IN THE SUPREME COURT OF FLORIDA

SUSAN NADER,
Petitioner,

SUPREME COURT CASE No: SC09 - 1533
vs. LOWER CASE No: 2D08 - 1047

STATE OF FLORIDA, DEPARTMENT OF
HIGHWAY SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

INTIAL BRIEF ON BEHALF OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

ADMINISTRATIVE RULES

FLORIDA SUPREME COURT CASES

DISTRICT COURT CASES

CIRCUIT/COUNTY COURT CASES

STATEMENT OF THE CASE AND FACTS

The facts/record in this case were established through the submission of documentary evidence to the Department of Highway Safety and Motor Vehicles (Bureau of Administrative Reviews) by law enforcement for the purpose of an administrative hearing related to the suspension of the Respondent's driving privilege for allegedly refusing to submit to a breath, blood, or urine test. (Petitioner's Exhibit A - DDL 1- 6). No witnesses were subpoenaed to appear and testify by either party.

The submitted documents created the following record:

On August 26, 2007, Nader was observed driving by Officer Baker of The Tampa Police Department. (Petitioner's Exhibit A - DDL 4). Officer Baker conducted a traffic stop. (Petitioner's Exhibit A - DDL 4). Officer Baker came into contact with Nader and based upon his observations of Nader (which includes the detection of an odor of alcohol on Nader's breath) summoned for the assistance of a DUI investigator and officer Wilson showed up to take over the investigation. (Petitioner's Exhibit A - DDL 1- DDL 4). Officer Wilson then investigated Nader for DUI. (Petitioner's Exhibit A - DDL 4).

Officer Wilson noted an odor of alcohol on Nader's breath, and blood shot eyes. (Petitioner's Exhibit A - DDL 4). Officer Wilson requested Nader

to submit to field sobriety tests and she complied. (Petitioner's Exhibit A - DDL 4). Based upon his observations of Nader and her performance on the field sobriety tests, Officer Wilson then arrested her for DUI. (Petitioner's Exhibit A - DDL 4). Officer Wilson transported Nader to CBT (located in the Hillsborough County Jail) for testing. (Petitioner's Exhibit A - DDL 4). Nader refused testing (Petitioner's Exhibit A - DDL 6).

The record evidence makes no mention of any accidents, taking Nader to a hospital (or other medical facility) thereby making a breath test or urine test impossible/impracticable, the presence of any chemical/controlled substances in the vehicle or on Nader's person, or any admissions by Nader to ingesting any chemical/controlled substances. The record evidence all points to this case being a routine traffic stop involving only the consumption of alcohol. (Petitioner's Exhibit A - DDL 4).

Officer Wilson requested Nader submit to a breath, blood, or urine test. (Petitioner's Exhibit A - DDL 6). According to the narrative written by officer Wilson contained in the DUI report, Nader refused the breath test. (Petitioner's Exhibit A - DDL 4). The narrative by officer Wilson makes no reference to the specific implied consent warning given to Nader or the exact language used by him. (Petitioner's Exhibit A - DDL 4). The document only states " that Nader refused to take a breath test", without claiming to have

given her any warning whatsoever. (Petitioner's Exhibit A - DDL 4). Officer Wilson's narrative fails to state Nader's answer to being requested to submit to blood and urine. In addition to his narrative, Officer Wilson submitted a form that states (in greater detail than his narrative) that he requested Nader to submit to a "breath, blood, or urine" test. (Petitioner's Exhibit A - DDL 6). That same form states at the bottom that Nader "refused to submit to such test or tests". (Petitioner's Exhibit A - DDL 6).

That according to DDL 6 (Exhibit A) as part of the implied consent warning given in this case, Nader was requested to submit to a breath, blood, or urine test. (Petitioner's Exhibit A - DDL 6). That Nader was also told that if she failed to submit to the blood and urine tests, that her driver's license would be suspended. (Petitioner's Exhibit A - DDL 6). That the record is completely silent as to any evidence justifying a request for urine or blood in that no accident occurred with serious bodily injury or that Nader presented herself at a hospital making a breath test or urine test impossible or impracticable; any evidence of ingestion of chemical or controlled substances thereby justifying a request for urine, or that Nader was ever arrested for DUI under the suspicion of DUI by chemical/controlled substances (versus alcohol) thereby justifying a request for urine. (Petitioner's Exhibit A - DDL 4, 6).

