IN THE SUPREME COURT OF FLORIDA

MICHAEL BRADSHEER and
MICHAEL K. JOHNSON,

Petitioners,

v.

Case No. SC 09-2255
Lower Tribunal No. 1D07-6610

FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and JULIE JONES, in her official capacity as Executive Director,

Respondents.

PETITIONERS' INITIAL BRIEF ON THE MERITS

M. STEPHEN TURNER, P.A.
Florida Bar No. 095691
DAVID K. MILLER, P.A.
Florida Bar No. 0213128
KELLY OVERSTREET JOHNSON, P.A.
Florida Bar No. 0354163
BROAD AND CASSEL
215 South Monroe Street, Suite 400 (32301)
Post Office Drawer 11300
Tallahassee, Florida 32302
Phone: (850) 681-6810
Fax: (850) 521-1446
Attorneys for Petitioners

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STATEMENT OF THE CASE AND FACTS

Petitioners Bradsheer and Johnson, on behalf of themselves and potential class members, seek review of *Bradsheer v. Dep't of Highway Safety and Motor Vehicles*, 20 So. 3d 915 (Fla. 1st DCA 2009) (copy at App. 1), which held that the Department's (DMV's) unauthorized orders cancelling Petitioners' driver's licenses unless they paid to install and maintain ignition interlock devices in their vehicles, may have violated due process if Petitioners can factually show a protected property interest in their driver's licenses; but that DMV's orders did not violate double jeopardy protections in essentially imposing criminal penalties, even though the criminal courts chose not to impose the device as a criminal penalty; and that judicial redress by equitable restitution of the unlawfully exacted penalties or by compensation for a taking is not available, since there was no statute allowing this remedy against the State.

Statutory Provisions Governing Device as Punishment for DUI Offenses

Petitioners were convicted and sentenced for driving under the influence (DUI) before July 1, 2005. 20 So. 3d at 917. During the material period, a sentencing criminal court could order DUI offenders to install an ignition interlock device (the "device") in their vehicles. The device is a breath alcohol analyzer connected to a motor vehicle's ignition. The driver must blow into the device to start the motor vehicle; if the driver's breath alcohol exceeds the start up point on

the device, the vehicle will not start. *Id.* at 917 n. 1. However, no statute granted DMV authority to administratively order offenders to install the device. *Id.* at 917.

The governing statute in effect from 1990 through June 30, 2002, §316.1937, Fla. Stat., allowed the criminal court and only the criminal court to sentence DUI offenders to install and maintain an ignition interlock device on any vehicle they operated. The statute provided that "the court may require" the device, so it was an option the court could choose to impose or not:

> (1) ***In addition to any other authorized penalties, the court may require*** that any person who is convicted of driving under the influence in violation of s. 316.193 shall not operate a motor vehicle unless that vehicle is equipped with a functioning ignition interlock device certified by the department as provided in s. 316.1938 and installed in such a manner that the vehicle will not start if the operator's blood alcohol level is in excess of 0.05 percent or as otherwise specified by the court. ***The court may require*** the use of an approved ignition interlock device for a period of not less than 6 months, if the person is permitted to operate a motor vehicle, whether or not the privilege to operate a motor vehicle is restricted, ***as determined by the court***.
>
> (2) ***If the court imposes*** the use of an ignition interlock device, the court shall: … (emphasis added)

In 2002, the Legislature amended this statute to add a sentence providing that "The court … shall order placement of an ignition interlock device in those circumstances required by s. 316.193." Ch. 2002-263 §4, Laws of Fla. For first offenders, the device remained a sentencing option for the court. For second and later DUI offenses, the law amended §316.193, Fla. Stat., which defines DUI and

provides penalties, to provide for mandatory placement of the device as part of the punishment. Ch. 2002-263, §1, Laws of Fla., amended §316.193 to provide:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if…. [listing elements of offense]
>
> (2) (a) … any person who is convicted of a violation of subsection (1) shall be punished:
>
> 1. By a fine …
>
> 2. By imprisonment …
>
> 3. For a second conviction, by mandatory placement for a period of at least 1 year, at the convicted person's sole expense, of an ignition interlock device approved by the department ….

The 2002 act also amended subsections (2)(b) and (c) of this statute to provide that for third or subsequent offenses, "the court shall order the mandatory placement [of the device] for a period of not less than 2 years." *Id*. These amendments took effect July 1, 2002. *Id*. §14.

Sentencing courts frequently did not order installation of the device, even in cases where this punishment was arguably mandatory. *Bradsheer*, 20 So. 3d at 917. However, despite the absence of any legal authority, beginning in 2004, DMV undertook a program to order all drivers convicted of DUI to install the device in cases where the criminal courts did not do so. *Id*. DMV threatened to cancel their driver's licenses if they failed to comply. *Id*. The appellate courts

uniformly held DMV's action was unlawful because DMV was a state agency, not a court, and had no authority to order this criminal punishment. *Id.*, citing *Dickenson v. Aultman*, 905 So. 2d 169 (Fla. 3d DCA 2005); *Doyon v. DMV*, 902 So. 2d 842 (Fla. 4th DCA 2005); and *Embrey v. Dickenson*, 906 So. 2d 316 (Fla. 1st DCA 2005); *see also Karz v. Dickenson*, 932 So. 2d 426 (Fla. 2d DCA 2006).

