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' REPLY BRIEF ON THE MERITS

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June 21, 2010

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PRELIMINARY STATEMENT

DMV repeatedly argues that Petitioners have "collaterally attacked" its final order, but does not show this case is improper. In fact, the court below held Petitioners could seek declaratory and injunctive relief, 20 So. 3d at 921; and DMV has waived any objection to this ruling. Regardless, Petitioners are entitled to directly enforce federal constitutional rights without exhausting state remedies, and can seek judicial relief under state law from agency action taken without legal authority or adequate process. Here DMV seized or threatened seizure of property (cancelling driver's licenses by internal computer entry), and held licenses hostage to exact a monetary penalty, without either legal authority or adequate pre-deprivation process. Subsequent judicial review by writ of certiorari, which can only review an agency record (which did not exist here), and cannot grant declaratory and injunctive relief or restore license rights taken or unlawfully exacted penalties, is not effective to cure the problem.

DMV admits the appellate decision below was wrong on some issues, Ans. Br. 24, 28, and does not defend its reasoning on other issues, so the erroneous rulings below should be corrected. Instead, DMV raises new issues not raised below, which do not alter Petitioners' rights to relief. DMV also argues its action has mooted Petitioners' claim for prohibitory injunctive relief, a new issue that does not affect the issues presented. *See* Petitioners' Response dated June 2, 2010.

REPLY ARGUMENT

I. DMV VIOLATED DOUBLE JEOPARDY BY IMPOSING AN UNAUTHORIZED CRIMINAL PENALTY THAT ONLY THE CRIMINAL COURT COULD IMPOSE, BUT DID NOT; AND RESTORATION IS CONSTITUTIONALLY REQUIRED

DMV does not defend the ruling below that double jeopardy applies only to courts, and not to DMV. Instead DMV contends that the penalty involved is civil and not criminal. However, during the period in question, controlling statutes and cases held that only a criminal court sentence could impose the interlock device as a criminal penalty. *See* In. Br. p. 2, quoting §§ 316.193 and 316.1937, Fla. Stat. (2003); p. 12, quoting legislative history and rulings in *Doyon v. DMV*, 902 So. 2d 842 (Fla. 4th DCA 2005); *Dickenson v. Aultman*, 905 So. 2d 169 (Fla. 3d DCA 2005); *Embrey v. Dickenson*, 906 So. 2d 316 (Fla. 1st DCA 2005); and *Karz v. Dickenson*, 932 So. 2d 426 (Fla. 2d DCA 2006).

In 2005 the Legislature enacted § 322.2715(4), Fla. Stat. (2005), to grant DMV authority to impose the device for cases arising after its effective date, July 1, 2005. This act changed the law. *Embrey*, 906 So. 2d at 317 n.1; *Karz*, 932 So. 2d at 428 n.1. The 2005 law would serve no purpose if DMV previously had this authority under an existing statute, such as § 322.271(2)(d). Prior to the 2005 amendment, DMV was like a sheriff who could execute a court's sentence by placing offenders in jail, but could not independently impose or increase a sentence without the criminal court's order.

DMV now suggests § 322.271(2)(d), Fla. Stat. (2003), granted this power to it before the 2005 amendment. This is a new improvised argument,[1] and has no basis in any case. The cited statute provides, in subsection (2)(d):

> (d) The department, based *upon review of the licensee's application for reinstatement*, may require use of an ignition interlock device *pursuant to s. 316.1937*. (e.s.)

This law expressly defers to § 316.1937, which requires a criminal court sentence to impose the device on license holders. As the law directs how this is to be done, doing it another way is prohibited. *Alsop v. Pierce*, 19 So. 2d 799, 805-06 (Fla. 1944). DMV does not discuss this limiting reference or analyze § 316.1937.

In any event, the entire statute, § 322.271, concerns cases where a driver's license has been lawfully suspended (or cancelled or revoked), but during the suspension period, the non-driver applies to DMV to reinstate the license, based on hardship to maintain employment. Subsection (2)(d) allows DMV, on "review of the … application for reinstatement," to impose the device as a condition of reinstating a lawfully suspended license, as shown by cases that DMV cites.[2]

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[1] DMV did not cite § 322.271(2)(d) in its order to drivers, Cir. Ct. R 15, In. Br. App. 3; or its Motion to Dismiss, Cir. Ct. R 179-89; or its brief below.

