d 1247 (Fla. 2d DCA 2006); see also Department of Highway Safety and Motor Vehicles v. Allen, 539 So. 2d 20 (Fla. 5th DCA 1989) (The law is well settled that it is the hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact).

In Department of Highway Safety and Motor Vehicles v. Marshall, 848 So. 2d 482, 486 (Fla. 5th DCA 2003), the driver testified and alleged that the officer gave her misleading information. The Fifth District did not agree.

> The only evidence that Marshall was misled was her own self-serving testimony, which the hearing officer rejected. Cf. Department of Highway Safety v. Dean, 662 So.2d 371 (Fla. 5th DCA 1995) (finder of fact is not required to believe unrebutted testimony of witness). Although Marshall had the opportunity to subpoena witnesses, she did not subpoena Officer MacDowell to confirm the statements she alleges the officer made to her.

In contrast to Marshall, here Appellant did not testify or present any evidence whatsoever. Instead, counsel for Appellant merely argued that the refusal affidavit was improper and somehow coerced her into refusing a lawful breath test.

As in the instant case, in Department of Highway Safety and Motor Vehicles v. Perry, 751 So. 2d 1277 (Fla. 5th DCA 2000), the driver was arrested for DUI and read the implied consent warning as required by section 322.2615(7)(b), Florida Statutes. The driver then refused to submit to testing. The circuit court quashed the administrative suspension of the driver's license because there was no refusal affidavit. The Fifth District reversed the circuit court's decision. Specifically, that Court held that the arrest affidavit could simply identify that implied consent warnings were given in order for the hearing officer to sustain the suspension.

> The arrest report states only generally that the implied consent warnings were given and that Perry refused to submit. It does not elucidate that Perry was fully informed of her obligations under the implied consent statute and the specific penalties. However, **the statute**

> **quoted above[1] does not require that the affidavit recount the specific information set forth in the Department's form or that the complete text of the implied consent warnings be quoted verbatim in the affidavit.** Like the Miranda warnings, the implied consent warnings are standard instructions which can be identified in an affidavit by simple reference.

Perry at 1280 (emphasis and footnote supplied).

In this case, as in Perry, Appellant was advised of Florida's Implied Consent Law as required by section 322.2615(7)(b), Florida Statutes. It is uncontested that she refused, as indicated in the refusal affidavit. (DDL-6). The refusal affidavit is described in Perry as follows:

> The Department developed a refusal affidavit form for use by law enforcement to ensure compliance with the procedures of the implied consent statute. When properly executed, this affidavit is evidence that the implied consent warnings were given, including notice of the automatic suspension of driving privileges for one year to eighteen months for refusing to take a blood, breath or urine test, and that **the driver was requested to submit to one of those tests**, but refused to submit.

Perry at 1279 (emphasis supplied, footnote omitted).

As in Department of Highway Safety and Motor Vehicles v. Possati, 866 So. 2d 737 (Fla. 3d DCA 2004), here the arrest affidavit (DDL-3) and the DUI report (DDL-4) both reflect that law enforcement had probable cause to believe Appellant was driving or in actual physical control of a motor vehicle while DUI.

[1] Section 322.2615(7)(b), Florida Statutes (1999).

The refusal affidavit (DDL-6) reflects that Appellant was properly advised by law enforcement regarding the consequences of her refusal as **required** by statutory law but nonetheless refused to submit a breath sample. The refusal affidavit used by Officer Wilson of the Tampa Police Department makes **no** misstatement of the implied consent law. It simply states what the law requires pursuant to section 322.2615(2). While the refusal affidavit does not indicate which sobriety test was requested, Officer Wilson's DUI report indicates that the Appellant refused a **breath** test. This DUI report was considered by the administrative hearing officer who upheld the suspension of Appellant's license for refusing a **breath** test. Notably, there exists no evidence whatsoever that any other test was requested and/or refused. Had another test been requested, Appellant could have testified to this effect or questioned Officer Wilson about it. Instead, the State's *prima facie* case was completely unrebutted.

Again, Appellant had the opportunity to present evidence that she was confused or somehow coerced into refusing a breath test, but chose not to do so. Appellant thus waived any prior review of these allegations and cannot now present any new evidence to this effect. Argument of counsel is not evidence. If there was any question as to the issue of coercion, this was answered below at Appellant's formal administrative review hearing where the hearing officer

weighed the evidence, which was presented, and upheld Appellant's license suspension.