Nader sought review of the hearing officer's decision to uphold her suspension. The Circuit Court granted her Petition for Writ of Certiorari. The Second District reversed certifying conflict with the 4th DCA decision of Clark. This cause follows timely.

SUMMARY OF ARGUMENT

Requesting chemical tests which are not factually and statutorily authorized requires exclusion of the driver's refusal. Florida Statute 316.1932 sets out very specific, necessary, and required conditions which each must be satisfied before law enforcement can request chemical tests to determine the alcoholic content of breath or blood, or for the presence of chemical or controlled substances.

If law enforcement improperly request chemical tests for which the required conditions have not been satisfied, then the refusal is inadmissible and the suspension should be invalidated. The Petitioner in this case was requested to submit to chemical tests which were not factually or statutorily authorized. Law enforcement had no right to request that she submit to a blood or urine test but the record evidence states that she was. As such, the refusal should be excluded and the suspension setaside.

The Second district Court also exceeded it's certiorari jurisdiction by granting the DHSMV's petition. The scope of review should have been

extraordinarily limited for 2nd tier review but it appears that the district court employed a more broad 1st tier standard. As such, the district court opinion should be reversed on this basis also.

ARGUMENT

Certified Question #1 – 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?

First of all, the relevant inquiry (i.e. the certified question) would be more appropriate were it to include the terminology "statutorily and factually authorized" and not the term "required". Required connotes a firm and unwavering obligation. Even though driver's impliedly consent to approved chemical tests, they still have the option of refusing. State v. Young, 483 So.2d 31 (5th DCA 1986). On the other hand, if a request to submit to chemical testing is "statutorily and factually authorized" thereby meeting the statutory requirements, it is then lawful and the person may be subject to the penalties associated with exercising the option of refusing. State v. Young, 483 So.2d 31 (5th DCA 1986).

In order to lawfully determine the correctness of a law enforcement officer's request to a driver arrested for DUI to submit to chemical testing, ***the court should focus it's analysis on the officer's mistakes***. (emphasis

added). Inevitably, when determining the admissibility of evidence, the relevant inquiry for courts addressing suppression always focuses on what the police did wrong, not what they did right (which is the inherent flaw to the analysis of the Second District Court's opinion. The Second DCA did the exact opposite, it focused on what the police did right and not what they did wrong).

When police misstate the obligations of the implied consent law, the appropriate remedy is suppression. State v. Henry, 42 Supp.2d 42 (17th Cir 1990), State v. Cox, 9 Fla. Law Weekly Supp. 634 (16th Cir 2002), State v. Ellis, 9 Fla. Law Weekly Supp. 275 (10th Cir 2002), State v. Dennis, 12 Fla. Law Weekly Supp. 569 (6th Cir 2005), State v. Tuinen, 7 Fla. Law Weekly Supp. 221 (17th Cir 1999), State v. Peden, 11 Fla. Law Weekly Supp. 953 (17th Cir 2004), State v. Lewison, 6 Fla. Law Weekly Supp. 656 (17th Cir 1999), State v. Shapiro, 7 Fla. Law Weekly Supp. 149 (17th Cir 1999). The court writes "If officers elect to go beyond the statutorily mandated advices, they are hereby warned that they do so at the peril of suppression of evidence if they misstate the law or rights of a defendant". State v. Henry, 42 Supp.2d 42 (17th Cir 1990)

Consequently, the answer to the first certified question should be ***YES***. (emphasis added). The Department should not be able to suspend a

drivers' license to operate a motor vehicle if law enforcement requested chemical tests not ***statutorily and factually authorized*** by Florida Statute 316.1932. (emphasis added)

A – Florida's implied Consent Statute 316.1932

While Florida's implied consent statute (316.1932) is very complex and inartfully written, certain provisions of the statute are easy to interpret. Three (3) separate subparagraphs require examination for the Petitioner's argument. When interpreting Florida's implied consent statute, this court should construe it strictly. State v. DeMoya, 380 So. 2d 505 (Fla 3d DCA 1980).

Florida Statute 316.1932 addresses requesting chemical testing by breath, blood, and urine in three (3) separate subparagraphs. Each subparagraph relates to a separate, particular chemical test. Breath testing has it's own subparagraph, blood testing has it's own subparagraph, and urine testing has it's own also. Each is independent of the others.