In 2005, the Legislature enacted §322.2715, Fla. Stat., which for the first time authorized DMV to administratively impose ignition interlock devices without a criminal court order. Ch. 2005-138, §2, Laws of Fla. This law took effect July 1, 2005. *Id*. §3. Hence, only after July 1, 2005, was DMV authorized by statute to regulate drivers by forced administrative imposition of the device for a DUI offense committed after the effective date of the statute.[1]

Complaint Allegations

Petitioners were plaintiffs in circuit court. *See* Amended Complaint ("AC") (R 164) (copy at App. 2). For purposes of review of the dismissal order, the fact allegations are presumed correct and all inferences are drawn in their favor.[2]

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[1] The decision below held this 2005 law applies if the *conviction* occurs after July 1, 2005, so the 2005 amendment could conceivably be applied retroactively to offenses occurring before its effective date. 20 So. 3d at 917, citing §322.2175(4). *Compare Karz*, 932 So. 2d at 428 n. 1 (indicating law in effect at the time of the offense controls). This Court may want to resolve this additional conflict of rulings and construe the 2005 law to avoid federal and state constitutional issues.

[2] *Wallace v. Dean*, 3 So. 3d 1035, 1042-43 (Fla. 2009).

DMV issued orders to drivers convicted and sentenced by the court for DUI before the law changed on July 1, 2005, whose sentences did not require a device, announcing their licenses were cancelled if they did not install the device in their vehicles within 30 days and maintain it thereafter. *See* order dated January 27, 2004, stating unless the recipient complies, "your driver license will be cancelled effective 02/25/04 and you will be required to surrender the driver license in your possession." *See* order, Initial Complaint Exh. B (R 15) (copy at App. 3). To avoid losing their driver's licenses, Petitioners and potential class members were forced to pay installation fees and monthly monitoring fees to a vendor chosen by DMV. AC ¶s 8, 18, 23-24. *See* fee schedule, Initial Complaint Exh. A (R 13).

DMV issued these orders without prior hearing, but told drivers they could appeal under §322.31, Fla. Stat., which allows review of final orders by writ of certiorari. The Amended Complaint alleges this procedure is inadequate:

> A petition for writ of certiorari is constitutionally inadequate as a remedy in these circumstances, because (1) there is no emergency or other reason the Department could not offer a hearing before suspending the license; (2) a petition for writ of certiorari is confined to review of the hearing record, and because no hearing was offered, there was no record to review; and (3) a petition for writ of certiorari requires considerable time and expense to resolve, during which time the petitioner must comply with the Department's order to install the device or be unable to drive, and the remedy is not practically available to most persons. (R 164 at 171, AC ¶ 33)

DMV issued device installation/license cancellation orders to over 1,000 persons whose DUI offenses occurred prior to July 1, 2005, and even prior to

July 1, 2002, even though these persons were not sentenced by a court to install ignition interlock devices. Petitioners sought to represent the class of such persons who were subjected to DMV's unlawful orders. AC ¶s 5-15, 17-27.

Petitioners sought declaratory and injunctive relief and equitable restitution for deprivation of property without due process; for double jeopardy clause violation; and for unlawful administrative exaction of a penalty; and compensation for a taking by exaction and physical invasion of their vehicles.

Rulings in the Lower Courts

The circuit court dismissed the entire case with prejudice for failure to state a cause of action, holding the Amended Complaint did not allege any interest protected by the federal constitution, and that all state constitutional law claims were barred by sovereign immunity. *See* Order Granting Motion to Dismiss, stating the circuit court's reasons (R 225-26); and Final Judgment of dismissal with prejudice (R 230). No class action issues were addressed.

The First District, by a 2-1 decision, affirmed in part and reversed in part. The panel majority acknowledged that DMV acted without authority in revoking driver's licenses and exacting payment of fees for interlock devices. 20 So. 3d at 917. The panel majority tentatively reinstated Petitioners' federal due process claim, but held that whether federal due process protects an issued driver's license from unlawful revocation is a fact issue to be resolved at trial. *Id*. at 918-20.

The panel majority affirmed dismissal of the double jeopardy claim, holding that double jeopardy does not protect persons from DMV penalties, because DMV is not a court and thus cannot impose criminal penalties. *Id*. at 920.

The panel majority affirmed dismissal of the restitution claim for violation of Art. I, §18, Fla. Const., prohibiting agencies' unlawful exaction of penalties, and state constitutional double jeopardy and due process guarantees. The majority held that even if all these provisions are self-executing, Petitioners have no cause of action for restitution of penalties exacted without authority, as no statute specifically waives sovereign immunity for such claims. *Id*. at 920-21.

The panel majority dismissed Petitioners' taking claims, without explanation except to say that the State had not waived sovereign immunity. *Id*. at 920. The majority said the record did not contain evidence or findings of fact that would support monetary damages. *Id*. at 920 n. 4. However, Petitioners' claims for restitution of amounts paid were dismissed for failure to state a cause of action, before any evidence could be considered or any findings of fact made.

Judge Benton wrote a lengthy dissent holding that Petitioners stated a cause of action on the aforesaid claims. He urged that due process claims did not turn on individual case facts, but rather on legally established property rights to valid existing licenses; and that constitutional claims for restitution and compensation should not be dismissed on sovereign immunity grounds. *Id*. at 922-29.

SUMMARY OF THE ARGUMENT

There is no question DMV acted unlawfully in forcing Florida drivers who committed DUI offenses before July 1, 2005, to pay an unlawful penalty to install and maintain the interlock device, on pain of losing their driver's licenses.

The issue in this case is whether citizens have full judicial redress to recover penalties that a state agency unconstitutionally forced them to pay. The decision below holds the courts are impotent to restore the unlawful penalties paid. If the driver has already complied, prospective injunctive relief would not serve any protective or remedial purpose. The ruling below effectively limits constitutional protections to those with enough wealth or political influence to obtain restitution by political action (such as a claims bill). It also allows the State to keep the benefit of its unconstitutional actions, which encourages state agencies to engage in more such unlawful exactions in the future.