[2] In *State DMV v. Butler*, 959 So. 2d 434 (Fla. 3d DCA 2007), the non-driver applied to reinstate a license after 5 years of a 10 year court-ordered suspension. In *DMV v. Gonzalez-Zaila*, 920 So. 2d 1220 (Fla. 3d DCA 2006), the non-driver applied to reinstate a license that the court had permanently suspended. These cases do not displace the court's prior decision in *Aultman*, holding DMV could not impose the device on a driver's restored license after the court suspension ends.

DMV's discretion to reinstate a lawfully-suspended license during the suspension period with the device as a condition, as an authorized *reduction* of the penalty (like a conditional early release from prison), has nothing to do with this case.

This case concerns drivers who have completed any court-sentenced license suspension, and are *entitled* to be licensed without the device because the criminal court did not impose the device. *See Embrey*, 906 So. 2d at 317 and n. 1 (DMV had no authority to impose device on driver who completed court-ordered suspension and held restored license); *Karz*, 932 So. 2d at 427-28 (driver entitled to reinstatement of unconditional license when court suspension ends).

DMV's order is based solely on the court conviction. It announces that "you were convicted of driving under the influence … Florida law requires that you have an ignition interlock device … If you do not comply … your driver license will be cancelled." Cir. Ct. R 15, In. Br. App. 3. The order did not refer to a reinstatement application or § 322.271(2)(d), and cancelling an existing license is not "review of an application for reinstatement" under § 322.271(2)(d).

DMV's practice in withdrawing its order when a driver occasionally comes forward to prove the criminal court did not impose the device (R 169 par. 25), serves as an admission by DMV that a criminal penalty was involved, as the controlling pre-2005 statute specifies, and that DMV had no authority to act unilaterally without a criminal court sentence requiring the device.

Hudson v. United States, 522 U.S. 93 (1997), does not require any 7 factor analysis to hold that § 316.1937 (2003) plainly designated the device as a *criminal penalty* that only a *criminal court sentence* could impose. *Hudson* affirmed the rule in *United States v. Ward*, 448 U.S. 242 (1980), that whether a statutory penalty is civil or criminal depends on whether the legislature expressly or impliedly indicated a preference for one category or another. A second inquiry (7 factor analysis) is used only if the penalty is civil in form, but the statute is so punitive in its purpose or its effect as to negate that intent. *Ward* at 248-49. The instant statute clearly intended a criminal penalty, so a 7 factor inquiry is not needed here.

Petitioners are entitled to relief for a double jeopardy violation under both the federal and state constitutions. Relief for violation of the federal constitution includes declaratory and injunctive relief and attorney fees under 42 U.S.C. §§ 1983 and 1988. The right to restitution of criminal monetary penalties exacted without authority of law derives from Art. I § 9, Fla. Const. (double jeopardy and due process). No statutory sovereign immunity waiver is needed to enforce these self-executing constitutional rights. A penalty imposed in violation of double jeopardy deprives the owner of property without due process, and requires restitution. In. Br. p. 15 (courts' inherent power to restore unlawful penalties).

II. ART. I, § 18, FLA. CONST., PROHIBITS AGENCIES FROM EXACTING UNLAWFUL PENALTIES, AND REQUIRES THAT UNLAWFUL MONETARY PENALTIES BE RESTORED

DMV argues that cancelling a driver's license and exacting payment for the device is not a "penalty" because it promotes public safety. The criminal court had exclusive power to impose the device as a criminal penalty; DMV's unauthorized usurpation of judicial power to impose this penalty served no lawful purpose, as *Aultman* and its progeny cases held. *See also Dep't of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996) (license revocation and administrative fines implicate property rights and are "penal in nature"); *Childers v. Dep't of Env. Prot.*, 696 So. 2d 962, 964-65 (Fla. 1st DCA 1997) (revoking business license is penalty even if it furthers conservation or public health goals).

DMV argues its action is not a "penalty" because it did not direct drivers to pay DMV directly, but to pay DMV's vendor. However, DMV required the driver to purchase a service for DMV's use to monitor and control the driver's actions. Whether DMV collected payment directly or used an intermediary to do so makes no difference. DMV cannot do indirectly what the Constitution prohibits it from doing directly. *E.g., IDS Properties v. Town of Palm Beach*, 279 So. 2d 353, 356 (Fla. 4th DCA 1973), *aff'd, Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (town cannot avoid Sunshine Law by delegating functions to private entity).

