IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2460

GARY BERNE,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review from the Fifth District Court of Appeal

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PRELIMINARY STATEMENT

In this Answer Brief, Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the “Department” or "Respondent." Petitioner, Gary Berne, will be referred to as “Petitioner.” Since a record on appeal has not been transmitted by the Fifth District Court of Appeal to date, citations to the record and transcript will be made to the Petitioner's response and the respondent's Petition for Writ of Certiorari filed in the Fifth District Court of Appeal. They will be referred to by pleading and then the appendix letter or number, i.e. (Petition App. ____, pg. ____).

ISSUES ON APPEAL

A. THE DISTRICT COURT’S RULING IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR OTHER DISTRICT COURT OF APPEAL.

B. THE DISTRICT COURT DID NOT ERR IN GRANTING CERTIORARI RELIEF WHERE THE CIRCUIT COURT COMMITTED A MISCARRIAGE OF JUSTICE.

1. The circuit court below erred when it found that Petitioner successfully rebutted the presumption that FDLE rules were complied with and the presumption that the Intoxilyzer instrument on which he was tested was approved.

2. **The circuit court below erred when it shifted the burden to the Department**.

3. **The circuit court below erred when it reweighed the evidence**.

4. **The limited scope of the hearing officer.**

STATEMENT OF THE CASE AND FACTS

The Department contends that the Petitioner's recitation of the facts is not accurate. The Department contends that the Petitioner's statement of the case and facts is improper for containing unduly argumentative statements. The Petitioner fails to cite to the transcript or the appendix to support many of his claimed facts and instead merely cites to his own response filed below which is a quote of his own argument. [1] The Department contends that the pertinent facts of this case are as follows:

Following Petitioner's arrest for driving under the influence, Petitioner requested a formal administrative review of his license suspension pursuant to section 322.2615, Florida Statutes. An evidentiary hearing was held for that

[1] The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute. Sabawi v. Carpentier, 767 So.2d 585, 586 (Fla. 5th DCA 2000).

purpose, and the Department hearing officer who presided over the case made the following findings of fact:

> On July 14, 2006, Trooper Hawkins, of the Florida Highway Patrol, was dispatched to a crash involving (Petitioner). After completing the crash investigation, Trooper Hawkins read (Petitioner) his Miranda Rights at which time he admitted to driving the vehicle that was involved in the crash. Trooper Hawkins detected the following: the odor of alcohol emitting from his breath, he swayed while standing, and his speech was slurred. Petitioner admitted to consuming two glasses of wine prior to driving.
>
> (Petitioner) consented to the following field sobriety exercises: Horizontal Gaze Nystagmus, walk and turn, finger to nose, and one leg stand. Petitioner did not maintain his balance nor follow instructions throughout.
>
> (Petitioner) was placed under arrest for DUI and transported to the Orange County DUI Breath Testing Center. (Petitioner) submitted samples of .137 and .131. (Petitioner's) privilege to operate a motor vehicle was suspended for six months for driving with an unlawful alcohol level.
> (Petition App. 6).

The hearing officer determined by a preponderance of the evidence that sufficient cause existed to sustain Petitioner's administrative driver's license suspension. The Department informed Petitioner in an Order dated October 20, 2006, that the suspension of his driving privilege had been sustained. (Petition App. 6).

The Petitioner then sought review of the Department's Order by a Petition for Writ of Certiorari to the Circuit Court of the Ninth Judicial Circuit. On October 23, 2009, the circuit court issued its Order Granting Petition for Writ of Certiorari reversing the Department's Order of license Suspension on the grounds that Respondent rebutted the presumption that the Intoxilyzer on which he performed his breath test was properly approved for use in Florida. (Petition App. 1). The circuit court held that "without independent scientific evidence demonstrating the reliability of the Intoxilyzer 8000 with software version 8100.26, the hearing officer should have excluded the Petitioner's breath test results." (Petition App. 1). The Department filed a Motion for Rehearing that was denied by the circuit court on December 2, 2009. (Petition App. 2).