Law enforcement and the public of this State should be neither punished nor penalized for law enforcement's completion of the correct, **statutorily required** affidavit indicating Appellant refused to be tested despite her previous consent. Even though the form in question has been changed so that law enforcement must check which specific test or tests were requested, defense counsel are still arguing that the mere mention of "urine" and/or "blood" on these forms is confusing to drunk drivers and constitutes a reason to invalidate their suspensions pursuant to Clark. Therefore, the effect of this case, improperly interpreting and misapplying sections 316.193 and 322.2615, Florida Statutes, is not minimal.

In its decision below, the Second District noted the limited scope of review for an administrative review hearing under section 322.2615(7)(b), as follows:

> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
> 2. Whether the person 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 was told that if he 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.

Section 322.2615(7)(b), Florida Statutes.

The Second District further noted that when these three criteria are met, section 322.2615(8)(a), provides that the Department **shall** sustain the suspension.

Laws against drunk driving must be interpreted liberally in favor of the public interest and against any private interest of the driver. Driving is not a right. It is a privilege which may be encumbered. The Fifth District Court of Appeal determined in Conahan v. Department of Highway Safety and Motor Vehicles, 619 So.2d 988 (Fla. 5th DCA 1993), that the suspension procedures in section 322.2615, Florida Statutes, make it clear that the interest in a driver's license is a privilege, 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.

The Legislature has provided the scheme by which the privilege (which the Legislature grants) to drive on the roadways of this State will be suspended if the driver cannot comport his or her actions to the terms and conditions of maintaining his or her driver's license. In some cases the privilege will be totally revoked for continued violations of the terms and conditions of the license. These actions are not taken to punish the driver, but rather to provide for the public safety. This Honorable Court specifically recognized this principle more than half a century ago in Smith v. City of Gainesville, 93 So. 2d 105 (Fla. 1957) (*en banc*).

> "It would appear to us to be utterly absurd to hold that a man should be allowed to fill his automobile tank with gasoline and his personal tank with alcohol and weave his merry way over the public highways without fear of retribution should disaster ensue, as it so often does. The millions who lawfully use the highways are entitled to protection against the potential tragedy ever lurking, inherent in this type of law breaking. It is this aspect of protecting the public, rather than as punishment for the offender, that courts have unanimously recognized as justification for revoking drivers' licenses upon conviction of certain offenses. True the recalcitrant law violator might feel the pain of the loss of a valuable privilege. However, the imposition of pain is not the objective of this law. On the contrary, its primary purpose is to relieve the public generally of the sometimes death-dealing pain recklessly produced by one who so lightly regards his licensed privilege. In re Probasco, 269 Mich. 453, 257 N.W. 861; 108 A.L.R. 1168. Also see Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393; Department of Public Safety v. Koonce, 147 Fla. 616, 3 So. 2d 331."

The Department's mission is to promote and protect the public safety. The Department takes issue with the FACDL's mischaracterization of police officers as lacking in integrity and being willing to "play all kinds of games" and "mislead drivers" because "there will be no remedies" if Nader is affirmed. The Department also takes exception to the suggestion that it might meet its burden of proof "by simply supplying an affidavit that is not a true statement of what happened." The FACDL's claims are baseless and scandalous.

An affidavit, by definition, is a true statement of what happened. In any case, the affidavit is not supplied by the Department. It is supplied by law enforcement. Section 322.2615(5), provides, "Materials submitted to the department by a law enforcement agency or correctional agency shall be considered self-authenticating and shall be in the record for consideration by the hearing officer." The constitutionality of section 322.2615, was addressed in Department of Highway Safety and Motor Vehicles v. Stewart and Henry, 625 So. 2d 123 (Fla. 5th DCA 1993), where the Fifth District upheld the constitutionality of the procedures set forth in section 322.2615, including the fact that written reports are enough to sustain the Department's burden and that the suspended driver has the burden to call all witnesses, in order to rebut the state's prima facie case. Id. at 124. This feature of the Florida statute is similar to the Massachusetts statute scrutinized and upheld by the United States Supreme Court in Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed. 2d 321 (1979).