DMV's conduct violated federal and state constitutional protections and should be fully redressed as explained in the four points of this Brief:

Point I – Double Jeopardy. The panel majority below held double jeopardy does not apply because state agencies cannot impose criminal penalties. But that reasoning is circular. The statute determines whether a penalty is criminal or not; the agency's unlawful action cannot determine anything to the contrary. Double jeopardy protects against multiple punishments by the state for one offense, and

secures the finality of court judgments. Once a court's criminal sentence is final, no further criminal penalty can be imposed, by either the court itself or a state officer acting unlawfully to enhance the court's sentence. This protection must include restoration of criminal penalties paid upon coercion of unlawful orders.

Point II – Unauthorized Penalty. The panel majority below held the prohibition in Art. I, §18, Fla. Const., against unlawful penalties by administrative agencies, even if this provision is self-executing, does not allow any monetary restitution unless a statute so provides. This negates the constitutional protection for most affected Florida citizens, who have no practical choice but to pay the unlawfully exacted penalties and seek restitution later.

Point III – Deprivation of Property without Due Process. The panel majority below held that property rights in a driver's license is a fact issue that varies depending on whether the court sentence was correct or not. However, the license is a legitimate expectation once the court's sentence became final and was served, even if erroneous. The DMV deprived drivers of property without due process by entering orders without lawful authority or any chance to object before this penalty was imposed. Drivers had no choice but to comply with the unlawful orders in order to keep their licenses, a practical necessity of life. Subsequent certiorari review is not an adequate remedy. Due process protects property rights in both the driver's license and the payment ordered, which must be restored to the owner.

Point IV – Compensation for a Taking. The panel majority below held the taking clause does not protect Petitioners unless a statute waives sovereign immunity for compensation. This makes the taking clause illusory. Petitioners allege both a regulatory taking by unlawful exaction, and a physical taking by involuntary intrusion of the device in their vehicles. The constitution and case law clearly allow judicial compensation. If state law does not provide this remedy, then federal taking rights arise that are not subject to state sovereign immunity.

These constitutional protections are self-executing, *i.e.*, not dependant upon legislative implementation. The courts have the inherent power and constitutional duty to enforce these constitutional protections, even if no statute so provides.

Contrary to the ruling below, Petitioners do not seek damages for a constitutional or common law tort, but equitable restitution of penalties unconstitutionally exacted, which is distinct from tort damages.

The lower courts undoubtedly sympathized with the idea of subjecting prior offenders who were not sentenced to install the device to contribute to the interlock device program to deter future offenses. But such sympathies cannot replace the constitutional rule of law. If State agencies can exact unlawful penalties from licensed drivers without redress, they can do the same to any licensed professions and occupations in this state. Agencies cannot exact payment of a penalty without legal authority. When they do, they must restore it to the owner.

ARGUMENT

COURT HAS JURISDICTION OVER ENTIRE CASE

The Court accepted jurisdiction based on conflict of decisions on the double jeopardy issue. Having accepted jurisdiction, the Court has jurisdiction to address all issues in the case, including whether Petitioners have meaningful court redress for deprivation of their constitutional rights. Fla. R. App. P. 9.040(a); *see Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 563 (Fla. 2005), citing *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982). *And see* Art. V, §3(b)(3), Fla. Const. (Court has jurisdiction over cases expressly construing the state or federal constitution).

STANDARD OF REVIEW

The case arises from a dismissal of a complaint for failure to state a cause of action, which presents only legal issues subject to *de novo* review. *Siegle v. Progessive Consumers Ins. Co.*, 819 So. 2d 732, 734-35 (Fla. 2002).

POINT I

DMV VIOLATED DOUBLE JEOPARDY BY IMPOSING A CRIMINAL PENALTY BEYOND THE CRIMINAL COURT'S SENTENCE, WHICH REQUIRES EQUITABLE RESTITUTION.

The Double Jeopardy Clause prohibits more than one criminal punishment for one offense. This issue turns on whether the Legislature intended to impose a criminal penalty. *United States v. Ward*, 448 U.S. 242, 248 (1980); *Lescher v. Fla. DMV*, 985 So. 2d 1078, 1082 (Fla. 2008). The Legislature intended during the

relevant period that the interlock device was a criminal penalty, and the DMV and the courts are bound by the Legislature's determination.

Before July 1, 2005, the controlling statute authorized this penalty only as part of a court's criminal sentence, so it must be a criminal penalty. Legislative history confirms this point. *See* House of Reps. Criminal Justice Committee Staff Report on HB 245, June 19, 1990 (judicial notice requested below, R 212):

> This bill creates s. 316.1937, F.S, which authorizes *the court to impose as a condition of probation for DUI offenders* the installation of an ignition interlock device. (Report p. 1 ¶ I B)
>
> *This bill … seeks to discourage, prevent and punish criminal behavior*. (*Id*. p. 4 ¶ III) (emphasis added)

Four appellate courts held this is a criminal penalty. *Doyon v. DMV*, 902 So. 2d 842 (Fla. 4th DCA 2005), held that DMV's order constitutes double jeopardy because the court sentence is final, even if erroneous, when the state did not move to correct it or appeal it; and Doyon completed his court sentence before DMV ordered him to install the device. *Id*. at 844. *See also Dickenson v. Aultman*, 905 So. 2d 169, 171 (Fla. 3d DCA 2005) (DMV's action imposed a "criminal penalty"); *Embrey v. Dickenson*, 906 So. 2d 316, 317-18 (Fla. 1st DCA 2005) (DMV's action is "criminal punishment"); *Karz v. Dickenson*, 932 So. 2d 426, 427 (Fla. 2d DCA 2006) (adopting rulings in *Doyon*, *Aultman*, and *Embrey*).