The term "penalty" has a broad meaning. *See Sun Coast Int'l Inc. v. Dep't of Bus. Reg.*, 596 So. 2d 1118, 1120-21 (Fla. 1st DCA 1992) (penalty is payment that the law exacts as punishment for a prohibited act, as opposed to payment to restore injured persons to their original position, or "restitution," citing dictionary); Fla. Atty. Gen. Op. 85-88 (penalty under Art. I § 18 seeks payment "for the state" when the state has not suffered direct injury from prohibited action, citing case); Webster's New Universal Unabridged Dictionary p. 1324 (2d ed. 1983) ("penalty" is "1. a punishment fixed by law, as for a crime or breach of contract. 2. the disadvantage, suffering, handicap, etc. imposed upon an offender, as a fine or forfeit"). Payment to a private person exacted by law to further public deterrence goals rather than restore loss is a "penalty." *See United Pac. Ins. Co. v. Berryhill*, 620 So. 2d 1077, 1079 (Fla. 5th DCA 1993) (statutory treble damages paid to private party are punitive, in the nature of fines).

Art. I, § 18, Fla. Const., absolutely prohibits all agency penalties, even if civil or remedial in purpose, without authority of law. DMV argues this clear and absolute prohibition is "bereft of guiding principles" and thus affords no judicially enforceable protection from unlawfully exacted monetary penalties. Art. I, § 18 leaves it to the courts to adopt procedures to implement this clear prohibition.

The legislature cannot, by failing to enact a statutory remedy, render Art. I § 18 impotent. Under DMV's reasoning, Art. VII, § 1(a), which provides, "No tax

shall be levied except in pursuance of law," would also require statutory authority for refund of unlawful taxes. Yet courts routinely refund unconstitutional taxes and fees based on the constitution alone, without any statutory remedy. *See Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994):

> The State next argues that the cause below was barred by the state's sovereign immunity … and by the requirements of Florida's refund statutes. Even if true, these are not a proper reason to bar a claim based on *constitutional* concerns. 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. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitution.

See also In. Br. pp. 18-20 (cases awarding refund of unlawful taxes or fees without statutory remedy). There is no legal or practical distinction between unlawful taxes and unlawful monetary penalties. The same constitutional refund right applies.

Cases granting restoration for unlawful search and seizure of property are also persuasive because DMV unlawfully seized drivers' licenses by internal process, to force drivers to install DMV's monitoring device. *See* In. Br. pp. 15, 20, 23 (courts have inherent power to enforce constitutional rights); *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957, 968 (Fla. 1991) (same); *In re*

Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So. 2d 261 (Fla. 1991) (compensation granted as remedy for unlawful seizure of private property).[3]

Granting restitution relief in this case does not open the door for damages for every constitutional violation. DMV unlawfully exacted and obtained value for its own use (monitoring service). DMV, not the driver, should pay for this service. The value of the unlawful penalty is capable of easy measurement, and does not expose DMV to unliquidated or unlimited liabilities, only to restore the value DMV obtained without authority of law to the lawful owner.

This Court historically allowed such claims as equitable type relief, *see New Smyrna Inlet Dist. v. Esch*, 137 So. 1 (Fla. 1931) (suit for accounting to refund invalid tax); *State Road Dep't v. Tharpe*, 1 So. 2d 868 (Fla. 1941) (equity action to compensate inverse taking); *see also DePaolo v. Town of Davie*, 872 So. 2d 377 (Fla. 4th DCA 2004) (back wages are equitable relief). Petitioners used the term "equitable restitution" to make it clear they are seeking refunds and not damages. In. Br. p. 17; *see Redington Grand, LLP v. Level 10 Props., LLC*, 22 So. 3d 604,

[3] Many jurisdictions imply a constitutional monetary remedy for unlawful seizure of property. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Widgeon v. Eastern Shore Hosp. Center*, 479 A.2d 921, 923-30 (Md. 1984); *Moresi v. Dep't of Wildlife & Fisheries*, 567 So. 2d 1081, 1091-93 (La. 1990); *Brown v. State*, 674 N.E.2d 1129, 1137-39 (N.Y. 1996); *Dorwart v. Caraway*, 58 P.3d 128, 133-34 (Mont. 2002) (citing survey finding majority of states that have addressed issue recognize implied monetary remedy). The State cannot invoke sovereign immunity to override all constitutional rights protecting private property from unlawful state action.

