**IN THE SUPREME COURT OF FLORIDA**

MICHAEL BRADSHEER and
MICHAEL K. JOHNSON,

Petitioners,

v.

Case No. SC _____
Lower Tribunal 1D07-6610

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

Respondents.

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# JURISDICTIONAL BRIEF OF PETITIONERS

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## Other Authorities

Petitioners seek review of a 2-1 decision of the First District Court of Appeal, __ So. 3d __, 2009 Fla. App. Lexis 14399, 34 F.L.W. D 1955 (Sept. 26, 2009). Contrary to decisions of this Court and other district courts, this decision denies the constitutional right to due process upon revocation of issued driver's licenses; denies constitutional double jeopardy protection against a criminal penalty not imposed by the court upon conviction, but imposed without authority by a state agency; and denies the constitutional right to restitution for illegal exactions by a state agency or compensation for property taken. *See* appended copy of slip opinion, rendered upon order denying rehearing dated November 5, 2009, for which Petitioners filed notice of seeking review in this Court on December 3, 2009. This Court has discretionary jurisdiction because the decision expressly construes the federal and state constitutions and expressly and directly conflicts with other decisions on the same issues of law. Fla. Const. Art. V § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(ii) and (iv).

## STATEMENT OF THE CASE AND FACTS

Prior to July 1, 2005, only a criminal court could sentence drivers convicted of driving under the influence (DUI) to install and maintain an ignition interlock device on their vehicles. When criminal courts did not impose this sentence, the Department of Highway Safety and Motor Vehicles ("DMV"), on its own, ordered drivers to install and maintain the device, or have their driver's licenses revoked if

they failed to comply. The First District acknowledged that DMV acted without any authority to revoke driver's licenses and exact payment of fees for interlock devices as a penalty on these drivers. Slip Op. at 2-4.

Petitioners sought declaratory and injunctive relief from these unlawful orders, and restitution or compensation of amounts they were forced to pay to install and maintain the device, claiming deprivation of property without due process, double jeopardy, unlawful fees exacted by a state agency, and taking of property without compensation. The trial court dismissed all claims for failure to state a cause of action, and Petitioners appealed. Slip Op. at 2-4.

The First District decision reinstated Petitioners' federal due process claim, but the panel majority held that whether federal due process protects issued driver's licenses from unlawful revocation is a **fact** issue, and refused to follow established precedent that drivers have a **legal** right to due process when the state revokes an issued driver's license. Slip Op. at 5-10.

The panel majority also affirmed dismissal of Petitioners' federal double jeopardy claim, holding the double jeopardy clause does not protect against an agency imposing a criminal sentence that the criminal court chose not to impose (and that the agency had no authority to impose). Contrary to decisions of other district courts on the exact issue, the panel majority held that double jeopardy does

not apply to a criminal penalty imposed by a state agency, because the agency is not a court authorized to impose criminal penalties. Slip Op. at 10-11.

Finally, the panel majority affirmed dismissal of Petitioners' claims for restitution of penalties exacted by an agency without authority, in violation of Fla. Const. Art. I § 18; and for compensation for property taken, in violation of Fla. Const. Art. X § 6. It held, contrary to well established case precedent, that even if these constitutional provisions are self-executing, no cause of action exists for reimbursement of illegally exacted fees or for compensation for property taken, unless a statute specifically waives sovereign immunity for these claims. Slip Op. at 11-13.

Judge Benton, in a lengthy dissent, held that Petitioners stated a cause of action on all of their claims, and cited the conflicting decisions. Slip Op. at 15-30.

## SUMMARY OF THE ARGUMENT

The panel majority's decision that a driver's right to retain a validly issued driver's license is not protected by due process as a matter of law expressly and directly conflicts with decisions recognizing such legal right. The panel majority's holding that entitlement to due process for statutory license rights is a "fact" issue fosters unpredictability and inconsistency in due process protection.

The panel majority's decision that double jeopardy protection does not apply when an agency imposes criminal penalties that only courts can lawfully impose,

expressly and directly conflicts with other district court decisions on the same facts, and enables the State to violate double jeopardy by an agency ordering criminal sanctions, after a criminal court sentence imposes a lesser penalty.

