IN THE SUPREME COURT OF FLORIDA

Case No. SC09-2255

MICHAEL BRADSHEER, et al.,

Petitioners,

vs.

FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al.,

Respondents.

ANSWER BRIEF OF RESPONDENTS

On Discretionary Review of a Decision of the District Court of Appeal, First District, State of Florida

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Statutory Background

This case involves the import and interplay of provisions of Chapters 316 and 322, Florida Statutes, as they existed in 2003 and thereafter.

Section 316.193(2) and (4)(c), Florida Statutes (2003), mandated the installation of an ignition interlock device ("IID") when a person applied and qualified for a permanent or restricted license following conviction of driving under the influence (DUI). Section 316.1937(1), Florida Statutes (2003), allowed trial courts the discretion to require installation of an IID "in addition to any other authorized penalties" and further emphasized that the courts "shall order" installation "in those circumstances required by section 316.193."

During the relevant time frame (and now), section 322.271(2)(d), Florida Statutes (2003), permitted the Department of Highway Safety and Motor Vehicles (the "Department") to require use of an IID when considering a hardship license "based upon review of [a] licensee's application for reinstatement." Courts have held that section 322.271(2)(d) granted the Department such authority without regard to any extant court order or sentence directing use of an IID.

In 2005, the legislature enacted section 322.2715, Florida Statutes (2005), mandating that the Department require installation of an IID for the DUI offenses specified therein and irrespective of whether a trial court had ordered mandatory

placement under section 316.193 or section 316.1937. See § 322.2715(1), (3), and (4), Fla. Stat. (2005), and ch. 2005-138, § 36, Laws of Florida.

Proceedings in the Circuit Court

As set forth in this Statement, and as discussed in the Argument, petitioners' claims present nothing more than a collateral attack on unappealed orders of the Department of Highway Safety and Motor Vehicles

In 2007, Plaintiffs Michael Bradsheer and Michael K. Johnson, filed a two-count complaint on behalf of themselves and a potential class. R1:1-37. The complaint alleged that beginning in early 2004 the Department sent letters to all persons convicted of DUI violations under section 316.193. The letters were purportedly sent both to persons who were convicted of DUI before July 1, 2002 and to those convicted after that date but who had not been required by the trial court to install an IID. R1:5-6. The letters stated that the person's driver's license would be suspended or cancelled if the IID were not installed. They also advised that the licensee could appeal the order pursuant to section 322.31, Florida Statutes. See Compl. Exh. B.

The initial complaint sued Electra Theodorides-Bustle in her official capacity as executive director of the Department. R1:1. Count I, brought under authority of the Civil Rights Act of 1871, 42 U.S.C. § 1983, asserted that the Department had illegally caused petitioners' driver's licenses to be suspended,

thereby violating their constitutional property rights. It sought prospective injunctive relief against the executive director.

Although the complaint did not allege that Bradsheer and Johnson had paid any money to the Department for installation or removal of the IIDs, Count II sought a refund of an "unconstitutionally extracted fee or tax" paid to the Department's "agents." Count II relied on article I, section 18, and article VII, section 1(a), of the Florida Constitution.

The executive director filed an answer and a motion to dismiss the complaint, asserting that plaintiffs stated no cause of action under 42 U.S.C. §1983 and that the refund claim sought damages that were not recoverable absent legislative waiver of the state's sovereign immunity. R1:50-56 and 57-62. The trial court granted the motion to dismiss, ruling that petitioners had not alleged deprivation of a federally protected right and had not shown the state had waived its sovereign immunity for the refund claim, which the court concluded sought monetary damages. R1:162 (App. B).

Bradsheer and Johnson then filed an amended complaint, again suing Electra Theodorides-Bustle in her official capacity as executive director and adding the Florida Department of Highway Safety and Motor Vehicles, an arm and agency of the State of Florida, as a defendant. R1:164-178.[1] According to the amended

[1] Julie L. Jones is now the executive director of the Department and is

complaint, petitioners and the potential class consisted of licensed drivers. Id. at 170. Some were convicted of DUI before July 1, 2002, the effective date of chapter 2002-263, Laws of Florida, and some after that date. Id. at 168. The courts that had adjudicated the DUI claims had not directed the installation of an IID as to those convicted after July 1, 2002. Id. at 166. Allegedly, the Department, by letter, directed these persons to install and maintain an IID; if they failed to do so, their driver's licenses would be suspended. Id. at 168. The Department offered no hearing prior to taking such action, but stated that its order could be reviewed by petition for a writ of certiorari in the circuit court pursuant to section 322.31, Florida Statues. Id. at 171. (A representative copy of these letters is attached to the initial complaint as Exh. B, and included in the appendix to petitioners' initial brief.)

Bradsheer and Johnson (and the prospective class members) did not exercise their statutory right to judicial review of the Department's action pursuant to section 322.31, Florida Statutes. Instead, the amended complaint attempts to excuse their inaction, alleging that section 322.31 is "constitutionally inadequate." R1:171, ¶ 33.[2]

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automatically substituted as a party pursuant to Rule 9.360(c)(2), Florida Rules of Appellate Procedure.