The Department then sought review of the circuit court's Order Granting Petition for Writ of Certiorari in the Fifth District Court of Appeal. The Fifth District Court of Appeal granted the Department's petition for writ of certiorari. In reversing the circuit court below, the Fifth District Court of Appeal held, as follows:

> Berne attempted to overcome the presumption of impairment by presenting evidence that the Intoxilyzer 8000 devices used in Florida, including the device that was used for his test, utilize the 8100.26 software, which is a version of software that he claims has "never been subjected to an approval study required under FDLE Rule 11D-8.003." He, therefore, argues that the

> Intoxilyzer 8000 devices in Florida that are now using this version of software are not approved devices as required under the rule. The circuit court accepted that argument. Specifically, the circuit found that Berne “met his ... burden of rebutting the presumption created by the Department's documentary evidence that it substantially complied with the rules governing the approval of the breath testing instrument.” Hence, the circuit court held that “without independent scientific evidence demonstrating the reliability of the Intoxilyzer 8000 with software version 8100.26, the hearing officer should have excluded the Petitioner's breath test results.” In holding that Intoxilyzers utilizing this version of software are not approved devices, the circuit court applied the wrong law.

Petitioner now seeks review in this Court for which the Department is filing its Answer Brief on the Merits.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal appropriately exercised its discretion and granted certiorari relief where the circuit court violated a clearly established principle of law resulting in a miscarriage of justice when it concluded that without independent scientific evidence demonstrating the reliability of the Intoxilyzer 8000 with software version 8100.26, the hearing officer below should have excluded the Petitioner's breath test results from his DUI arrest. In doing so, the circuit court ignored the record evidence establishing that the Intoxilyzer was operated and maintained in accordance with FDLE rules, and instead concluded,

without any evidence to support such conclusion, that "the hearing officer failed to consider the discrepancies and problems presented" although no discrepancies or problems were presented to the hearing officer and there was no evidence whatsoever that the hearing officer failed to consider what was presented by Petitioner. See Department of Highway Safety and Motor Vehicles v. Falcone, 983 So. 2d 755, 759 (Fla. 2d DCA 2008) ("As in Alliston, 813 So. 2d at 145, we conclude that the circuit court's error resulted in a miscarriage of justice requiring certiorari relief because it has precedential value and the circuit court is applying the same error to numerous other administrative proceedings involving the suspension of driver's licenses.")

The Fifth District Court of Appeal correctly concluded that Petitioner's attempt to overcome the presumption of impairment by presenting evidence that the Intoxilyzer 8000 with software version 8100.26 was not approved was insufficient because that software was properly evaluated in accordance with FDLE rules and did not require a separate approval. As the District Court recognized, Rule 11D-8.003, titled "Approval of Breath Test Methods and Instruments" specifically provides:

> (6) the availability of new instruments, **software**, options or modifications does not negate the approval status of previously approved instruments, software, options or modifications. (emphasis added).

Based on the foregoing, the Fifth District properly granted certiorari in the instant case where the circuit court's application of wrong law amounted to a miscarriage of justice and would result in the continual application of the wrong law absent a District Court ruling. Combs, 436 So. 2d at 96 (Fla. 1983); Haines, 658 So. 2d at 530 (Fla. 1995); Allstate Ins. Co., 843 So. 2d at 890 (Fla. 2003).