The panel majority below held this is a criminal penalty when imposed by a

sentencing court as the law allows. 20 So. 3d at 920 n. 3. But in conflict with the *Doyon-Aultman-Embrey-Karz* line of cases, the panel majority held that "the Department, as an administrative agency, cannot impose criminal sanctions," so it would be "illogical" to apply double jeopardy protection to DMV's action. *Id*. at 920. This is circular reasoning. Proper analysis of whether a penalty is criminal turns solely on legislative intent. The statute allowed only sentencing courts to impose the device, so it is a criminal penalty, and its nature is the same when administrative officers imposed it unlawfully, as the other cited cases hold.

As in *Doyon*, 902 So. 2d at 843, DMV presumably waited until after drivers had already fully served their court sentence and license suspension or revocation period set by the court sentence, to issue its orders imposing the device. Otherwise the orders would serve no practical purpose. Imposing the device is unlawful extra punishment, and cancelling a restored or entitled driver's license for failure to comply with the unlawful order is also unlawful extra punishment.

The court sentence is final and binding on the State. State administrative officers cannot increase court sentences. *Doyon; see also Jackson v. State*, 959 So. 2d 1282 (Fla. 1st DCA 2007) (probation officer cannot impose enhanced probation terms); *Fuston v. State*, 838 So. 2d 1205, 1207 (Fla. 2d DCA 2003) (administrative agency lacks "authority to impose a more onerous sentence … than the sentence actually imposed by the trial court").

The Supreme Court recently described the two purposes for the Double Jeopardy Clause in *Yeager v. United States*, 129 S. Ct. 2360, 2365-66 (2009):

> …the Clause embodies two vitally important interests. The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity" …. The second interest is the preservation of 'the finality of judgments. [citations omitted]

Once a court sentence is final, not even the court itself can impose extra penalties without violating double jeopardy. *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994); *Ashley v. State*, 850 So. 2d 1265, 1268 (Fla. 2003) ("An order of probation, like any other aspect of sentencing, ought not to be a work in progress that the trial court can add to or subtract from at will …. To permit this would mean a lack of finality for no good reason and multiple appeals," quoting prior case); *Gardner v. State*, 35 F. L. W. D 598, 2010 Fla. App. LEXIS 3329 at *7-*8 (Fla. 2d DCA Mar., 17, 2010) ("Absent a proper appeal, double jeopardy considerations bar increasing even an illegal sentence"); *Doyon*. When the State does not ask to correct the sentence by timely motion or appeal under the controlling court rules of procedure, the defendant has a legitimate expectation that the sentence is final, even if the sentence is erroneous. DMV's orders adding new criminal penalties to a final sentence violate both purposes of the Double Jeopardy Clause under *Yeager*.

The notion that DMV can disregard final court sentences by administratively imposing extra penalties usurps judicial powers; evades court rules imposing jurisdictional deadlines for review, *cf. Fox v. District Court of Appeal*, 553 So. 2d 161 (Fla. 1989) (granting writ of prohibition in untimely state appeal of sentence); and undermines State Attorneys' sole authority to make binding plea bargains.

The remedy for a double jeopardy violation is to vacate the unlawful order. *Heck v. State*, 966 So. 2d 515, 517 (Fla. 4th DCA 2007). Furthermore, in cases where the defendant has complied with an unlawful order, as here, the court has "inherent power" to correct the wrong and restore the status quo, *e.g.*, restoration of fines, probation costs, and forfeitures that the defendant has been unlawfully ordered to pay. *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. 3d DCA 1980); *Sheriff of Alachua Cty. v. Hardie*, 433 So. 2d 15, 16 (Fla. 1st DCA 1983); *Dixie Cty. Sheriff's Office v. Forfeiture of 1987 Ford Van*, 592 So. 2d 748, 749 (Fla. 1st DCA 1992). The court can exercise this inherent power to restore criminal penalties that DMV coerced in violation of double jeopardy protection.

The decision below emphatically states a contrary rule of law that will misguide future agency and trial court decisions. This Court should correct the ruling below to make clear that persons who are subjected by agencies to criminal penalties beyond the court's final sentence, have the right to full judicial redress, including restitution of penalties paid, under the Double Jeopardy Clause.

POINT II

ART. I, §18, FLA. CONST. IS A SELF-EXECUTING PROHIBITION AGAINST AGENCIES EXACTING UNLAWFUL PENALTIES, WHICH REQUIRES EQUITABLE RESTITUTION.

Regardless of whether this penalty is designated as a criminal penalty or a civil penalty, Art. I, §18, Fla. Const., prohibits agencies from imposing penalties without authority under law. DMV violated this provision by imposing the device without authority. *See Aultman*, 905 So. 2d at 171, holding DMV's action violated this provision, and cases following *Aultman* cited above.

The decision below limits Art. I, §18 to allow only prospective relief, which affords no relief at all for persons who were forced to pay a penalty on pain of losing their driver's licenses. The issue is whether Art. I, §18 allows the court to award restitution of unlawful penalties, or whether the agency gets to exact unlawful penalties and keep the benefit thereof, whenever immediate injunctive relief is not obtained, or cannot be obtained as a practical matter.