Each chemical test has it's own condition precedent requirements ***which all must be satisfied*** before the request by law enforcement for that particular chemical test is statutorily authorized. Florida Statute 316.1932 (2006). (emphasis added).

Certain blood testing scenarios have application to the implied consent law through Florida Statute 316.1933 (in addition to Florida Statute 316.1932). Law Enforcement may take blood by force, if factually, probable cause exists that the person is under the influence of alcohol and has caused death or serious bodily injury to another. Florida Statute 316.1933 (2002). Forcible blood (authorized through Florida Statute 316.1933) is not in issue in this case.

Law enforcement is ***statutorily authorized*** to ***request*** blood (i.e not take it by force) if reasonable cause exists that a person is (1) under the influence of alcohol (and/or chemical or controlled substances) and (2) appears at a hospital, clinic, or other medical facility for treatment thereby making a breath test or urine test (3) ***impossible*** or ***impracticable***. (emphasis added). Florida Statute 316.1932(1)(C) (2006). In the absence of ***each*** condition precedent being satisfied, law enforcement ***may not request blood***. (Emphasis added). Florida Statute 316.1932(1)(C) (2006). (emphasis added).

Law enforcement is ***statutorily authorized*** to ***request*** urine if a person is (1) lawfully arrested for suspicion of driving while under the influence of (2) chemical or controlled substances (i.e. not an arrest based upon suspicion of alcohol impairment). (emphasis added). Florida Statute 316.1932 (1)(B)

(2006). [See also State v. Byers, 13 Fla. Law Weekly Supp. 635 (17th Cir 2006), State of Florida v. Linaje, 15 Fla. Law Weekly 373 (11th Cir 2008)]. In the absence of ***each*** condition precedent being satisfied, law enforcement ***may not request urine***. (Emphasis added). Florida Statute 316.1932 (1)(B) (2006). [See also State v. Byers, 13 Fla. Law Weekly Supp. 635 (17th Cir 2006), State of Florida v. Linaje, 15 Fla. Law Weekly 373 (11th Cir 2008)]. Just because a person is arrested for DUI does not mean that law enforcement can request any chemical test. If law enforcement only detect an odor of alcohol but observe no evidence of ingestion of chemical or controlled substances, then law enforcement can not request urine. Florida Statute 316.1932 (1)(B) (2006). [See also State v. Byers, 13 Fla. Law Weekly Supp. 635 (17th Cir 2006), State of Florida v. Linaje, 15 Fla. Law Weekly 373 (11th Cir 2008)].

And finally, law enforcement is statutorily authorized to request a breath test if a person is lawfully arrested for allegedly committing any offense while driving (or being in actual physical control) of a motor vehicle while under the influence of an alcoholic beverage. Florida Statute 316.1932 (1)(A)(1)(A) (2006). Nothwithstanding a law enforcement officer's lawful entitlement to request a breath test, if however factually, the condition precedents fail to exist for requesting (1) a non forcible blood test or (2) a

urine test, then law enforcement may not request either, only breath. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007), Florida Statute 316.1932(1)(C) (2006), Florida Statute 316.1932 (1)(B) (2006). [See also State v. Byers, 13 Fla. Law Weekly Supp. 635 (17th Cir 2006), State of Florida v. Linaje, 15 Fla. Law Weekly 373 (11th Cir 2008)].

Law Enforcement may only request those chemical tests which factually are authorized by Florida's implied consent law. Florida Statute 316.1932 (1)(A)(1)(A) (2006), Florida Statute 316.1932(1)(C) (2006), Florida Statute 316.1932 (1)(B) (2006). [See also State v. Byers, 13 Fla. Law Weekly Supp. 635 (17th Cir 2006), State of Florida v. Linaje, 15 Fla. Law Weekly 373 (11th Cir 2008)].

The failure of these ***necessary condition precedents*** being satisfied have been the foundation to numerous rulings throughout the State finding that ***requests for chemical testing are statutorily unauthorized*** thereby resulting in the invalidation of driver license suspensions (through exclusion of the evidence of the refusals) beginning with the Clark case. (emphasis added).