[2] As discussed infra, and as implicitly acknowledged in petitioners' brief, similarly-situated license applicants who challenged the Department's action were all successful.

The amended complaint contained five counts. Counts I, II, and III sued the executive director in her official capacity, again under authority of 42 U.S.C. § 1983. Count I asserted the deprivation of property and liberty rights without due process, Count II asserted a violation of the double jeopardy prohibition, and Count III alleged a violation of the ex post facto clause, all under the United States Constitution. Id. at 170-174. These counts sought prospective injunctive relief and attorney's fees.

Count IV relied solely on the Florida Constitution. Id. at 174. This count sought a declaration that the Department's actions violated article I, sections 9 and 10 (the due process, double jeopardy, and ex post facto provisions); article I, section 18, which prohibits an administrative agency from imposing any penalty not provided by law; and article VII, section 1(a), prohibiting the imposition of any tax except pursuant to law. Petitioners alleged they were entitled to a declaration of their rights, and restitution to restore any "unconstitutional penalty or fees exacted from class members." Id. at 175. Again, they did not allege they paid any penalty or fee to the Department.

Count V also attempted to compel the Department to pay costs each petitioner allegedly incurred after deciding not to challenge the Department's order. This count purports to present a constitutional taking claim under article X, section 6 of the Florida Constitution, or alternatively, under the Fifth and

Fourteenth Amendments to the United States Constitution. Id. at 175-176. Petitioners asserted that:

> [T]he Department took the class members drivers' licenses for a public purpose unless those drivers paid the cost for an interlock device, which thereby represents the value taken to preserve the license rights. For persons unable to pay, the Department took their drivers' licenses for such public purpose, and they should also be compensated at least this value. . . .
>
> The Department has never offered compensation to Plaintiffs or members of the class. . . .

Id. at 176.

Respondents filed a motion to dismiss all counts of the amended complaint. R1:57-62. The trial court granted the motion, again finding that Bradsheer and Johnson had failed to allege deprivation of a federally protected right and that, as before, the claim for refunds sought damages and was barred by the State's sovereign immunity. R2:225-226 (App. C). The court entered a final judgment in favor of defendants, and petitioners timely filed their appeal. R2:230, 231.

The First District's Decision

The First District affirmed in part, and reversed in part, the decision of the trial court. Bradsheer v. Dep't of Highway Safety and Motor Vehicles, 20 So. 3d 915. (Fla. 1st DCA 2009) (App. A).

The First District majority held that the double jeopardy and ex post facto claims hinged on the assertion that the Department had inflicted a criminal penalty

on petitioners by requiring installation of the IID. The majority concluded that because the Department was not a court, it could not impose a criminal penalty. Accordingly, it affirmed dismissal of those counts. Id. at 920.

Construing Counts IV and V as seeking damages for a due process violation, the majority also held that no damages were available under the Florida Constitution in the absence of a waiver of sovereign immunity. Id. at 921.

The First District reversed the dismissal of Counts I and IV insofar as these sought declaratory and injunctive relief. The court held that further fact-finding was needed to determine if protected property rights were at stake. Id. at 919-920. The court distinguished second DUI convictions where installation of the IID was mandatory from first convictions where installation was discretionary. It noted, in conclusion, that declaratory and injunctive relief might not be appropriate if, at this point, the Department's actions were not likely to recur. Id. at 921, n.10.

Judge Benton dissented. Id. at 922-929. Drawing no distinction between an action under the federal Civil Rights Act of 1871, 42 U.S.C. § 1983, and an action under chapter 86, Florida Statutes, Judge Benton concluded that petitioners were entitled to a declaration of their rights under each count of the amended complaint.

SUGGESTION OF MOOTNESS

The Department has filed with this brief a suggestion of mootness, submitting that Bradsheer and Johnson are not entitled to prospective injunctive

relief. The Department has relieved them of any requirement to maintain an IID in their vehicles for their DUI convictions which occurred prior to July 1, 2005. No reasonable prospect exists that the Department will order Bradsheer or Johnson (or anyone convicted of DUI prior to July 1, 2005) to install or maintain an IID in the absence of an appropriate court order.

SUMMARY OF THE ARGUMENT

Given that the claims for injunctive relief are moot, this Court need not decide whether the Department's orders attempted to impose a criminal penalty subjecting plaintiffs to double jeopardy (Count II) or violated due process (Count I) as these claims seek only prospective injunctive relief. In any event, the amended complaint states no cause of action for injunctive relief under the state or federal constitution or any claim for damages, which petitioners present as one for equitable restitution or an unconstitutional taking of their property.

First, the amended complaint does not state a cause of action for violation of the constitutional prohibitions against double jeopardy. Whether a penalty is civil or criminal is determined according to the criteria set forth in Hudson v. United States, 522 U.S. 93 (1997), and Lescher v. Florida Department of Highway Safety & Motor Vehicles, 985 So. 2d 1078 (Fla. 2008). The IID requirement is a restriction on driving, i.e., a condition of granting or reinstating the privilege of driving, the intent of which is to protect the public. It is not, therefore, a criminal

penalty, and its attempted imposition did not violate prohibitions against double jeopardy.