607-08 **(**Fla. 2d DCA 2009) ("return of one's own money hardly constitutes damages in any meaningful sense"). Whether claims for refund or restitution of unlawfully exacted payments are described here as "legal" or "equitable" is not determinative of the right to constitutional redress. *Kuhnlein*, 646 So. 2d at 725-26, citing Art. V § 2 (b), Fla. Const., and requiring refund of unlawful fees incident to declaratory relief, regardless of label.

III. DRIVER LICENSES ARE PROPERTY RIGHTS PROTECTED BY DUE PROCESS AND NO ADEQUATE PROCESS WAS AFFORDED

DMV admits that a driver's license is a property right protected by due process without qualification, Ans. Br. p. 24. The panel majority ruling below that this is a fact issue is clearly wrong, and should be corrected. As DMV had no authority to act, it did not afford "due process of law" when it unlawfully imposed a criminal penalty that could only be imposed by criminal court sentence.

DMV also plainly violated procedural due process because it denied drivers any pre-deprivation opportunity to challenge its action. DMV asks the Court to decide whether post-deprivation judicial review by writ of certiorari pursuant to § 322.31, Fla. Stat., would satisfy due process. This Court can readily determine that due process was not satisfied. Due process requires DMV to afford a hearing *before* it takes a license or exacts a substitute penalty. *Bell v. Burson*, 402 U.S. 535 (1971); *see also Zinermon v. Burch*, 494 U.S. 113, 127-30 (1990) (if state

authorized deprivation as agency policy and had an opportunity to provide a pre-deprivation remedy, failure to do so implicates the due process clause). DMV could feasibly provide a pre-deprivation hearing before taking action, so it must do so, regardless of the adequacy of any post-deprivation remedy. *Zinermon* at 127, 133. *See also* In. Br. pp. 24-25.

A pre-deprivation hearing would have exposed and prevented DMV's unauthorized exaction. DMV cites no exigent circumstances to justify acting before affording drivers a hearing. In these circumstances, a pre-deprivation hearing is essential to comply with due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (when state deprives owner's property right, process due is determined by the importance of the right deprived, the risk that the procedure used will lead to an erroneous decision, and strength of government's interest).

Certiorari review of DMV orders that suspend or revoke a driver's license provides no remedy for drivers to challenge the exaction and restore their payment. DMV denies that drivers have any court remedy at all to restore monetary penalties unlawfully exacted. Certiorari review could not possibly satisfy due process.[4]

Due process guarantees a hearing at a meaningful time and manner. *Dep't of Law Enforcement*, 588 So. 2d at 960. The certiorari review statute assumes that

[4] Property protected by due process includes monetary penalties. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972); *Osborne Stern*, 670 So. 2d at 935.

DMV has already given the driver a Chapter 120 administrative hearing on the proposed license revocation. Certiorari review cannot occur without an administrative record to review. *State v. Hanna*, 901 So. 2d 201, 209-10 (Fla. 5th DCA 2005) (if no record exists, writ of certiorari cannot be granted, and declaratory relief is proper remedy). *Cf. Vichich v. DMV*, 799 So. 2d 1069, 1073-74 (Fla. 2d DCA 2001) (certiorari review is limited to administrative record; where DMV acted without hearing, due process question was presented). Here DMV bypassed the administrative process, so Petitioners were afforded no administrative record and no due process. DMV is in no position to argue that Petitioners must seek a judicial writ whose sole function is to review an administrative record.[5]

The court below correctly held Petitioners have the right to seek declaratory and injunctive relief. 20 So. 3d at 921.[6] Petitioners are entitled to seek relief under the federal constitution without exhausting state administrative remedies. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). State law allows judicial relief

[5] Certiorari also offers no class-wide remedy, which is needed for effective relief for the multitude of citizens who complied without knowing they had any rights.