ARGUMENT

A. THE DISTRICT COURT'S RULING IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR OTHER DISTRICT COURT OF APPEAL.

Despite the Petitioner's contention that the Fifth District Court of Appeal "merely disagreed with the holding of the Circuit Court without supplying a proper sufficient legal basis for [reversal]," the Petitioner has failed to show any conflict between the Fifth District Court of Appeal's holding in Department of Highway Safety and Motor Vehicles v. Berne, 49 So. 3d 779 (Fla. 5th DCA 2010) and any decision of this Court or any other District Court of Appeal on the same question of law. Contrary to Petitioner's contention the district court did not merely disagree with the circuit court's ruling. The district court reversed the circuit court because the circuit court applied "the wrong law" and will continue to do so without clear direction from the higher court. The district court

appropriately exercised its discretion and granted certiorari relief because the circuit court's departure from a clearly established principle of law in the instant case resulted in a miscarriage of justice. See Ivey v. Allstate Insurance Company, 774 So.2d 679, 682 (Fla. 2000). Combs v. State, 436 So. 2d 93, 96 (Fla. 1983); Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995); Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003).

In Berne, the Fifth District specifically held that:

> the circuit court clearly indicates that absent an opinion from this court, the circuit court will continue to apply the **wrong law** in future cases of administrative license suspensions involving breath tests administered on the Intoxilyzer 8000. Accordingly, we grant the petition and quash the order under review. (emphasis added).

Berne, 49 So. 3d 779. In fact, in footnote 1 of its opinion, the district court cites to no less than nine different district court cases where circuit courts applied the incorrect law. See Department of Highway Safety and Motor Vehicles v. Falcone, 983 So. 2d 755, 756 (Fla. 2d DCA 2008); Dep't of Highway Safety & Motor Vehicles v. Patrick, 895 So.2d 1131, 1133 (Fla. 5th DCA 2005); Dep't of Highway Safety & Motor Vehicles v. Alliston, 813 So. 2d 141, 143-144 (Fla. 2d DCA), review denied, 835 So. 2d 269 (Fla. 2002); at 143-44; Dep't of Highway Safety & Motor Vehicles v. Lazzopina, 807 So. 2d 77, 77 (Fla. 5th DCA 2001); Dep't of Highway Safety & Motor Vehicles v. Neff, 804 So. 2d 519, 520 (Fla. 5th

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The Fifth District Court of Appeal makes it clear that the circuit court violated a clearly established principle of law resulting in a miscarriage of justice and noted that absent action from the district court, the circuit court would continue to apply the wrong law. This assertion is not based merely on the Fifth District's opinion or speculation, it was made upon invitation by the circuit court in their own Berne decision where the lower court held that "[a]bsent any controlling authority on point from the Fifth District Court of Appeal, we find the en banc panel's decision in the Atkins case to be well reasoned and highly persuasive." Thus, the Ninth Circuit admitted that there is no controlling case on point that addresses whether or not independent scientific evidence demonstrating the reliability of the Intoxilyzer 8000 with software 8100.26 is necessary in order

for a hearing officer to conclude that a driver's breath test results are accurate and essentially requested the District Court to provide such authority.

Furthermore, the reality of the Ninth Circuit repeatedly failing to follow clearly established law concerning the approval of an Intoxilyzer instrument is a reoccurring problem in that circuit. There is no better example of this than the *en banc* ruling in Brady v. State, Department of Highway Safety and Motor Vehicles, 15 Fla. L. Weekly Supp. 1145a (Fla. 9th Cir. Ct., September 11, 2008), which disapproved more than twenty-eight (28) circuit court cases in which the Ninth Circuit had previously ruled that the Intoxilyzer instrument was not approved and reversed an administrative driver's license suspension like the Petitioner's. [2] In

[2] *Alejandro v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 738b (Fla. 9th Cir. Ct. May 8, 2007); *Boswell v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 717b (Fla. 9th Cir. Ct. Apr. 26, 2007); *Vadher v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 719a (Fla. 9th Cir. Ct. Apr. 26, 2007); *Flynn v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 723a (Fla. 9th Cir. Ct. Apr. 24, 2007); *Rozen v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 729a (Fla. 9th Cir. Ct. Apr. 23, 2007); *Rainwater v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 734a (Fla. 9th Cir. Ct. Apr. 17, 2007); *Myers v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 625a (Fla. 9th Cir. Ct. Apr. 11, 2007); *Cruz v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 603a (Fla. 9th Cir. Ct. Apr. 10, 2007); *Della Barba v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 629a (Fla. 9th Cir. Ct. Apr. 5, 2007); *Boesel v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 617a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Nickol v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 597a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Ameritskiy v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 619a (Fla. 9th Cir. Ct. Apr. 2, 2007); *Filipe v. Dep't of Highway Safety &*