Second, Article I, section 18 of the Florida Constitution does not authorize equitable restitution. It is not self-executing because it lays down no rule authorizing the recovery of money from a state agency, whether called a refund, restitution, or damages, and whether sought in law or equity. Petitioners paid nothing to the Department, and it is clear they seek only to recover out-of-pocket costs incurred in complying with orders of the Department they chose not to appeal. The lower courts correctly recognized that petitioners' refund claim sought money damages and was barred by the state's sovereign immunity.

Third, the amended complaint states no cause of action for deprivation of due process. The Department made a legal determination that section 316.193 mandated the use of IIDs in prescribed circumstances and that it had authority to order installation of IIDs where a court had not following DUI convictions under that statute. Petitioners (and prospective class members) had the right to challenge the Department's orders in circuit court pursuant to section 322.31, Florida Statutes. They chose not to exercise that right. The belated assertion that section 322.31 is "constitutionally inadequate" is insupportable. Petitioners do not dispute their DUI convictions, they do not challenge the Department's records, and they do not assert the existence of any factual issue requiring a hearing. If, as petitioners

contend, the Department was acting without an appropriate court order it would have been a simple matter to demonstrate that to the circuit court. Review in the circuit court is wholly adequate, not only for all the licensees who decided to challenge the Department's orders, but petitioners too.

Finally, the Department's orders did not constitute an unconstitutional taking of petitioners' property, and they are not entitled to compensation for costs incurred in complying with orders they did not challenge. Petitioners' property interests in their driver's licenses and out-of-pocket costs are protected by the due process clause, not the takings clause.

STANDARD OF REVIEW

All issues in this appeal present questions of law that are subject to review de novo. Zingale v. Powell, 885 So. 2d 277, 280 (Fla. 2004) ("constitutional interpretation, like statutory interpretation, is performed de novo."); Florida Dep't of Health & Rehab. Servs. v. S. A. P., 835 So. 2d 1091, 1094 n.2 (Fla. 2002) (on appeal of the dismissal of a complaint, the appellate court's standard of review is de novo.). In this case, the trial court dismissed all counts of the amended complaint for failure to state a cause of action. Thus, if there is any theory of law that would support the trial court's judgment, this Court is obliged to affirm. Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 644-645 (Fla. 1999) (citing cases); TransPetrol Ltd. V. Radulovic, 764 So. 2d 878, 880 (Fla. 4th DCA

2000) (affirming dismissal of complaint on "right for wrong reasons" analysis where complaint failed to plead a cause of action).

ARGUMENT

Petitioners claim the amended complaint states a cause of action for i) violation of the constitutional protections against double jeopardy, ii) equitable restitution under article I, section 18 of the Florida Constitution, iii) deprivation of their property rights without due process, and iv) a regulatory and physical taking of their property under the Florida Constitution and the United States Constitution and ask this Court to so hold. See Initial Br. at 33.[3] None of these claims states a cause of action, and the amended complaint was therefore properly dismissed by the trial court. This case presents nothing more than a collateral attack on final orders of the Department by persons who did not avail themselves of the right to judicial review of those orders.

I. THE DEPARTMENT'S ALLEGED ACTIONS DID NOT VIOLATE DOUBLE JEOPARDY.

Petitioners' first point contends the Department's alleged action—attempting to require installation of IIDs when the courts had not—constituted the imposition of a criminal penalty in violation of the prohibition against double jeopardy that

[3] Petitioners do not pursue Judge Benton's contention that the Department's motion to dismiss the amended complaint was improper, and that, contrary to the judgment of the trial court, they were entitled to a declaration of their rights as to all counts. See Bradsheer, 20 So. 3d at 922, 927-928 (Benton, J., dissenting).

must be rectified by "equitable restitution" of the amounts paid for installation of the IIDs. The argument is without merit because the installation of IIDs is not a criminal penalty, and because petitioners, in any event, are not entitled to equitable restitution.[4]

A. The Required Installation of an IID Is Not a Criminal Penalty.

The double jeopardy provision of the Florida Constitution is modeled after the Fifth Amendment to the United States Constitution. Kelso v. State, 961 So. 2d 277, 279 (Fla. 2007). It is well-established that the double jeopardy clause of the United States Constitution "protects only against multiple criminal punishments for the same offence" and not "the imposition of additional sanctions that could 'in common parlance' be described as punishment." Hudson v. United States, 522 U.S. 93, 99 (1997) (citations omitted). Hudson sets forth a number of factors that serve as "guideposts" for determining whether a civil remedy is so punitive as to constitute criminal punishment. This Court has adopted the Hudson factors to determine whether a sanction is criminal or civil. Lescher v. Fla. Dep't of

[4] The decision of the majority below rejected Petitioners' double jeopardy and ex post facto arguments reasoning that the Department was not a court and therefore could not impose a criminal penalty. Petitioners do not pursue their ex post facto claims (Counts II and IV) in this Court. Because the IID requirement is not a criminal penalty in the first instance, the dismissal of these two counts was correct. It is not necessary to consider the fact that the Department is not a court in addressing the double jeopardy claim. The dismissal was correct even if for the wrong reason. See Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 644-645 (Fla. 1999) (reasoning of the lower court is not binding if the result was correct).

