IN THE SUPREME COURT OF FLORIDA

MICHAEL BRADSHEER and
MICHAEL K. JOHNSON,

Petitioners,

Case No. SC09-2255
Lower Tribunal 1D07-6610

v.

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

Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Stripped of its gloss, Petitioners' Jurisdictional Brief is a classic disagreement with a majority decision of a district court of appeal, arguing that the dissenting opinion represents the correct posture of the law.

At the outset, it is understandable why Petitioners are so vigorously opposed to remand. Once the case is before the trial court, the first issue that will have to be addressed is subject matter jurisdiction born of Petitioners' standing in light of the passage of time. Indeed, the District Court's attached majority opinion intimates the awareness of this by virtue of footnote 5, 2009 WL 3047325. pg. 11. The critical inquiry will be whether Petitioners still have agency mandated ignition interlock devices (IID) on their vehicles. The obvious consequences of Petitioners not having such an IID is that: (1) they would not have standing because there would no longer be a present case or controversy that is required for declaratory and injunctive relief;[1] (2) they would not be able to represent a class;[2] and (3) the court would not have subject matter jurisdiction because standing implicates

[1]Declaratory actions require a bona fide, actual present and practical need, May v. Holley, 59 So. 2d 636 (Fla. 1952); entitlement to injunctive relief requires, inter alia, irreparable injury, Fed. Corp. v. State Office Supply Co., 646 So. 2d 737 (Fla. 1st DCA 1994). If Petitioners no longer have an agency mandated IID, then there is no present controversy and no irreparable injury.

[2]Indeed, by virtue of the passage of time, there may no longer be a class. Whether this is so will be determined on remand.

subject matter jurisdiction, see Florida Commission on Hurricane Loss Projection Methodology v. Department of Insurance, 716 So. 2d 345 (Fla. 1st DCA 1998), and subject matter jurisdiction can be raised at any time, Davis v. State, 998 So. 2d 1196 (Fla. 1st DCA 2009), even on appeal, Manning v. Tunnell, 943 So. 2d 1018 (Fla. 1st DCA 2006). Petitioners, of course, have the burden of proving standing, Cadle Company v. Schecter, 602 So. 2d 984 (Fla. 3rd DCA 1992), and they must continue to show they have standing throughout the course of the proceeding because any putative injury must be of a continuing nature. Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996).

Thus, Petitioners here have the continuing burden of demonstrating standing by showing that they currently have an agency mandated IID on their vehicles. They must also demonstrate that they have been and continue to be deprived of their drivers license as a result of not installing this device.[3] Petitioners' standing and their ability to demonstrate a present case or controversy obviously impact this Court's jurisdiction separate from decisional conflict and construction of a Florida constitutional provision, neither of which is demonstrated by their jurisdictional brief as shown below.

STATEMENT OF THE CASE AND FACTS

Because Petitioners' Statement of the Case and Facts contains argument, the First District Court of Appeal's Facts and Procedural History are incorporated herein by reference and offered as the Respondents' statement. Bradsheer, 2009 WL 3047324, pgs. 3 and 4.

SUMMARY OF THE ARGUMENT

Petitioners' assault on the majority opinion cannot and does not mask their overarching failure to demonstrate the constitutional requirements for this Court to exercise its jurisdiction over this case. In addition to outstanding issues of standing and the absence of a bona fide need for a declaration–issues which further implicate this Court's jurisdiction–there is no decisional conflict and there is no construction of a constitutional provision occasioned by the majority decision. Petitioner's reliance on selected snippets of putative ultimate points of law without any consideration of the fact patterns of the case upon which they rely, plus the failure to show any "express and direct conflict ... on the same question of law," precludes the required jurisdictional showing. Accordingly, this Court lacks jurisdiction to consider this case.