B – The Clark Case

In State of Florida, DHSMV, v. Clark, the 4th DCA affirmed the Circuit Court's invalidation of Clark's driver license suspension. State of

Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). The 4th DCA accepted Clark's argument that the warning given her by law enforcement ***erroneously*** informed her that her driving privilege would be suspended if she refused to submit to **a *breath, blood, or urine test***. [Emphasis added] State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). Law enforcement in Clark was only statutorily authorized to request breath, ***not blood or urine***. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). (emphasis added). The court in Clark writes "the State acknowledges, but attempts to minimize the ***error*** in the warning given Clark in this case; however, the ***error*** may have misled Clark into thinking that she would have to submit to a more invasive test, the withdrawal of blood, then was authorized by the statute. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). (emphasis added). The essence of the Clark ruling is that law enforcement requested chemical testing which was ***not statutorily authorized based upon the facts present***. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). (emphasis added).

Since the Respondent in this case (State of Florida, DHSMV) is the same entity as in Clark, they ***too must acknowledge/concede*** (just as they did in Clark) that it is ***error*** to request a chemical test which is not statutorily and factually authorized. State of Florida, DHSMV v. Clark, 974

So.2d 416 (4th DCA 2007). (emphasis added). The DHSMV is free, to again, attempt to ***minimize the error*** but they must remain consistent. (emphasis added). They conceded the error in the warning before and must concede it again now. To do otherwise would be as if they were speaking from both sides of their mouth.

B(1) – Comparison between Clark and Nader

When comparing Clark and Nader, the Clark case is the better opinion because it penalizes the police for their mistakes. Court's punish criminal defendant's who commit crimes. Courts also punish law enforcement for mistakes in their investigations by excluding evidence. This process works.

The focus of the 4th DCA's opinion was on the mistakes committed by law enforcement in the implied consent warning given when requesting chemical testing as opposed to focusing on whatever chemical test law enforcement had a legitimate entitlement to request based upon the facts present (a distinction between the 4th DCA opinion and the 2nd DCA opinion).

The flawed perspective and analysis with the 2nd DCA's ruling is that the court excuses law enforcement error. Whenever court's resolve issues regarding exclusion of evidence, the relevant question should revolve around law enforcement errors. For example, if law enforcement give a Miranda

warning which is mostly correct but somehow misinforms the suspect as to his/her rights to remain silent or to have an attorney present, then the accused persons' statement should be excluded. ***Even though most*** of the Miranda warning was fine, because law enforcement got part of it wrong, the evidence should be suppressed. (emphasis added). Another example, if a crime scene unit processes a house with perfection so that chain of custody for evidence collected is not an issue, that any and all analysis of physical tangible evidence is properly tested so as to insure reliability, however, if the entry to the home violated the 4th Amendment then none of what law enforcement did properly after the fact is relevant. If law enforcement made an error entering the home, the evidence is excluded. Consequently, this Court should not focus it's analysis on what law enforcement did correctly, rather the focus should be on the mistakes.

This is the mistake; by requesting chemical tests which are ***statutorily and factually unauthorized***, law enforcement erred. (emphasis added). That error now requires judicial remedies so as to educate law enforcement for future cases.

Additonally, the 2nd DCA also appears to believe that the grammatical construction has some relevance. This too is a mistake. The grammatical construction of the request to submit to chemical testing is irrelevant. A

request to submit to chemical testing ***given in either the conjunctive or disjunctive*** but which requests testing not ***statutorily or factually authorized*** is ***error***. (emphasis added). Plain and simple. The 2nd DCA misapprended this point.

The Second DCA also appears to have required some proof that the Petitioner was confused or felt misled based upon the implied consent warning given to her. Since in Clark, that was an argument accepted by the court, the 2nd DCA made it an issue in it's order also. However, upon examining The Clark decision, it makes no reference to any record evidence establishing that Clark affirmatively testified that she was some how confused or felt misled. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). Rather, the argument accepted by the 4th DCA appears to have been intellectually based. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). Moreover, it represents a pragmatic and logical argument, soundly founded and based in common sense. Just as in Clark, and also in this case, the request to submit to a more invasive chemical test which is statutorily and factually unauthorized may be the reason for the Petitioner's refusal. Had law enforcement only requested that chemical test which was statutorily and factually authorized, the Petitioner might not have refused.

Finally, the 2nd DCA's failure to focus on the mistakes by law enforcement results in the court's failure to read all the three (3) subparagraphs (previously discussed) ***in para materia***. (emphasis added). The court has chosen to only consider the subparagraph dealing with breath testing. This is a flawed legal analysis. The court cannot ignore the requirements set out in the subparagraphs for blood testing and urine testing, but it has. Therefore, it now falls upon this court to remedy the 2nd DCA's error.