Constitutional provisions are presumed to be self-executing, and are conclusively so if courts can determine their purpose without legislative help. *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 485 (Fla. 2008); *Gray v. Bryant*, 125 So. 2d 846, 851-52 (Fla. 1960). Art. I, §18's prohibition against unlawful penalties has a very clear purpose and the courts need no help to understand this purpose, so it is self-executing. Unlawful exaction by an

administrative agency violates the Constitution unless and until restitution is made to the owner. The State's sovereign immunity does not allow it to break the law by exacting property or benefits to which it has no legal right, and not restore the same to the legal owner. Art. I, §18 authorizes suit for this purpose. The Constitution itself can waive sovereign immunity without a statute. *Circuit Court v. Dep't of Natural Resources*, 339 So. 2d 1113, 1114 (Fla. 1976); *Klonis v. State Dep't of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000).

The panel majority below held that even if Art. I, §18 (and double jeopardy and due process protections) are self-executing, there is no cause of action for "monetary damages" because the Legislature did not waive sovereign immunity for such claims. 20 So. 3d at 921. The majority fail to recognize that Petitioners' pleading seeks equitable restitution, *see id*. at 928 (dissenting opinion), and AC par. 1 and Count IV prayer for relief at p. 12 (R 164, 175). This is different from tort damages for a violation of constitutional rights. Restitution entitles one to recover that which he or she parted with or that which the defendant received. *Sun Coast International, Inc. v. Dep't of Bus. Reg*., 596 So. 2d 1118, 1120-21 (Fla. 1st DCA 1992). *See also Ocean Communities, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007) (distinguishing restitution, requiring a wrongdoer to restore to the injured party that which was received, from damages, which put an injured party in as good a position as if no wrong had been committed). A hypothetical

claim to compensate drivers' consequential damages for forcing them to maintain interlock devices in their vehicles could include additional amounts for lost wages, alternate transportation costs, embarrassment, and invasion of privacy. Petitioners' equitable restitution claim does not seek "damages" for these consequential harms.

Restitution is part of equitable relief to prohibit a party from gaining a benefit that does not belong to it. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946) (restitution remedy is "adjunct to" injunction and "within the recognized power and within the highest tradition of a court of equity"). *See also* Palmer, *Equitable Restitution* Ch. 9, "Restitution of Benefits Obtained by Duress," §§ 9.1 and 9.6 (1978), which explains that for centuries, courts have awarded restitution of money involuntarily paid to obtain the release of property wrongfully detained (often called "duress of goods"). Courts generally extend this equitable restitution remedy to award refund of invalid taxes and other charges unlawfully exacted by government under duress. *Id*. § 9.16.

Florida courts follow this rule. They order refunds of unconstitutional taxes, fees, or fines paid, even though no statute waives sovereign immunity for this remedy. *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), exemplifies such cases. There the Court refunded motor vehicle license fees unlawfully exacted, over the state's sovereign immunity objection, explaining that "Sovereign immunity does not exempt the State from a challenge based on violation of the

federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will." *Id*. at 721.

Kuhnlein follows a long line of cases granting refund of invalid taxes or fees. *See New Smyrna Inlet Dist. v. Esch*, 137 So. 1, 3-4 (Fla. 1931) (constitutional provision that "no tax shall be levied except in pursuance of law" allowed suit to recover invalid tax involuntarily paid; "that is not in effect an unauthorized suit against the State"). The prohibition against unauthorized taxes, similar to the prohibition against unauthorized penalties in Art. I, §18, authorizes suit for full judicial redress, including refund, even though the right to a refund is not explicit. This principle was known to the framers of the 1968 Constitution. Indeed, Art. I, §18 is not needed to enjoin unauthorized agency penalties. Art. I, §18 is presumably not redundant, but was adopted to assure full judicial redress, including restitution.

The appellate courts routinely apply this rule. *See City of Jacksonville v. Jacksonville Maritime Ass'n, Inc.*, 492 So. 2d 770, 772 (Fla. 1st DCA 1986) ("we also affirm the allowance of recoupment" of invalid user fees, citing cases); *Broward County v. Mattel*, 397 So. 2d 457 (Fla. 4th DCA 1981 ("[N]o statutory provision authorizing a refund is necessary for the taxpayer to obtain a refund where payment of an illegal tax is involuntary"); *Broward County v. Burnstein*, 470 So. 2d 793, 795 (Fla. 4th DCA 1985) ("[I]f a tax is paid involuntarily, a refund may be obtained even in the absence of a statute providing for same"); *Bill Stroop*

Roofing, Inc. v. Metro. Dade Cty., 788 So. 2d 365, 367-68 (Fla. 3d DCA 2001) ("governments are required to refund taxes and fees illegally exacted, and the doctrine of sovereign immunity is inapplicable thereto"). *Stroop* noted, with understatement, "We believe this conclusion injects greater morality in government than would allowing the retention of illegal exactions." *Id*. at 368 n. 5. *And see Cooper*, 389 So. 2d 318, and other cases cited in Point I above, holding courts have "inherent" power to restore unlawful fines or forfeitures paid. Because of this rule, there is no need to enact a statutory remedy. If these rulings were contrary to constitutional intent, the people would have amended the Constitution.

The absence of a statutory remedy is not a barrier that prevents courts from enforcing self-executing constitutional rights. *E.g.*, *Kuhnlein,* 646 So. 2d at 721, and cases cited above. The courts have the ultimate duty to provide "ways and means" to give effect to constitutional rights, if the legislature does not. *See Dade Cty. Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684, 686-87 (Fla. 1972):

> We think it is appropriate to observe here that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights. The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it. … When the people have spoken through their organic law concerning basic rights, *it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights*; *however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so*. (emphasis added)

> [T]he people … have the right to have their constitutional rights enforced…."