Incidentally, law enforcement is obviously not allowed to threaten anyone with a needle in order to obtain a breath test. The law clearly defines when a blood test may be taken with or without consent. In any case, the instant matter has nothing to do with breath or blood test results. Rather, it concerns (1) the suspension of the Appellant's license for her refusal to take a breath test after the statutorily mandated reading of the implied consent warning advising her of the

consequences of refusal; and (2) the Appellant's argument that she was somehow coerced into refusing a breath test by the wording of law enforcement's statutorily required refusal affidavit.

II. A DISTRICT COURT MAY GRANT CERTIORARI RELIEF FROM A CIRCUIT COURT'S OPINION REVIEWING AN ADMINISTRATIVE ORDER WHEN THE CIRCUIT COURT APPLIED PRECEDENT FROM ANOTHER DISTRICT COURT BUT THE REVIEWING DISTRICT COURT CONCLUDES THAT THE PRECEDENT MISINTERPRETS CLEARLY ESTABLISHED STATUTORY LAW.

It is not uncommon for the Department or a driver to file a petition for writ of certiorari in the District Court requesting relief from an order of the circuit court granting or denying relief from an administrative order upholding the suspension of a driver's license. Pursuant to section 322.2615(13), Florida Statutes, a driver may appeal any decision of the Department sustaining the suspension of his or her driver's license by a petition for writ of certiorari to the circuit court. Importantly, the foregoing statute specifically states that it, "shall not be construed to provide *de novo* appeal." Section 322.2615(13), Florida Statutes. Instead, the circuit court's scope of review upon a petition for writ of certiorari is limited to determining whether the Department's actions accorded procedural due process, observed the essential requirements of law, and were supported by substantial competent evidence. See Campbell v. Vetter, 392 So.2d 6 (Fla. 4th DCA 1980), review denied, 399 So.2d 1140 (Fla. 1981).

The standard of review for a district court of appeal reviewing a decision of a circuit court in its appellate capacity is whether the circuit court violated a clearly established principle of law resulting in a miscarriage of justice. Combs v. State, 436 So. 2d 93, 96 (Fla. 1983). The district courts' "second-tier" review is similar to common law certiorari review. Fla. Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000). In determining whether the lower court violated an established principle of law, the district court may consider, among other things, recent controlling case law, rules of court, statutes, and constitutional law. See Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003).

The district courts are charged with ensuring that miscarriages of justice do not occur. See Ivey v. Allstate Ins. Co., 774 So. 2d 679, 682 (Fla. 2000); Haines City Cmty. Dev. V. Heggs, 658 So. 2d 523, 528 (Fla. 1995); Combs v. State, 436 So. 2d 93 (Fla. 1983). In order to prevent miscarriages of justice, the district courts must grant relief from circuit court opinions, which follow controlling precedent from another district court, which has misinterpreted clearly established law. No method other than a petition for writ of certiorari exists whereby a party may seek review of such a circuit court ruling.

The Second District Court noted that, "Our constitutional system of review in Florida has been built on a foundation that encourages debate among the district courts and a screening of cases so that direct conflict between the districts

on dispositive issues is usually required for the supreme court to resolve an issue." While the circuit courts may not disregard the decision of a District Court, the District Courts are not bound by the decision of a sister court and may certify conflict, as the Second District did in the instant case. If such were not the case, the district courts would be unable to prevent miscarriages of justice and violations of clearly established statutory law. Thus, the Second District Court properly concluded that a district court is authorized to grant certiorari relief from a circuit court decision following controlling precedent from another district which misinterprets the plain language of the statute.

CONCLUSION

WHEREFORE, based on the record in this case and the arguments and authorities cited above, Appellee, Department of Highway Safety and Motor Vehicles, respectfully requests this Court approve the decision of the Second District Court of Appeal below, and disapprove the decision of the Fourth District Court of Appeal in Clark.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this _____ day of February 2010, to Eilam Isaak, Esq., 306 East Tyler Street, 2nd Floor, Tampa, FL 33602, and Michael Catalano, Esq., 1531 N.W. 13th Court, Miami, FL 33125. I hereby certify that this brief is typed in Times New Roman 14-font and is in compliance with Fla. R. App. P. 9.210(a)(2) and 9.100(l).

_____

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