C – Cases supporting Clark

While Circuit Appellate cases and County Court decision have no binding precedent on this court, these cases still have value and should be considered.

The 11th Circuit Appellate Court invalidated suspensions for requests for chemical tests (i.e. breath, blood, or urine tests) which are statutorily and factually unauthorized. Trauth, Llamas v. State of Florida, DHSMV, 14 Fla. Law Weekly Supp. 10 (11th Cir 2006) Martin v. State of Florida, DHSMV, 15 Fla. Law Weekly Supp. 347 (11th Cir 2007). Whitehead v. State of Florida, DHSMV, 15 Fla. Law Weekly Supp. 431 (11th Cir 2007), State of Florida v. Linaje, 15 Fla. Law Weekly 373 (11th Cir 2008).

County Courts throughout the State have also excluded evidence based upon requests by law enforcement to submit to chemical tests which are statutorily and factually unauthorized. State v. Byers, 13 Fla. Law Weekly Supp. 635 (17th Cir 2006), State v. Warnick, Case No: 489810X (11th Cir 2008), State v. Simon, 15 Fla. Law Weekly Supp. 838 (11th Cir 2008), State v. Desmaison, 14 Fla. Law Weekly Supp. 1060 (11th Cir 2007),

The inevitable result should be that this court penalizes law enforcement mistakes by approving Clark and disapproving Nader. To rule otherwise would be judicially improvident.

D – An evidential evaluation of the facts in Nader

Florida Statute 322.2615 sets out the parameters for a formal review hearing to challenge a suspension of a person's driving privileges for either having an unlawful breath/blood alcohol level or refusing to submit to a lawful request to a breath/blood/urine test (which ever may be factually and statutorily authorized). Florida Statute 322.2615 (2006). The suspended driver is entitled to a meaningful hearing. Florida Statute 322.2615 (2006).

The DHSMV carries the burden of proof by a preponderance of the evidence. Florida Statute 322.2615 (2006). The DHSMV meets it's initial burden through law enforcement's submission of written documentation consisting of police reports, citations, notice of suspension, and a variety of

other affidavits used to establish threshold evidential obligations. Florida Statute 322.2615 (2006), Rule 15A-6.013 F.A.C (2007). Administrative Rule 15A-6.012 F.A.C permits the issuance of subpoena's for witnesses. Rule 15A-6.012 F.A.C (2007). Rule 15A-6.013 empowers not only the suspended driver to subpoena witnesses, it also empowers the DHSMV to subpoena witnesses to supplement the reports already submitted as evidence. Rule 15A-6.012 F.A.C (2007).

The formal review for Nader took place on October 26, 2007. Neither side requested the issuance of a subpoena for any witness to appear and testify in order to supplement the evidence.

The police report states that after being arrested, the Petitioner refused a breath test. (DDL 4). The document fails to mention in any way the warning given to the Petitioner, which chemical tests where requested from the Petitioner, and whether she refused any chemical tests other than the breath test. (DDL 4). ***The document is simply silent and devoid of any of this information.*** (emphasis added). The refusal affidavit is a different story. It is under oath and states that the Petitioner was "requested to submit to a breath, blood, or urine test". (DDL 6). ***This is the only record evidence document which speaks to the warning given, and the chemical tests requested.*** (emphasis added). The document is very clear. ***Chemical tests***

which were not factually or statutorily authorized were requested from the Petitioner. (DDL 6). (emphasis added).

When submitted documents used as evidence are deficient and lack specificity, that lack of proper documentation benefits the suspended driver. Dobrin v. State of Florida, DHSMV, 874 So.2d 1171 (Fla. 2004), State of Florida, DHSMV, v. Roberts, 938 So.2d 513 (5th DCA 2006), Panjevic v. State of Florida, 14 Fla. Law Weekly Supp. 415 (4th Circuit 2007), Steinberg v. State of Florida, DHSMV, 15 Fla. Law Weekly Supp 661 (13th Circuit 2008), Upahl v. State of Florida, DHSMV, 15 Fla. Law Weekly Supp 662 (13th Circuit 2008). In Dobrin, the submitted police report failed to state that the officer effected the traffic stop believing that Dobrin may be impaired. Dobrin v. State of Florida, DHSMV, 874 So.2d 1171 (Fla. 2004). The lack of proper documentation benefited Dobrin. Dobrin v. State of Florida, DHSMV, 874 So.2d 1171 (Fla. 2004). In Roberts, the submitted police report failed to state the point of view of the stopping deputy so as to justify the opinion Roberts was speeding, consequently, the lack of documentation invalidated the deputy's opinion. State of Florida, DHSMV, v. Roberts, 938 So.2d 513 (5th DCA 2006).