Brady, the Ninth Circuit took issue with the driver's attempt to shift the burden of proof to the Department to establish that the Intoxilyzer instrument used in that case was an approved breath testing instrument. Id. The circuit court clearly held in Brady that the burden is on the driver to come forward with evidence that the Department failed to substantially comply with the administrative rules concerning the approval of the breath testing machine. Id. The circuit court concluded in Brady that the burden is on the petitioner to come forward with evidence that the

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Motor Vehicles, 14 Fla. L. Weekly Supp. 627a (Fla. 9th Cir. Ct. Mar. 28, 2007); *Shamey v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 408a (Fla. 9th Cir. Ct. Jan. 24, 2007); *Zicchino v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 947a (Fla. 9th Cir. Ct. Apr. 6, 2006); *Garcia v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 28a (Fla. 9th Cir. Ct. Aug. 16, 2005); *Lessard v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 19a (Fla. 9th Cir. Ct. Aug. 2, 2005); *Kimmins v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 1013a (Fla. 9th Cir. Ct. July 6, 2005); *Clark v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 1017a (Fla. 9th Cir. Ct. July 1, 2005); *Talbott v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 539a (Fla. 9th Cir. Ct. June 30, 2005); *Kuneman v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla, L. Weekly Supp. 1017a (Fla. 9th Cir. Ct. June 29, 2005); *Spano v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 830a (Fla. 9th Cir. Ct. Apr. 29, 2005); *Jones v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 698b (Fla. 9th Cir. Ct. Apr. 12, 2005); *MaGee v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 699a (Fla. 9th Cir. Ct. Apr. 7, 2005); *Bennett v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 707a (Fla. 9th Cir. Ct. Mar. 30, 2005); *McEver v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 703a (Fla. 9th Cir. Ct. Mar. 30, 2005); *Mejia v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 701a (Fla. 9th Cir. Ct. Mar. 30, 2005); and *Guerrero v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 695a (Fla. 9th Cir. Ct. Jan. 21, 2005).

Department failed to substantially comply with the administrative rules concerning the approval of the breath testing machine. See Mowry, 794 So. 2d at 659; see also Dep't of Highway Safety and Motor Vehicles v. Fiorenzo, 795 So. 2d 1128 (Fla. 5th DCA 2001)(where petitioner failed to rebut the presumption created by the documentary evidence that the Department substantially complied with the administrative rules, the circuit court erred in granting certiorari). Id. at 4.

In the instant case, the Fifth District properly granted the Department's Petition for Writ of Certiorari because the Ninth Circuit again committed the same mistake that it had committed at least twenty-eight times prior to Brady by applying incorrect law in holding that Intoxilyzer instruments are not approved devices without any proof of non-compliance by the driver. In doing so, the circuit court ignored the record evidence establishing that the Intoxilyzer was operated and maintained in accordance with FDLE rules, and instead concluded, without any evidence to support such conclusion, that "the hearing officer failed to consider the discrepancies and problems presented" although no discrepancies or problems were presented to the hearing officer and there was no evidence whatsoever that the hearing officer failed to consider what was presented by Petitioner. Berne v. Department of Highway Safety and Motor Vehicle, 17 Fla. L. Weekly Supp. 75a (Fla. 9th Cir. Ct. Oct 23, 2009). See Department of Highway Safety and Motor Vehicles v. Falcone, 983 So. 2d 755, 759 (Fla. 2d DCA 2008)

("As this court did in Alliston, 813 So. 2d at 145, we conclude that the circuit court's error resulted in a miscarriage of justice requiring certiorari relief because it has precedential value and the circuit court is applying the same error to numerous other administrative proceedings involving the suspension of driver's licenses.")