Highway Safety & Motor Vehicles, 985 So. 2d 1078 (Fla. 2008). Under this test, the Department's efforts to compel installation of IIDs by those convicted of one or more DUIs did not amount to the imposition of a criminal penalty.

Petitioners' argument ignores the Hudson/Lescher factors and assumes the Department's action imposed a criminal penalty simply because, during the relevant time frame, section 316.193 required an IID for a person qualifying for a permanent or restricted license in specified circumstances. The argument assumes far too much.

The first consideration under Hudson and Lescher is whether the legislature intended the penalty to be civil or criminal, and that question "is, at least initially, a matter of statutory construction." Hudson, 522 U. S. at 99; see also Lescher, 985 So. 2d at 1081. Section 316.193 prescribes both fines and imprisonment, clearly criminal penalties, for DUI convictions. The IID requirement, however, comes into play only when the convicted person later qualifies for a permanent or restricted license. The authority to see to the installation of the IID is delegated to the Department as a restriction on the grant of a driver's license, a civil function. See §§ 316.193(2)(a)3., 316.193(2)(b)2., & 316.193(4)(c), Fla. Stat. (2003). It is thus a condition of granting or reinstating the privilege of a license, the intent of which is to protect the public, not impose a criminal penalty. As Hudson and Lescher expressly recognize, the fact that the conduct addressed by a statute is

also criminal is insufficient to make the civil penalty criminally punitive. Hudson, 522 U. S. at 105; Lescher, 985 So. 2d at 1085. Moreover, the delegation of authority to the administrative agency to impose the restriction on driving "is prima facie evidence that [the legislature] intended to provide for a civil sanction." Hudson, 522 U. S. at 103. See also Dep't of Highway Safety & Motor Vehicles v. Rigau, 901 So. 2d 339 (Fla. 2d DCA 2005) (suspension of a driver's license is a civil sanction).

The plainly civil nature of the IID provision in section 316.193 is supported by the fact that during the relevant time frame the Department had the discretion to require use of an IID when approving a hardship license. See § 322.271(2)(d), Fla. Stat. (2003). This statute does not require a court order directing use of an IID as a predicate for the Department's action. See State, Dep't of Highway Safety & Motor Vehicles v. Butler, 959 So. 2d 434 (Fla. 3d DCA 2007); Florida Dep't of Highway Safety & Motor Vehicles v. Gonzalez-Zaila, 920 So. 2d 1220 (Fla. 3d DCA 2006). The enactment of section 322.2715 in 2005 further underscores the fact that the legislature did not intend the 2002 amendment to section 316.193 providing for IIDs to be a criminal sanction. If the IID were a criminal penalty, section 322.271(2)(d), and likely section 322.2715, would be unconstitutional because agencies may not impose criminal penalties. Petitioners have never made that argument.

The remaining Lescher/Hudson factors are employed to determine whether the "clearest proof" negates the legislature's intent to create a civil remedy. Lescher, 985 So. 2d at 1082. Application of these factors conclusively demonstrates that IIDs are not criminal punishment. The first factor is whether the sanction involves an affirmative disability or restraint. Id. at 1082-1083. As the Supreme Court observed in Hudson, the "revocation of a privilege voluntarily granted . . . is characteristically free of the punitive criminal element." 522 U. S. at 104 (citation omitted). This Court echoed that statement in Lescher in holding that the revocation of a driver's license, while a hardship, is not an affirmative disability. 985 So. 2d at 1083. The IID requirement, by comparison, does not constitute even a slight hardship. It does not revoke or deny the driving privilege, but simply attempts to insure its proper and safe use. This factor is closely linked to the second--whether the sanction has been historically regarded as punishment. A device that seeks to insure the safe use of a dangerous instrumentality cannot, under Lescher's reasoning, be considered criminal punishment. See id. at 1083-1084.

The third factor, scienter, does not weigh in favor of criminality. The restriction is imposed without regard to the licensee's state of mind.

The fourth factor is whether the IID promotes the traditional aims of punishment, retribution, and deterrence. Id. at 1084-1085. While the cost to the

driver may have some deterrent effect, the obvious purpose of the IID is safety. The existence of a slight deterrent effect does not render this safety measure criminal. Id. Further, the mere fact that the IID may deter criminal behavior does not suffice to make the sanction criminally punitive. See id. at 1085.

Finally, the IID is not a criminal sanction under the fifth, sixth, and seventh factors. As stated, the fact that the conduct addressed by the statute is also criminal does not make a civil restriction criminally punitive. See Hudson, 522 U.S. at 105; Lescher, 985 So. 2d at 1085. The restriction serves a purpose other than punishment—protecting the public by preventing DUI offenders from driving after they have been drinking. Even if deemed a "sanction," the IID is not excessive in relation to its purpose of protecting the public. See id. at 1085-1086.

Ignoring the Hudson/Lescher analysis, petitioners contend that the question has been settled by the decisions of the district courts of appeal in Dickenson v. Aultman, 905 So. 2d 169 (Fla. 3d DCA 2005), Embrey v. Dickenson, 906 So. 2d 316 (Fla. 1st DCA 2005), Doyon v. Dickenson, 902 So. 2d 842 (Fla. 4th DCA 2005), and Karz v. Dickenson, 932 So. 2d 426 (Fla. 2d DCA 2006).