Finally, the panel majority decision nullifies self-executing constitutional rights to restitution for fees unlawfully exacted by a state agency and to compensation for taking of property, contrary to decisions holding the constitution itself waives sovereign immunity for such actions. The panel majority decision effectively eliminates any form of recoupment of unlawful administrative penalties imposed by agencies. To reach this holding, the panel majority misapplied cases that find immunity from constitutional tort type damages, which have nothing to do with restitution of unlawful penalties or compensation for takings of property.

## ARGUMENT FOR REVIEW

I. The Court should grant review to decide whether entitlement to due process protection for issued driver's licenses is a fact issue to be decided case by case, or a legal right

The decision below acknowledges cases holding that driver's licenses are protected by due process, Slip Op. pp. 7-9; but rejects these cases, and instead improvises, contrary to all prior case law, that this is a case-by-case fact issue:

> It is possible that even if a driver's license is found to be a protected property interest in one situation, it may not be in another. Therefore on remand the trial court should take evidence and make findings regarding whether Appellants' licenses qualified as cognizable property interests under section 1983. Slip Op. p. 9.

This ruling does not concern whether any particular procedure satisfies due process requirements, but instead the threshold issue of whether due process is required at all in revoking driver's licenses. The decision that there is no legal entitlement to due process for revocation of issued driver's licenses expressly and directly conflicts with *Dep't of Highway Safety and Motor Vehicles v. Hofer*, 5 So. 3d 766, 771 (Fla. 2d DCA 2009) ("the United States Supreme Court has explained that drivers' licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment"); and *Young v. Williams*, 249 So. 2d 684, 685 (Fla. 1971) (same). Judge Benton's dissent below carefully analyzes all of the cases to conclude that while the legislature can subject driver's licenses to restrictions, due process must be observed as a matter of law to prevent unlawful or unauthorized executive action revoking issued driver's licenses, regardless of whether a driver's license is labeled a property right or a privilege. *Id*. at 20-27.

The panel majority left trial courts without guidance as to what facts could even be relevant to determine entitlement to due process.[1] By leaving it to trial judges and juries to guess what facts may be relevant to decide whether due process applies, the First District's decision will result in conflicting rulings as to

[1] The panel majority discusses a completely irrelevant distinction between first and second DUI offenders, *see* Slip Op. p. 9. The statute did not allow the Department to penalize either class of drivers, under any circumstances and regardless of their prior record, and certainly not by threat of license revocation without due process.

licensees' right to due process. The decision makes it impossible to know whether any process is due for license revocation until *after* a fact-finding process is concluded, which is far too late to provide meaningful relief.

Under the authorities cited above, which recognize precedent established by the United States Supreme Court, DMV must afford due process in some form to assure its action is not taken unlawfully or against the wrong driver.

The First District's decision implicates due process entitlement for other statutory license rights as well, and thus conflicts with holdings of other courts on due process entitlement for all licenses issued by the state, which are property rights. *E.g., Delk v. Dep't of Prof. Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1993) (professional license is a property right protected by due process).

## II. The Court should grant review to decide whether an agency's imposition of a criminal penalty violates the double jeopardy clause

The panel majority decision holds the federal double jeopardy clause does not apply when state agencies impose penalties reserved for the criminal courts:

> The Department may have acted without legal authority in imposing the device. But because it was not a court, its actions did not amount to a criminal sentence. Consequently, Appellants' claims concerning the federal prohibitions against double jeopardy… are meritless. Slip Op. pp. 10-11.

This holding directly and expressly conflicts with *Doyon v. DHSMV*, 902 So. 2d 842, 844 (Fla. 4th DCA 2005), which holds that identical DMV action violates the constitutional prohibition against double jeopardy:

> Once the time for filing a motion to correct such an error in sentencing has elapsed, the sentence is final and may not be "corrected" by the addition of new conditions or provisions. * * * *see also Dickenson v. Aultman*, 905 So. 2d 169, 2005 Fla. App. LEXIS 3080, 2005 WL 544844 (Fla. 3d DCA Mar. 9, 2005) (DMV lacks authority to require ignition interlock for a second DUI conviction without court entering conviction so specifying).
>
> Because Doyon completed his sentence before DMV sent him the order requiring the installation of ignition interlock devices, upholding the DMV's order subjects Doyon to double jeopardy. * * * As the *Aultman* court said:
>
> "... There is no doubt that the sentencing judge failed to impose the criminal penalty mandated … and that the State Attorney's office failed to take any action to have this error corrected. This sentencing error, however, cannot be remedied by allowing the Department to impose a criminal penalty that the legislature has not expressly authorized the Department to impose."