In fact, in Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So. 2d 1245, 1249 (Fla. 3d DCA 2007), a case heavily relied upon by the Petitioner, the Third District Court of Appeal held, as follows:

> We find that the circuit court applied the correct law. In the initial instance, DHSMV is not required to prove that the intoxilyzer machine was in compliance. Dep't of Highway Safety and Motor Vehicles v. Mowry, 794 So. 2d 657, 659 (Fla. 5th DCA 2001). Instead, the driver has the burden of establishing that the intoxilyzer machine was not in compliance. Id. However, once a driver submits proof that an intoxilyzer machine was not in substantial compliance with the appropriate regulations, DHSMV must prove that there was substantial compliance. See Dep't of Highway Safety and Motor Vehicles v. Farley, 633 So. 2d 69, 71 (Fla. 5th DCA 1994). Because this is the law that the circuit court applied, there is no error.

In Wejebe, the driver presented evidence which included both court orders and live testimony that showed that the specific Intoxilyzer instrument that Wejebe used was out of compliance. There is no such evidence in this case. Here, the Petitioner presented absolutely no evidence that showed that the Intoxilyzer 8000

instrument he used was either unapproved, unevaluated, inaccurate or not properly maintained by law enforcement. In fact, none of the Petitioner's witnesses were able to testify that the Intoxilyzer instrument used by the Petitioner was either not approved, did not pass any evaluations or was out of compliance with any rule or regulation. Thus, he failed to meet his burden of establishing that the instrument was not in compliance.

Furthermore, unlike the circuit court, the Fifth District Court of Appeal did not reweigh the evidence in holding that the Department met its burden of establishing the admissibility of Petitioner’s breath test results through the documentary evidence which established that Petitioner’s breath test was performed on an Intoxilyzer that was operated and maintained substantially according to methods approved by FDLE. State v. Donaldson, 579 So. 2d 728, 729 (Fla. 1991). Section 316.1932(1)(b)(2), Florida Statutes. The district court did not reweigh the evidence in concluding that Petitioner’s attempt to overcome the presumption of impairment by presenting evidence that the Intoxilyzer 8000 with software version 8100.26 was not approved was insufficient because the software was properly evaluated in accordance with FDLE rules and did not require a separate approval. As the district court recognized, Rule 11D-8.003, titled “Approval of Breath Test Methods and Instruments” specifically provides:

> (6) the availability of new instruments, **software**, options or modifications does not negate the approval status of previously approved instruments, software, options or modifications. (emphasis added).

Based on the foregoing, the Fifth District properly granted certiorari in the instant case where the circuit court's application of wrong law amounted to a miscarriage of justice and would have persuasive wide-spread effect in other cases. Petitioner's arguments regarding a conflict are therefore without merit and the request for relief must be denied. Combs, 436 So. 2d at 96 (Fla. 1983); Haines, 658 So.2d at 530 (Fla. 1995); Allstate Ins. Co., 843 So. 2d at 890 (Fla. 2003).

While the standard of certiorari review for the district court is narrow, it also contains a degree of flexibility and discretion. Haines, 658 So. 2d at 530 (Fla. 1995). Here, the district court properly exercised that discretionary power of certiorari review to prevent an ongoing application of the incorrect law. In Department of Highway Safety and Motor Vehicles v. Alliston, 813 So. 2d 141 (Fla. 2d DCA 2002), the district court recognized that one factor to consider in determining when a "miscarriage of justice" has occurred is whether the error is isolated or widespread in its application. The Second District stated:

> Although we conclude that the circuit court applied the incorrect law in its review of this administrative order, this does not necessarily allow us to grant certiorari in this second-tier proceeding. The more difficult question

> in this case is whether the circuit court's error rises to the level that can be corrected as a "miscarriage of justice." Despite all the efforts of the supreme court and the district court the test to determine when a "miscarriage of justice" has occurred remains easier to state than to apply. In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or widespread in its application to numerous other proceedings. *See*, *e.g.,* Progressive Specialty Ins. Co. v. Biomechanical Trauma Ass'n, 785 So.2d 667 (Fla. 2d DCA 2001); Stilson v. Allstate Ins. Co., 692 So.2d 979 (Fla. 2d DCA 1997).