Petitioners are wrong. Not one of these decisions undertakes the Hudson/Lescher analysis. Aultman, the first case decided, rejected the argument that under section 322.16, Florida Statutes, the Department had "shared authority" with the courts to require installation of an IID. Aultman held that section 322.16

had nothing to do with IIDs and that the Department's order was invalid under article I, section 18 of the Florida Constitution because it had no authority of its own to impose such a requirement. Embrey and Karz cited and followed Aultman without further analysis, but both noted that under the newly-enacted section 322.2715(4), Florida Statutes (2005), the Department had authority to require IIDs where a court had failed to do so under section 316.193 or section 316.1937, Florida Statutes. Surely if this restriction on driving were so plainly criminal, the courts would have been loath to acknowledge the Department's authority under section 322.2715(4).

Aultman, Embrey, and Karz decided only that the Department had, at that time, no separate authority to require an IID when the courts had not, with the exception of hardship licenses under section 322.271(2)(d), which the decisions did not consider. Doyon offhandedly alludes to double jeopardy, citing a criminal case, but the decision did not undertake the Hudson analysis. None of these cases can support the conclusion that the IID restriction was per se a criminal penalty.

B. Petitioners Are Not Entitled to "Equitable Restitution" Under 42 U.S.C. § 1983.

Petitioners' first point does not make clear whether it is based on Count I—a 42 U.S.C. § 1983 claim—or Count IV, which sought declaratory and injunctive relief and restitution under the Florida Constitution. Petitioners pleaded their claim for "equitable restitution" only under Count IV. Moreover, the first three counts—

all based on § 1983—were against Electra Theodorides-Bustle in her official capacity as executive director of the Department. R1:104, ¶3. States are not "persons" under § 1983, nor are the arms and agencies of the state, nor are state officers sued in their official capacities. Will v. Michigan Dep't of State Police, 491 U. S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."); see also Howlett v. Rose, 496 U.S. 356, 365 (1990) (the State and arms of the State are not subject to suit under § 1983). Therefore, petitioners are entitled to no relief against the Department under § 1983, and only prospective, injunctive relief against Theodorides-Bustle, or her successor, if still appropriate. See id. at n.10.[5]

Damages can be awarded under § 1983 only against state officials sued in their individual capacities; that law does not provide for "equitable restitution" from state officers sued in their official capacity. Petitioners' claim for equitable restitution, therefore, will be addressed under state law in Point II, infra.

[5] Petitioners conceded in the trial court that they sought only prospective injunctive relief against Theodorides-Bustle because the unlawful acts complained of were allegedly continuing, R1:115-116, and that they sought retrospective monetary relief under state law. Id. at 117. See also R2:207-209; 212-220 (same concession as to amended complaint). Their briefs in the First District do not so much as hint that they sought monetary relief under § 1983. To the contrary, they represented that "[i]f appellants' rights are protected by the United States Constitution, then § 1983 provides a declaratory and injunctive remedy to force the Director to prospectively respect those federal constitutional rights." Initial Br. to the First District at 16 (emphasis added).

II. ARTICLE I, SECTION 18 OF THE FLORIDA CONSTITUTION DOES NOT AUTHORIZE "EQUITABLE RESTITUTION."

The amended complaint alleges that Bradsheer and Johnson (and members of the potential class) were required to install IIDs or face suspension of their licenses. R1: 165-169. It does not allege that they paid a fee or tax of any kind to the Department, or money in any form. The IIDs were apparently installed by private companies whom plaintiffs paid directly. Id. at 167-168. As noted, it appears from the records of the Department that Bradsheer never installed an IID. See Respondents' Suggestion of Mootness.

Bradsheer and Johnson nevertheless assert that article I, section 18 of the Florida Constitution entitles them to "equitable restitution" from the Department in the form of a "refund" of the cost of the IID. Section 18 provides:

> **Administrative penalties** – No administrative agency, except the Department of Military Affairs in an appropriately convened court-martial action as provided by law, shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

Art. I, § 18, Fla. Const. This provision was enacted as part of the 1968 constitution and the reference to the Department of Military Affairs adopted in 1998. Petitioners contend that section 18 is "self-executing" and that it "was adopted to assure full judicial redress, including restitution." Initial Br. at 19. They point to no history supporting this assertion. The Department has found none.

Petitioners premise their restitution theory on section 18 and its purported self-executing nature apparently because they can find no case ordering a refund of money an agency never received, no case ordering a refund of costs a licensee incurred in complying with an unchallenged agency order, and no authority recognizing state liability for constitutional torts. That in itself is telling, but the claim that section 18 fills the gap is flatly wrong.