In Nader's case, the only document which speaks to the chemical tests requested is the refusal affidavit. (DDL 6). In the absence of any other

evidence, the police report which states that Nader refused a breath test is neither inconsistent or refutes the refusal affidavit. The police report simply fails to discuss the other chemical test referenced in the refusal affidavit.

Since the only record evidence which discusses the chemical tests requested in Nader is the refusal affidavit, the facts in this case are identical to Clark. Clark states that the requested chemical tests were breath, blood, or urine. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). As such, Clark should control and be approved.

E – The Refusal affidavit has been corrected

The precedential effect of this case as it relates to the use of the refusal affidavit form in this case will be minimal. The DHSMV has promulgated a new form which now requires law enforcement to check the box for the chemical test requested.

Certified Question #2 – May a District Court grant common law Certiorari relief from 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?

The Second District Court over extended it's review capacity by exercising it's Certiorari Jurisdiction in this case.

The Second District's review was "second-tier" certiorari. "First tier" Certiorari has a scope of review which is more broad than "Second-tier".

"First-tier" Certiorari review includes whether the Petitioner was afforded Procedural Due Process, whether there exists a departure from the essential requirements of law, and whether the factual findings are supported by substantial competent evidence. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982).

"Second-tier" Certiorari review is extraordinarily limited. Miami-Dade County v. Omnipoint Holdings, 863 So.2d 195 (Fla. 2003). A "Second tier" review requires more than a simple legal error, it requires a violation of a clearly established rule of law resulting in a miscarriage of justice. Ivey v. Allstate Ins., 774 So.2d 679 (Fla. 2000), Combs v. State, 436 So.2d 93 (Fla. 1983).

If the Second District were certain that it was justified in exercising jurisdiction, then it would not have included the second certified question. The court would simply have entered the order withholding any discussion on jurisdiction. Obviously, there was some trepidation by the court regarding it's exercise of jurisdiction.

The certified question seems to improperly expand the narrowed scope of review for a "second-tier" review to that of a "first-tier" review. The requirement of a miscarriage of justice is an added element to "Second-tier" review. Ivey v. Allstate Ins., 774 So.2d 679 (Fla. 2000), Combs v.

State, 436 So.2d 93 (Fla. 1983). The certified question seems to eliminate this requirement for "second-tier" review. In doing so, it improperly broadens the scope of review.

The Second District Court appears to want the ability to create interdistrict conflicts for cases which arise from trial courts which are in essence a County Court level. [Analogizing administrative hearings to County Court proceedings for purposes of this argument]. When issues begin in Circuit Court, the review by the District Court is then "first-tier" review (regardless if it an appeal of right in accord with Florida Rules of Appellate Procedure 9.130, 9.140, or Certiorari). But review of County Court issues apparently poses a different challenge for the District Court since by the time the cases gets to a DCA, the scope of review is extraordinarily limited by "second-tier". Ivey v. Allstate Ins., 774 So.2d 679 (Fla. 2000), Combs v. State, 436 So.2d 93 (Fla. 1983).

Consequently, it appears that the 2nd DCA is attempting to create a new rule of law in order to accommodate this scenario. Unfortunately, in doing so, the 2nd DCA has over extended it's Certiorari jurisdiction and granted the petition by the DHSMV in error. As such, in addition to it's erroneous ruling on the first certified question, this court should grant this appeal and reverse the decision of the 2nd DCA thereby approving the Clark

decision and also grant this appeal on the basis for the 2nd DCA improperly exercising Certiorari jurisdiction.

CONCLUSION

Respectfully, the Petitioner requests this court approve Clark, disapprove Nader and limit the certiorari jurisdiction of the District Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery/mail/fax to: Department of Highway Safety and Motor Vehicles, Legal Department, P.O. Box 540609, Lake Worth, Florida 33454-0609, Mr. Michael Catalano, 1531 NW 13th Court, Miami, Florida 33125, this _____ day of _____, 2009.

I HEREBY CERTIFY that the font size in the Respondent's motion is New Times Roman 14 point.

_____

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