The absence of a legislatively enacted legal remedy does not bar equitable remedies such as restitution. Prospective individual injunctive relief alone is just a halfway measure that fails to carry out the judiciary's constitutional duty to protect property rights, as it does not restore exacted property to its owner, nor deter violations, as evidenced by DMV's continued exactions despite repeated court rulings that this is unlawful. Equity does not allow anyone to be unjustly benefited by divesting another's property. *See Bell v. Smith*, 32 So. 2d 829, 832 (Fla. 1947). Full equitable relief requires restitution of unlawfully exacted penalties.

There is no reason this well-established constitutional redress should not apply to the unlawful exaction in this case. This Court should not allow the decision below to prevent Florida citizens from having full constitutional redress when a rogue agency forces exactions without authority of law.

If any doubt remains, the Florida Constitution must be construed to allow the courts to award restitution of unlawful exactions to the owner, to avoid having the Florida Constitution itself violate federal due process. *See Kupke v. Orange Cty.*, 293 Fed. Appx. 695, 698 (11th Cir. 2008), an action to recover an invalid fine under federal due process, in which the court held that "To be meaningful, a post-deprivation remedy must afford the property owner an opportunity to recover the property taken without due process…." The decision below not only defeats the

intent of Art. I, §18 to protect citizens from unlawful penalties, but also interprets the state constitution in a manner that violates the Fourteenth Amendment's due process guarantee.

The panel majority below ignored these precedent cases, but cited two inapposite cases for its conclusion. 20 So. 3d at 921. No property restitution remedy was involved in *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997). Rather, that decision rejected a constitutional tort claim for damages for wrongful imprisonment.[3] *Fernez v. Calabrese*, 760 So. 2d 1144 (Fla. 5th DCA 2000), rejected a constitutional tort cause of action for damages under state law against individual city employees for violating due process and free speech rights. This case likewise did not involve claims against an agency to restore unlawfully exacted property. *See Depaola v. Town of Davie*, 872 So. 2d 377, 380-82 (Fla. 4th DCA 2004) (distinguishing both cases and holding that a complaint stated a cause of action for declaratory and supplemental equitable relief, including that the court "direct the defendant [town] to restore the plaintiff to his former employment with full retroactive status, seniority, pay and benefits, including accrued retirement credit and benefits").

[3] This underscores that such action is treated as a common law tort claim that may be brought under the statute waiving sovereign immunity. *See Thomas v. Florida Game and Freshwater Fish Comm'n*, 627 So. 2d 541 (Fla. 2d DCA 1993) (false arrest claim allowed).

Awarding a judgment for restitution does not interfere with legislative powers over the state budget. Constitutional rights and the rule of law are not dependent on the State's fiscal priorities. *See Kuhnlein* and other cases cited above; *Flack v. Graham*, 453 So. 2d 819 (Fla. 1984) (judge awarded salary as constitutional right). *And see generally Corn v. State*, 332 So. 2d 4, 7-8 (Fla. 1976), holding that courts have a "constitutional duty to protect rights of property," as "basic civil rights … founded in nature," "basic to the foundation of our democratic system," and "a sacred right, the protection of which is an important object of government." *See also* Art. VII, §1(d), Fla. Const. ("Provision shall be made by law for raising sufficient revenue to defray the expenses of the state….").

If the courts award a constitutional restitution judgment against the State, there is a statutory process for Petitioners to obtain payment by appropriation if sufficient funds are not available in the current agency budget. §11.066, Fla. Stat. This statute contemplates that claimants obtain a court judgment to be entitled to an appropriation to satisfy the State's adjudicated constitutional obligation, when no current appropriation is available for that purpose. There is no fiscal reason for the Court to deny persons with meritorious constitutional claims a court judgment for equitable restitution of penalties unlawfully exacted.

POINT III

DRIVER LICENSES ARE PROPERTY RIGHTS PROTECTED BY DUE PROCESS AS A MATTER OF LAW.

The United States Supreme Court has conclusively decided that a driver's license is a property right protected by due process as a matter of law. *Bell v. Burson*, 402 U.S. 535, 539 (1971). *Bell* explained that driver's licenses merit federal due process protection because:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. ***In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.*** (emphasis added)

Id. *Bell* concluded that:

> We hold, then, that under Georgia's present statutory scheme, before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. … the failure of the present Georgia scheme to afford the petitioner a prior hearing on liability of the nature we have defined ***denied him due process in violation of the Fourteenth Amendment.*** (emphasis added)

Accord, Mackey v. Montrym, 443 U.S. 1, 10-11 (1979) (due process applies to the suspension of a driver's license, because drivers cannot be made whole for the inconvenience and hardship for delay in redressing erroneous suspension). These cases are controlling here.

This Court and other Florida appellate courts have followed *Bell* and *Mackey,* including two decisions as recent as last year. *See Young v. Williams*, 249 So. 2d 684, 685 (Fla. 1971), upholding a class action for deprivation of driver's licenses without due process, stating that the state could not summarily suspend drivers' licenses under the Financial Responsibility Law, without a prior hearing on the issue, quoting the rule in *Bell.* *Accord*, *Wheeler v. DMV*, 297 So. 2d 128, 129-30 (Fla. 2d DCA 1974); *Souter v. DMV*, 310 So. 2d 314, 315 (Fla. 1st DCA 1975); *DMV v. Pitts*, 815 So. 2d 738, 743 (Fla. 1st DCA 2002) ("It is without question that the 'suspension of a driver's license for statutorily defined cause implicates a protectable property interest. This is a substantial private interest and due process applies to its denial"); *DMV v. Lee*, 4 So. 3d 754, 757-58 (Fla. 1st DCA 2009); *DMV v. Hofer*, 5 So. 3d 766, 771 (Fla. 2d DCA 2009). None of these cases is based on particular facts, and some were second tier certiorari cases where the appellate court was not reviewing fact findings but deciding only legal issues.