A self-executing constitutional provision is one that "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478, 485 (Fla. 2008) (quoting Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960)). Section 18 is self-executing only to the extent it prohibits unauthorized penalties. It lays down no rule authorizing the recovery of money from any state agency, whether called a refund, restitution, damages, compensation, or something else, and whether sought in law or equity. In the absence of any directive to the legislature, a sufficient rule for the recovery of money from the state would necessarily have to prescribe how the money could be recovered (i.e., the procedure to be followed), under what circumstances (the legal basis for the claim), in what time frame (corresponding to a statute of limitations), and within what limits (the extent of the liability). Section

18 contains no such rule and is therefore not self-executing.[6]

Petitioners' argument fails at the most basic level – article I, section 18 does not even mention restitution or damages, much less agency liability. This Court reads constitutional provisions as written; it does not add words to those provisions, or indeed, paragraphs, to facilitate a result the framers and the people never intended. Lawnwood Medical Center, Inc. v. Seeger, 990 So. 2d 503, 511, 512 (Fla. 2008) (language that is clear and unambiguous must be enforced as written; courts are not at liberty to add words to the constitution). Petitioners' request that the Court rewrite the constitution must be rejected.

Petitioners' reliance on tax refund cases, particularly Dep't of Revenue v. Kuhlein, 646 So. 2d 717 (Fla. 1994), is inapposite. In Kuhnlein, plaintiffs sought the refund of an unconstitutional tax they had no choice but to pay. Bradsheer and Johnson paid no tax or fee to the Department, and they had a right to challenge the Department's order. Article I, section 18 does not throw open the doors of the state treasury to every person who, of his own volition, forgoes review, complies with an agency order, regrets the decision, and sues for a "refund" of costs incurred in complying with the order.

[6] Sections 768.28 and 215.26, Florida Statutes, allow recovery from the state in specified circumstances and provide examples of essential details that must be addressed. Petitioners apparently would have this Court intuit such details by reading between the lines of article 1, section 18. They are certainly not in the lines as written.

Further, there are important distinctions to be made concerning legal restitution, equitable restitution, and damages, see O'Neal v. Florida A & M University, 989 So. 2d 6, 10-11 (Fla. 1st DCA 2008), none of which are addressed in section 18 or in petitioners' brief. As noted in O'Neal, an action for restitution in equity seeks to restore to the plaintiff particular funds or property in the defendant's possession. Here, the amended complaint does not allege that the Department holds or ever held particular funds or property of the petitioners that they now want restored. It seeks to impose liability on the Department in the form of a money judgment for the costs of the IIDs. That is a claim for damages under the reasoning of O'Neal, not restitution. See id. at 11.

Petitioners' contrived take on article I, section 18 is troubling—and wrong—for other reasons. Because section 18 does not distinguish refunds or restitution from damages, indeed, does not even faintly allude to such matters, the liability petitioners would impose on the state is entirely open-ended. If all the rights conferred in article I are enforceable by actions under the "self-executing" provisions of section 18, as petitioners avow, that section would make agencies liable for the imposition of any "penalty" that violates those rights. In fact, because section 18 is bereft of guiding principles, the imposition of any unauthorized penalty could give rise to a claim for damages irrespective of whether it violates a constitutional right. It is clear that petitioners are asking this Court to

nullify the plain language of article X, section 13 of the Florida Constitution, which gives the legislature the exclusive authority to provide for suits against the state "as to all liabilities." See American Home Assur. Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 471-472 (Fla. 2005) ("Only the Legislature has authority to enact a general law that waives the state's sovereign immunity."). There is not a scintilla of evidence supporting the contention that in 1968 the framers and the people intended article I, section 18 to mandate compensation for other unspoken liabilities.

Petitioners also err because, as the First District correctly found, their claim at most asserts a constitutional tort. The notion that petitioners' failure to exercise their right to review makes the Department's order a constitutional tort, however, is not supported by any authority, if that is their argument. In any case, as the lower courts correctly held here, the legislature has not waived immunity for torts based on the Florida Constitution. Fernez v. Calabrese, 760 So. 2d 1144, 1142 (Fla. 5th DCA 2000); Garcia v. Reyes, 697 So. 2d 549, 550 (Fla. 4th DCA 1997).

Although petitioners contend that the decision in DePaola v. Town of Davie, 872 So. 2d 377 (Fla. 4th DCA 2004), supports their restitution claim, the Fourth District found it significant, in distinguishing its earlier Garcia decision, that DePaola sought injunctive relief under section 86.011, Florida Statutes, relating to termination of his employment. Id. at 380. It did not hold that Mr. DePaola was

entitled to money damages, and it did not construe article I, section 18. Money is what petitioners seek by relying on article I, section 18 as "self-executing" and adopted to "assure restitution." Initial Br. at 19. Here, the lower courts considered this claim and decided petitioners were not entitled to money. Petitioners thus received the declaration of rights they sought. They are not entitled to further consideration of their damages claim under section 86.011.

In sum, petitioners' reliance on article I, section 18 is misplaced even considering the self-serving limitations they would have this Court—at least for the present—read into section 18. No matter whether their claim is one for restitution or damages, section 18 does not authorize recovery.

III. THE SUSPENSION OF A DRIVER'S LICENSE IMPLICATES A PROTECTIBLE PROPERTY INTEREST, AND SECTION 322.31, FLORIDA STATUTES, PROVIDES ALL THE PROCESS THAT IS DUE.