[6] Previous decisions also allowed declaratory and injunctive relief for the issues presented here. *See Aultman*, 905 So. 2d 170, 171-72 (driver sought declaratory and injunctive relief); *Doyon*, 902 So. 2d at 844 (directing declaratory relief on remand); *Embrey*, 906 So. 2d at 318 (directing declaratory and injunctive relief on remand); *Karz*, 932 So. 2d at 427 (driver sought declaratory and injunctive relief). DMV did not raise any objection based on a certiorari remedy in the lower courts. Ans. Br. p. 27. Any contention that a petition for writ of certiorari is the exclusive remedy is waived. *See Aultman*, 905 So. 2d at 171-72.

without exhausting administrative remedies in these circumstances. *Dep't of Revenue v. Nemeth*, 733 So. 2d 730 (Fla. 1999) (claimants for constitutional refunds need not exhaust statutory remedies); *Bill Stroop Roofing, Inc. v. Dade Cty.*, 788 So. 2d 365, 366, 368 n. 1 (Fla. 3d DCA 2001) (declaratory and injunctive relief and refund of illegally exacted fees under state due process clause); *State Dep't of Env. Reg. v. Falls Chase Spec. Dev. Dist*., 424 So. 2d 787, 793-94 (Fla. 1st DCA 1982) (court has power to protect citizens' rights when agency acts without colorable authority, or administrative remedy is inadequate); *Dep't of Health v. Curry*, 722 So. 2d 874 , 878 (Fla. 1st DCA 1998) (agency exceeded statutory authority); *Sunshine Key Assocs. L. P. v. Monroe Cty.*, 684 So. 2d 876 (Fla. 3d DCA 1996) (same); *Lewis Oil Co. v. Alachua Cty*., 496 So. 2d 184, 188 (Fla. 1st DCA 1986) (administrative remedy inadequate). If claimants have no administrative remedy, then certiorari review is not a proper remedy.

Certiorari review is also inadequate because § 322.272, Fla. Stat. (2003 et seq.), provides that seeking a writ of certiorari does not operate as a supersedeas. The only relief permitted on a writ of certiorari is to quash the order below. *Broward Cty. v. G.B.V. Int'l, Inc.*, 787 So. 2d 838, 843-44 (Fla. 2001). Forcing the driver to seek costly judicial review while having to pay to comply with a patently illegal order over a lengthy time is not adequate to satisfy due process.

Petitioners properly allege a due process violation, R 171 ¶ 33. DMV offers no reason it could not give drivers due process before cancelling a license or imposing other penalties. If any question remains, that can be resolved on remand.

IV. SOVEREIGN IMMUNITY IS NOT A DEFENSE TO A CLAIM TO COMPENSATE A TAKING BY UNAUTHORIZED ORDER OR UNLAWFUL EXACTION

DMV concedes that sovereign immunity cannot bar claims for compensation for a taking. Ans. Br. p. 28. DMV argues, however, that because drivers' licenses are protected by due process, the taking clause is inapplicable. Both clauses appear in Amendment V and both protect "property," so both clauses must apply to "property" of any kind. Although deprivation of property without due process should give rise to compensation rights, even if it does not, the taking clause requires compensation for exactions paid by owners to keep property (licenses) to which they are entitled. In. Br. p. 31, citing *Nollan v. California*, 483 U.S. 825 (1980); *Aspen-Tarpon Springs Ltd. v. Stuart*, 635 So. 2d 61 (Fla. 1st DCA 1994).

DMV cites *Key Haven Assoc. Ent. v. Bd. of Trustees of the I.I. Fund*, 427 So. 2d 153 (Fla. 1982), which is inapposite. There the claim was that land use regulation was so excessive that it deprived the owner of economic use. In such overregulation cases, the owner must have a ripe claim by a valid administrative order, for the court to decide what rights or uses were permitted and what rights or uses are taken, in order to decide if the regulation went "too far." Here a fully ripe

taking occurred, as DMV took drivers' license rights *in toto*, by internal process and unauthorized final orders of cancellation that took effect before a challenge could be brought, so drivers had to pay ransom to restore this property right.

DMV also ordered physical intrusion of the device to monitor and control drivers' use of their vehicles, which is also a taking. In. Br. p. 32. *See also Borgoff v. Dep't of Ag. & Cons. Services*, 2010 Fla. App. LEXIS 6563 at *9 (Fla. 4th DCA 2010) ("Physical invasion of private property is the clearest example of a governmental taking for which just compensation is due").

Compensation is due for the time the taking was in effect, even if the taking was temporary and was later enjoined or withdrawn by DMV. In. Br. pp. 31-32. Unauthorized agency action that takes or deprives private property brings all constitutional remedies into play, to assure the property owner is made whole. If state law afforded no remedy, a taking under Amendment V is also pled and would be actionable. In. Br. p. 32.

Respectfully submitted this 21st day of June, 2010.

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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, George Waas, Special Counsel/Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, Attorneys for Respondents, this 21st day of June, 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