Respondents argued below that because they issue drivers' licenses under state law, drivers cannot have any federal constitutional right in their drivers' licenses. The circuit court agreed, but on appeal the majority and dissenting judge rejected this extreme argument, which is contrary to *Bell* and *Mackey*. State law is the source of most property rights protected by Amend. XIV, and by Art. I, §9, Fla. Const. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Bishop v. Wood,* 426

U.S. 341, 344 (1976); *Crocker v. Pleasant*, 778 So. 2d 978, 983-84 (Fla. 2001); *Moser v. Barron Chase Secs., Inc.*, 783 So. 2d 231, 236 n. 5 (Fla. 2001).

However, the panel majority below pronounced a novel rule not suggested by either party or by any case law, that henceforth whether a state driver's license is protected as a property right depends on factual determinations. 20 So. 3d at 918-20.

The apparent reason the panel majority improvised this rule is that they felt unable to reconcile cases holding that a drivers license is a property right with other cases that refer to a driver's license as a "privilege," in contexts where DMV acts within its powers and under court orders to enforce statutory burdens on which the license is conditioned. *Cf. Bolware v. State*, 995 So. 2d 268 (Fla. 2008) (statute required DMV to revoke license of habitual offender convicted of driving with revoked license); *Lite v. State*, 617 So. 2d 1058 (Fla. 1993) (statute required court to direct DMV to revoke license as punishment for drug offense); *Lescher v. Fla. DMV*, 985 So. 2d 1078 (Fla. 2008) (when license had been lawfully permanently revoked, statute validly cut off privilege to seek discretionary reinstatement from DMV). These cases involve different statutes which authorized DMV to act, and are thus distinguished from this case in which DMV acted with no authority at all.

Judge Benton's dissent notes that whether a driver's license is called a "right" or a "privilege" is irrelevant for due process purposes, because the United

States Supreme Court eliminated any such labeling distinction. 20 So. 3d at 923-24, quoting *Bell*, 402 U.S. at 539. Judge Benton painstakingly analyzed and distinguished the cases that apply the "privilege" label, pointing out that they do not involve procedural due process challenges to revoking or cancelling a driver's license. 20 So. 3d at 924-27 and nn. 10-17.

The panel majority stated that "… further fact finding is needed to determine if those plaintiffs convicted of a second DUI who fortuitously avoided the mandatory sentencing sanction of imposition of the device or license revocation suffered the loss of a property right. Similarly, fact finding is needed to determine whether the sanction of imposition of the device or license revocation in cases where the offender has only one DUI conviction affects a protected property right. It is possible that even if a driver's license is found to be a protected property right in one situation, it may not be protected in the other." 20 So. 3d at 919-20.

These statements overlook that sentencing criminal courts had exclusive power to impose this penalty for DUI offenses. Whether the defendant committed one DUI or two is irrelevant to DMV's lack of authority. *See* Judge Benton's dissent, 20 So. 3d at 923 n. 9. If the court sentence was erroneous, it is nonetheless final and cannot be collaterally attacked or modified by State executive officers acting without authority. *See* cases cited in Points I and II above. The sentencing court's failure to impose the interlock device does not empower DMV to impair or

diminish drivers' rights in licenses or exact payment, depriving the owner's property rights. The property value deprived can be measured by the payment unlawfully ordered, for which due process requires post-deprivation restitution. By the same token, due process would require restitution of a payment unlawfully exacted from a vehicle owner for return of the owner's unlawfully seized vehicle.

There is no authority to take away entitlement to driver's licenses, or any other license, without due process under rulings of the United States Supreme Court, to which Florida courts have long adhered. The ruling below is a gross misapprehension of the law that will create confusion, because trial courts and agencies will lack guidance as to when a driver's license is or is not property (which, as a fact issue, may go to a jury). The ruling imposes extra workload on lower tribunals and litigants to establish or oppose property rights by contentious and burdensome fact presentations; and creates substantial danger that property rights in licenses will henceforth be unpredictable based on case-by-case fact finding. Constitutional protections should be decided efficiently and uniformly for all Florida licensees as a matter of law, and not vary from person to person based on what trial judges, juries or administrative fact-finders think is "property." *See generally Cent. Fla. Reg'l Hosp. v. Dep't of Health & Rehabilitative Servs*., 582 So. 2d 1193, 1196 (Fla. 5th DCA 1991) ("It is axiomatic that administrative due process requires agency consistency among like petitioners or respondents").

In short, the ruling below makes driver's license rights subject to arbitrary, unequal, and unpredictable deprivation. If the license is not a property right, then state officers are free to do whatever they want to licensees, with no due process protection. The ruling will also have widespread implications as precedent for actions involving other professional or occupational licenses or permits that state or local agencies may use as a basis to exact unlawful penalties.

If property rights are a fact issue, that also makes it difficult to pursue a class action. Cases challenging unconstitutional exactions can be brought as class actions on the common legal issue of whether the exaction is lawful, *e.g., Young,* 249 So. 2d 684; *Kuhnlein*, 646 So. 2d 717; *Public Med. Assistance Trust Fund v. Hameroff*, 736 So. 2d 1150 (Fla. 1999); *City of Miami v. Florida Retail Federation, Inc*., 423 So. 2d 991 (Fla. 3d DCA 1982). The ruling below may force each driver to try his or her case individually, which would deprive meritorious claimants who can only obtain relief by class action of any effective remedy.