Respondents agree that the "suspension of a driver's license for statutorily defined cause implicates a protectible property interest." Mackey v. Montrym, 443 U.S. 1, 10 (1979); see also Dep't of Highway Safety & Motor Vehicles v. Pitts, 815 So. 2d 738, 743 (Fla. 1st DCA 2002) (quoting Mackey). The question, as Mackey make clear, is "what process is due to protect against an erroneous deprivation of that interest." 443 U.S. 10. Here, petitioners have not pleaded a

cause of action for deprivation of procedural process. [7]

Petitioners argue in their brief that, "[The Department] acted without a prior hearing because if it had afforded a prior hearing as due process requires, the driver would clearly win, based on the unanimous decisions in Doyon-Aultman-Embrey-Karz." Initial Br. at 29. Their amended complaint argues that a petition for a writ of certiorari to a circuit court pursuant to section 322.31, Florida Statutes, was "constitutionally inadequate" in the face of the Department's threatened suspension of their licenses in that it did not provide for a pre-suspension hearing or the opportunity to make a record. R1: 171. They ask the Court to rule that they have stated a cause of action as a matter of law. Initial Br. at 33. They have not.

Section 322.31, Florida Statutes, was perfectly adequate to address petitioners' objection as it allows an aggrieved person immediate judicial review of the Department's action. Under this statute a circuit court may determine: i) whether procedural due process has been accorded, ii) whether the essential requirements of law have been observed, and iii) whether the administrative findings and judgment were supported by competent, substantial evidence.

[7] 42 U.S.C. § 1983 creates a cause of action for violation of federal rights committed by persons acting under color of state law which may be brought in state courts. Howlett v. Rose, 496 U.S. 356 (1990). It is common practice for a defendant to move to dismiss a § 1983 action if the complaint fails to state a claim for relief. See, e.g., Brower v. County of Inyo, 498 U.S. 593 (1989). Section 86.011 and § 1983 should not be conflated, however. A plaintiff is not entitled to a "declaration of rights" under § 1983 if the complaint does not state a cause of action.

Vichich v. Dep't of Highway Safety & Motor Vehicles, 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001). Petitioners' allegations and arguments do not demonstrate a violation of procedural due process based on the "constitutional inadequacy" of section 322.31. In fact, Doyon, Aultman, Embrey, and Karz demonstrate precisely the opposite, as all were successful challenges to the Department's orders.

Petitioners do not explain what a pre-suspension hearing would have accomplished or why they would need to create a record when the Department, as they themselves contend, made a determination of law that only a court could invalidate. Petitioners do not claim that the Department's records were in error, they do not dispute their DUI convictions under section 316.193, and they do not argue that there were ever any material facts to contest. All they challenge is the Department's authority to issue an order mandating use of an IID. The quicker the opportunity for judicial review in such circumstances the better, and that is what section 322.31 provides. If on review pursuant to section 322.31 the Department could produce nothing of record to show it had the right to demand installation of an IID—presumably, a court order entered under authority of section 316.193—its action would be invalid. Indeed, that is precisely what the courts held.

The decisions in Gonzalez-Zaila, Doyon, and the other cases did not depend on record-making proceedings before the Department and do not reflect any constitutional inadequacy in section 322.31. In seeking circuit court certiorari

review, Gonzalez-Zaila moved for and received a stay of his license suspension. 920 So. 2d at 1220. While there is a possibility that the circuit court might agree with the Department, as occurred in Doyon, 902 So. 2d 842, it is well-established that due process procedures need not guarantee error-free determinations. Mackey, 443 U.S. at 13.

The adequacy of available remedies was not explored by the lower courts. If this Court thinks it inappropriate to consider the facial adequacy of section 322.31 or mootness at this time, the Court may remand for that purpose. It may not be necessary for the trial court to even decide this issue should it find that the Department has ceased to require plaintiffs to maintain IIDs in their vehicles and their claims are moot. If so, petitioners would not be entitled to declaratory and injunctive relief. See, e.g., Boatman v Fla. Dep't of Corrections, 924 So. 2d 906, 907 (Fla. 1st DCA 2006) (that part of complaint seeking declaratory and injunctive relief as to conditions of confinement mooted by inmate's transfer to another facility.); Environmental Confederation of Southwest Fla., Inc. v. State, 852 So. 2d 349 (Fla. 1st DCA 2003) (complaint for declaratory and injunctive relief mooted by subsequently enacted law).

IV. THE LOWER COURTS CORRECTLY RULED THAT PETITIONERS' CLAIM WAS FOR DAMAGES AND THAT THE STATE HAD NOT WAIVED ITS SOVEREIGN IMMMUNITY FROM THIS CLAIM.

Read carefully, it is apparent that the decisions of the First District and the

trial court both ruled that petitioners' monetary claim did not state a cause of action for a taking; if anything, petitioners sought damages for which there had been no waiver of sovereign immunity. R1: 162 & 225 (App. B & C); 20 So. 3d at 920 ("We affirm the trial court's ruling that since Appellants failed to demonstrate the State had waived sovereign immunity for these claims, they could not recover monetary damages.") (emphasis added). Petitioners now argue that sovereign immunity is no defense to an unconstitutional taking of property, a point the Department does not dispute, and ask the Court to hold that they have stated a cause of action for either a regulatory or physical taking of their property under the Florida Constitution and the United States Constitution. Initial Br. at 30-33. The Department strongly disputes that claim.