ARGUMENT ON JURISDICTION

PETITIONERS POSE THE WRONG ISSUES; THE ONLY ISSUE BEFORE THIS COURT AT THIS TIME IS WHETHER THERE IS JURISDICTION UNDER EITHER DECISIONAL CONFLICT OR EXPRESS AND DIRECT CONSTRUCTION OF A PROVISION OF THE FLORIDA CONSTITUTION. AS SET OUT IN THIS BRIEF, BOTH ARE ANSWERED IN THE NEGATIVE.

Petitioners cite to 12 cases they contend conflict with the majority decision in the case sub judice. They further contend that the majority decision construes two constitutional provisions, Art. I, §18 (administrative penalties) and Art. X, §6 (eminent domain).[4] Initially, amid their claims of a denial of due process, double jeopardy and denial of restitution arising out of drivers license revocation, Petitioners glaringly omit any showing that they were ever deprived of their drivers licenses. This alone undermines their jurisdictional arguments here.

Petitioners' claim of **direct conflict** may be summarily disposed of. Both Article V, §3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(iv) vest jurisdiction in the Supreme Court over a district court of appeal decision that "**expressly and directly conflict[s**] with a decision of another district court of appeal or of the supreme court **on the same question of law**." (Emphasis added.)

[4]Petitioners fail to offer a single case citation in support of this claim. The reason for this is this Court's holding in Schutz v. Schutz, 581 So. 2d 1290 (Fla. 1991) set out below.

Boiling this jurisdictional point down to its essence here, for decisional conflict to be present, Petitioners must establish that the decision of the District Court of Appeal "expressly and directly" conflicts with a decision of another district court or the Supreme Court "on the same question of law." The fatal flaw in Petitioners' representation is that not a single case they cite for conflict involves the issues and disposition thereof in the majority decision. The cited cases do **not** deal with claims pertaining to: (a) federal due process; (b) ex post facto; (c) restitution or damages; or (d) unlawful taking[5] in connection with IIDs or with regard to any of the factual averments applicable to the case at bar.

The remainder of Petitioners' plea for decisional conflict is based on arguments made–and rejected by the First District Court of Appeal–in their briefs, oral argument and post-decision motions before that Court. Further, their arguments for decisional conflict are not based on cases that "directly and

[5]Only one case, Doyon v. Department of Highway Safety and Motor Vehicles, 902 So. 2d 842, 844 (Fla. 4th DCA 2005), mentions double jeopardy's application to an agency-imposed IID. In fact, research reveals that Doyon is the only case in the United States that purports to link double jeopardy to IIDs. However, Doyon is far different than the case at bar. First, Doyon did not involve a damages claim. Second, there were no issues of standing or case-or-controversy because there was a live claim throughout the litigation. Third, the putative application of double jeopardy was based on a criminal case–Willingham v. State, 833 So. 2d 237 (Fla. 4th DCA 2002). This leads to the prospect that Doyon was wrongly decided. This Court, of course, is free to reject the isolated, and perhaps erroneous, dictum in Doyon.

expressly" conflict with any other relevant decision of another appellate court "on the same question of law."

As to the "drivers license is a property right" argument, the Supreme Court's latest expressions on this subject vitiate Petitioners' claim. See Bolware v. State, 995 So. 2d 268, 274 (Fla. 2008) (historically, Florida courts have viewed a license to drive ... as a privilege, not a right); Lescher v. Fla. Department of Highway Safety and Motor Vehicles, 985 So. 2d 1078, 1083 (Fla. 2008)(there is no property interest in possessing a drivers license.). On two occasions, Smith v. Florida Department of Highway Safety and Motor Vehicles, 993 So. 2d 513 (Fla. 2008) and Mulder v. Florida Department of Highway Safety and Motor Vehicles, 993 So. 2d 513 (Fla. 2008), the Supreme Court relied on Lescher in disposing of property interest claims. Further, Lite v. State, 617 So. 2d 1058 (Fla. 1993), makes it abundantly clear that there is no property interest in possessing a drivers license; rather, driving is a privilege and this privilege can be taken away or encumbered as a means of meeting a legitimate legislative goal.