*See also Karz v. Dickenson*, 932 So. 2d 426, 427 (Fla. 2d DCA 2006), in which the Second District expressly adopted the Fourth District's reasoning in *Doyon*.

The First District panel majority decision contravenes these decisions under identical facts, and nullifies double jeopardy protection where an executive agency imposes penalties that the criminal court chose not to impose. In rejecting these holdings, the panel majority relies on circular reasoning. DMV's lack of authority to impose a criminal penalty does not change the nature of that penalty, which by

statute only criminal courts may impose. Double jeopardy rights do not cease to apply just because another branch of the state imposes the criminal penalty.

## III. The Court should grant review to decide whether constitutional claims for restitution of unlawful exactions and compensation for takings are barred in the absence of a statute waiving sovereign immunity.

The panel majority decision below dismissed claims for restitution of unlawfully exacted fees and for compensation for property taken, holding:

> Appellants have failed to cite any legislative enactment waiving the State's immunity …. Instead, they argue that the constitutional provisions cited are self-executing, thereby making a waiver unnecessary.
>
> However, even if the rights indicated were self-executing [and] …. [e]ven assuming Appellants can establish a violation of their state constitutional rights, they cannot receive monetary reimbursement…. Slip. Op. pp. 12-13.

This decision expressly and directly conflicts with the rule of decisions that courts can restore unconstitutional exactions without a statutory waiver of immunity. *See, e.g., Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994) (refund of unconstitutional fees; "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"); *Bill Stroop Roofing, Inc. v. Metro Dade Cty*., 788 So. 2d 365, 367-78 (Fla. 3d DCA 2001) ("governments are required to refund taxes and fees

illegally exacted and the doctrine of sovereign immunity is inapplicable thereto," citing many cases granting restitution from various types of illegal exactions without any statutory provision for such relief).

The decision below also expressly and directly conflicts with decisions holding that when the State takes private property, the owner is entitled to compensation, without statutory waiver of sovereign immunity. *See State Road Dep't v. Tharp*, 1 So. 2d 868, 869-70 (Fla. 1941) ("Immunity of the State from suit … will not relieve the State against any illegal act 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…. "); *Dep't of Agriculture & Cons. Services v. Mid-Florida Growers*, 521 So. 2d 101, 103-04 n. 2 (Fla. 1988) ("Because article X, § 6, Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss").

All these decisions reject the rule announced by the panel majority that absent a specific statute, sovereign immunity bars claims for restitution or compensation by the state for unlawful exaction or property taken. Conflict jurisdiction arises based on conflict in the rule of decision, even if the cases involve different facts. *Wallace v. Dean*, 3 So. 3d 1035, 1039 n. 4 (Fla. 2009).

The panel majority decision also creates conflict by misapplying cases dealing with tort type damages for state constitutional violations. *See* Slip Op. at

10, citing *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997) (dismissing damages claim for wrongful imprisonment); and *Fernez v. Calabrese*, 760 So. 2d 1144, 1146 (Fla. 5th DCA 2000) (dismissing damages claim for wrongful discharge from city employment). These cases do not address, and certainly do not deny, restitution of unlawfully exacted fees under Art. I § 18, or compensation for private property taken under Art. X § 6. Conflict arises upon misapplication of decisions that have nothing to do with the issues in this case. *Wallace*, 3 So. 3d at 1040.

## CONCLUSION

The panel majority decision eviscerates well established constitutional rights to due process, double jeopardy protection, restitution of amounts exacted without statutory authority, and compensation for property taken. The panel majority may have been guided by lack of sympathy for DUI drivers to subordinate the constitutional rule of law. But even if DMV's action might serve a salutary purpose, the Courts cannot allow the State to benefit from illegal and unconstitutional agency action. Forcing Petitioners to seek political largesse, *i.e.*, a claims bill, effectively limits vindication of constitutional property rights to the privileged few who have political influence. The Court should grant review to resolve the conflicts between this out-of-step decision and prior decisions of this Court and other courts. The Court should also grant review to clarify constitutional protections for property rights in Florida.

Respectfully submitted this _____ day of December, 2009.

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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).

Attorney

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon George Waas, Special Counsel, E. Jon Whitney, Assistant Attorney General, and Craig Feiser, Deputy Solicitor General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, Attorneys for Defendant, this _____ day of December, 2009.

Attorney