The Department did not take petitioners' property. Although petitioners argue that the Department engaged in a regulatory taking "by depriving owners of property, either the license or funds paid to ransom the license," Initial Br. at 31, the amended complaint alleges no more than that petitioners incurred out-of-pocket costs for complying with an agency order they chose not to have judicially reviewed. They cite no case holding that such costs—or in the alternative, the suspension of their licenses—fall within the ambit of the Fifth Amendment's prohibition on the taking of private property for public use without just compensation. Petitioners' reliance on In re Forfeiture of 1976 Kenworth Tractor

Trailer Truck, 576 So. 2d 261 (Fla. 1991), is conspicuously misplaced. In that case the state had refused to return a truck acquired through forfeiture proceedings despite a court order to do so.

The claim of a "physical taking" fares no better. In Loretto v.Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and Storer Cable TV, Inc. v. Summerwinds Apts. Assocs., 493 So. 2d 417 (Fla. 1986), the courts found that statutes compelling owners of apartment properties to accept installation of cable TV lines gave rise to a compensable taking. Petitioners do not contend that the statutes mandating installation of IIDs are unconstitutional invasions of their property. Rather, they claim that installation pursuant to an unchallenged order effects a taking. There is no authority for this interpretation of the Fifth Amendment's taking clause.

As Justice Kennedy has pointed out, in some instances it is the due process clause of the Fifth Amendment, not the takings clause, that protects against government exactions. See Eastern Enterprises v. Apfel, 524 U.S. 498, 539-550 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). At issue in Eastern Enterprises was the constitutionality of the Coal Industry Retiree Health Benefit Act that required a former operator to fund health benefits for retired miners who had worked for the operator before the operator left the coal industry. A four-member plurality found that the Coal Act was a taking. Justice Kennedy

concurred in the judgment but concluded the act was invalid only under the due process clause. Four other dissenting justices agreed with Justice Kennedy that the due process clause applied, but they would have held the act constitutional. Id. at 556-557.

Justice Kennedy's opinion catalogues various property interests the Supreme Court has recognized as protected by the takings clause. Id. at 541-542. Not one is remotely analogous to the losses petitioners claimed resulted from not appealing the Department's suspension orders. Indeed, this Court has repeatedly held that there is no property interest in possessing a driver's license; rather, driving is a privilege subject to proper regulation. Lescher, 985 So. 2d at 1083; Lite v. State, 617 So. 2d 1058, 1060 (Fla. 1993); Bolware v. State, 995 So. 2d 268, 274 (Fla. 2008)(citing cases). The suspension or revocation of a driver's license is protected by the due process clause. Petitioners (and prospective class members) could have sought judicial review of the Department's orders just as did the licensees in Aultman, Embrey, Doyan, Karz, and Gonzalez-Zaila. They did not. Instead, after forfeiting the right to judicial review, and after these other cases were decided, they brought this action arguing the costs they incurred amounted to an unconstitutional taking of their property.

Petitioners are wrong again. No authority exists for such an application of the takings clause, and petitioners cite none. State departments and boards

frequently revoke, suspend, or condition licenses of all kinds. Any property interest in the license is protected by the right of judicial review, not by compensation under the takings clause for costs incurred in complying with, rather than appealing, an agency order. An unappealed agency licensing decision, particularly one concerning a driver's license, is not subject to collateral attack under the takings clause on the ground that it affects a property interest.

Finally, even when an agency decision affects a property interest protected by the takings clause— unlike this case — a permit applicant who forgoes judicial review must concede the correctness of the agency decision in order to sue for a taking in circuit court. Key Haven Assoc'd Enterprises v. Bd. of Trustees of the Internal Imp. Trust Fund, 427 So. 2d 153 (Fla. 1982). This action does not concede the correctness of the Department's decision but rather contests it. Thus, even accepting for argument petitioners' erroneous premise—that the takings clause applies to a driver's license—the claim fails.

The lower courts correctly ruled that petitioners' claim was, at most, one for damages, not a taking, and that the state had not waived its immunity from such a claim. Plaintiffs do not contend that the state has waived its immunity for damages of this kind. Accordingly, the dismissal of Count V should be affirmed.

CONCLUSION

For the reasons set forth, the amended complaint states no cause of action for violation of procedural due process under the United States and Florida Constitutions (Counts I and IV); no cause of action for violation of the double jeopardy provisions of the United States and Florida Constitutions (Counts II and IV); no cause of action for an unconstitutional taking under the United States and Florida Constitutions (Count V); and no cause of action for equitable restitution under article I, section 18 of the Florida Constitution (Count IV). Accordingly, the dismissal of these claims should be affirmed.

Based on the suggestion of mootness filed with this brief, petitioners' claim that the Department is continuing to violate article I, section 18 of the Florida Constitution by unlawfully ordering petitioners to install or maintain IIDs in their vehicles is moot, and they are not entitled to prospective, injunctive relief under Count IV. If the Court does not decide whether this claim is moot, it should instruct the trial court that Bradsheer and Johnson are entitled to declaratory and injunctive relief under Count IV only if they can demonstrate the Department continues to unlawfully require them to install and maintain their IIDs.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 28th day of May, 2010 to the following:

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