As the majority said, there may be circumstances in which a property right vis- a-vis a drivers license may be implicated, but more fact finding is necessary in order to resolve this matter. While this Court certainly did not foreclose such a determination, Petitioners argue this point as a fait accompli–an argument already

rejected by the majority. In addition, missing from Petitioners' case is any representation or demonstration by them that they were in fact deprived of any property right; that is, that they were ever deprived of their drivers licenses by failing to install an agency mandated IID. This is presumably at least one of the reasons why the majority noted that additional facts must be discerned.

As previously noted, only one case, Doyon v. Department of Highway Safety and Motor Vehicles, 902 So. 2d 842, 844 (Fla. 4th DCA 2005), mentions double jeopardy's application to an agency-imposed IID. The flaws in relying on Doyon are set out in footnote 5, supra. Petitioners evidently believe that unauthorized administrative action here is ipso facto double jeopardy. The majority, however, was careful to point out the distinction, saying that because an agency cannot impose what amounts to a criminal sentence, there is no double jeopardy violation. Petitioners' rehash of its previously rejected argument should once again be rejected.

As to Petitioners' claim for damages,[6] none of their cited authorities addresses mandated installation of the IID for DUI convictions by the Florida Department of Highway Safety and Motor Vehicles, and the impact of the Art. X,

[6]Throughout this case, Petitioners maintained that they were not seeking damages, only restitution. Their restitution-is-not-damages argument received no vitalization from the judiciary.

§13, Fla. Const., sovereign immunity to such claims. Indeed, none of the cases they cite for conflict even remotely addresses this fact pattern against the governing legal principles as determined by the majority. Specifically, the law governing sovereign immunity is well set out in the majority decision; that Petitioners disagree with that decision is not a basis for invoking this Court's jurisdiction.

Likewise, Petitioners' argument regarding a taking (inverse condemnation) has already been rejected by the panel majority, and their cited authorities have nothing whatever to do with IIDs installed by the agency based on DUI convictions. The First District already applied the law to the specific facts of this case; Petitioners' reargument of points already rejected does not provide a basis for this Court's jurisdiction.

Petitioners' cited authorities do not address "the same question of law" decided by the panel in this case. The Court's opinion did not even mention the points contained in Petitioners' cited authorities, much less "expressly and directly conflict" with other court decisions "on the same question of law."

Finally, Petitioners' claim that the panel decision "expressly construe(d) a provision of the state ... constitution" is belied by this Court's decision in Schutz, supra. In that case, the Court said as follows:

> The distinction between the construction and the application of a constitutional provision for purposes of Supreme Court jurisdiction was well explained by Justice Thornal in Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958):
>
> > We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial **judge must undertake to explain, define or otherwise eliminate existing doubt arising from the language or terms of the constitutional provision.** It is not sufficient merely that the trial judge examine the facts and then apply a recognized, clear-cut provision of the Constitution. (Emphasis added.)

Schutz, 581 So. 2d at 1294.

The Schutz Court concluded by saying "*Applying* is not synonymous with *construing*; the former is NOT a basis for our jurisdiction, while *express* construction of a constitutional provision is." Id. Because Petitioners have failed to show how the district court "expressly construe(d)" the two constitutional provisions they rely on, and the majority opinion itself demonstrates application of constitutional provisions to the particularized facts of the case, Petitioners' second jurisdictional claim is without foundation.

CONCLUSION

The majority decision carefully tracks the relevant legal principles and applies them to the specific facts of this case. There is no "express and direct conflict" and no "express" construction of a state constitutional provision that invokes this Court's jurisdiction. Not a single case offered by Petitioners involves the claims for relief posed here. Accordingly, this Court should deny Petitioners' application to invoke this Court's discretionary jurisdiction.

Respectfully submitted,

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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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to M. STEPHEN TURNER, P.A.; DAVID MILLER, P.A.; and KELLY OVERSTREET JOHNSON, P. A., BROAD AND CASSEL, 215 South Monroe Street, Suite 400, Post Office Drawer 11300, Tallahassee, Florida 32301, this 17th day of December, 2009.

s/ George Waas
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