The United States Supreme Court's constitutional rulings in *Bell* and *Mackey* and this Court's decision in *Young* are controlling. DMV acted without 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*. Hence, declaratory and appropriate supplemental equitable relief as discussed above should be granted, with attorney's fees under 42 U.S.C. §1988.

POINT IV

SOVEREIGN IMMUNITY IS NOT A DEFENSE TO A CLAIM TO COMPENSATE A TAKING OF PRIVATE PROPERTY.

State Road Dept. v. Tharp, 1 So. 2d 868 (Fla. 1941), squarely rejected sovereign immunity as a defense to a taking claim as a matter of constitutional law:

> Immunity of the State from suit does not afford relief against an unconstitutional statute or against a duty imposed on a State officer by statute, nor does it afford a State officer relief for trespassing on the rights of an individual even if he assumes to act under legal authority. It will not relieve the State against any illegal act or for depriving a citizen of his property; neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State. It will not be permitted as a city of refuge for a State agency which appropriates private property before the value has been fixed and paid.
>
> . . . .
>
> If a State agency can deliberately trespass on and destroy the property of the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of non-liability of the State for suit, then the constitutional guaranty of the right to own and dispose of property becomes nothing more than the tinkling of empty words. Such a holding would raise administrative boards above the law and clothe them with an air of megalomania that would eternally jeopardize the property right of the citizens. It would reverse the order of democracy in this country ….

Id. at 869. *Accord, Jacksonville Expressway Authority v. Henry G. DuPree Co.*, 108 So. 2d 289, 294 (Fla. 1958); *Dept. of Agriculture & Consumer Services v.*

Mid-Florida Growers, 521 So. 2d 101, 103 n. 2 (Fla. 1988) (Art. X, §6, Fla. Const. is self-executing, so regulatory taking claim must be compensated even though no statute waives sovereign immunity). Sovereign immunity does not bar monetary relief for a taking, so the ruling below conflicts with established law.

DMV's action is a regulatory taking by depriving owners of property, either the license or funds paid to ransom the license. A taking arises when DMV fails to return private property it acquired by an unlawful order. *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So. 2d 261, 263 (Fla. 1991) (DMV's failure to promptly return improperly forfeited truck is a taking for which the owner may seek compensation, citing *In re Forfeiture of 1978 Green Datsun Pickup Truck*, 475 So. 2d 1007 (Fla. 2d DCA 1985)).

A taking occurs when a property owner is burdened by being forced to pay just to exercise its lawful rights. *Aspen-Tarpon Springs Ltd. v. Stuart*, 635 So. 2d 61, 68 (Fla. 1st DCA 1994), which held a statute requiring a mobile home park owner that wanted to change the use of its land to pay tenants' moving costs is a taking, saying "A statute that requires any form of remuneration to recover the right to possess and occupy one's own property would seem to be confiscatory…." *See also Nollan v. California*, 483 U.S. 825, 837 (1980) (compensation due for "government plan of extortion").

In addition, DMV's action is a physical taking, because the forced installation of the device is a physical intrusion into the owner's vehicle that the owner had the right to exclude. A physical intrusion is a taking, even if it is spatially insignificant and even if it is allowed by statute. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (statute forcing apartment owner to allow installation of cable TV lines is a taking of owner's property right to exclude such lines, even if the physical burden is insignificant compared with the public benefit); *Storer Cable TV, Inc. v. Summerwinds Apts. Assocs., Ltd.*, 493 So. 2d 417 (Fla. 1986) (same). Where an agency acts without any authority to force a physical intrusion on private property, the owner should have no less right to compensation.

Compensation is due even if the taking is only temporary. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keshbro v. City of Miami*, 801 So. 2d 864 (Fla. 2001).

State law must provide a remedy for a taking. Otherwise, Petitioners have a federal constitutional remedy under the U.S. Const. Amend. V and XIV. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194-95 (1985) (a state taking is complete when the state fails to provide an adequate compensation remedy, and a federal taking claim for compensation ripens).

CONCLUSION

The Court should reverse the decision below and direct further proceedings consistent with the following rulings:

(1) Petitioners have stated a cause of action against Respondents for declaratory and supplemental injunctive relief and equitable restitution for violation of constitutional protections against double jeopardy.

(2) Petitioners have stated a cause of action against Respondents for declaratory and supplemental injunctive relief and equitable restitution for violation of Art. I, §18, Fla. Const.

(3) Petitioners have stated a cause of action against Respondents for declaratory and supplemental injunctive relief, including equitable restitution, for deprivation of property without due process, as a matter of law, without any need for fact-finding to determine whether their driver's licenses are property rights.

(4) Petitioners have stated a cause of action against Respondents for compensation for a regulatory taking and for a physical taking under Art. X, §6, Fla. Const., or alternatively, under U.S. Const. Amend. V and XIV.

Respectfully submitted this _____ day of April, 2010.

M. STEPHEN TURNER, P.A.
Florida Bar No. 095691

DAVID K. MILLER, P.A.
Florida Bar No. 0213128
KELLY OVERSTREET JOHNSON, P.A.
Florida Bar No. 0354163
BROAD AND CASSEL
215 South Monroe Street, Suite 400 (32301)
Post Office Drawer 11300
Tallahassee, Florida 32302
Phone: (850) 681-6810
Fax: (850) 521-1446
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon Scott D. Makar, Solicitor General, Louis F. Hubener, Chief Deputy Solicitor General, Ronald A. Lathan, Deputy Solicitor General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, Attorneys for Respondents, this _____ day of April, 2010.

Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Attorney