Alliston, 813 So.2d at 145 (Fla. 2d DCA 2002).

In Department of Highway Safety and Motor Vehicles v. Hofer, 5 So. 3d 766, 772 (Fla. 2d DCA 2009) the court also considered the repetitive nature of the error in granting certiorari. The court held, as follows:

> the circuit court appellate decision in this case has precedential value and will result in the repetition of the same error in other proceedings involving suspension of driver's licenses. See Alliston, 813 So.2d 145. Because the circuit court's application of incorrect law established a legal principle applicable to future administrative proceedings, the circuit court's decision results in a miscarriage of justice that warrants the exercise of this court's certiorari jurisdiction.

Hofer, 5 So. 3d at 772*;* See also Department of Highway Safety and Motor Vehicles v. Anthol, 742 So. 2d 813 (Fla. 2d DCA 1999)(Because the circuit court's written decision could affect many other administrative proceedings involving the suspension of drivers' licenses, we grant certiorari relief).

Based on the foregoing, the Fifth District Court of Appeal's opinion in Berne is not in conflict with any decision of this Court or another district court of appeal as specified in Fla. R. App. P. 9.030(2)(A)(iv). The circuit court applied the incorrect law and the application of the incorrect law amounted to a miscarriage of justice because absent a ruling from the district court, the circuit court would continue to apply the wrong law in future cases of administrative license suspensions involving breath tests administered on the Intoxilyzer 8000. Haines City Community Development, 658 So. 2d at 530 (Fla. 1995); Alliston, 813 So. 2d at 145 (Fla. 2d DCA 2002). Based on the foregoing, Petitioner has failed to show that this Court should exercise discretionary jurisdiction in this case and grant any further relief.

B. THE DISTRICT COURT DID NOT ERR IN GRANTING CERTIORARI RELIEF WHERE THE CIRCUIT COURT COMMITTED A MISCARRIAGE OF JUSTICE.

The circuit court below erred when it essentially concluded that the hearing officer departed from the essential requirements of law and that there was insufficient competent evidence to support her findings. Specifically, the circuit court found that the hearing officer below should have excluded the Petitioner's breath test results because there was no independent scientific evidence

demonstrating the reliability of the Intoxilyzer 8000 with software 8100.26. As demonstrated below, the circuit court's final order granting the petition for writ of certiorari violated clearly established principles of law resulting in a miscarriage of justice and is clearly contrary to both the facts and Florida law.

1. The circuit court below erred when it found that Petitioner successfully rebutted the presumption that FDLE rules were complied with and the presumption that the Intoxilyzer instrument on which he was tested was approved.

The circuit court below committed a miscarriage of justice when it concluded that Petitioner rebutted the presumption that FDLE complied with applicable rules and regulations in the approval of the Intoxilyzer used to perform his breath test. Under section 316.1934(2), Florida Statutes, Petitioner's breath test results are prima facie evidence that he was impaired. Department of Highway Safety and Motor Vehicles v. Johnson, 686 So. 2d 672 (Fla. 5th DCA 1997). The record evidence at Petitioner's formal review established that his breath test was conducted pursuant to sections 316.1932 and 316.1934 and in compliance with Florida Department of Law Enforcement ("FDLE") rules. To be considered valid and admissible, an analysis of a person's breath must have been performed substantially according to methods approved by HRS (FDLE at the time of Petitioner's arrest). State v. Donaldson, 579 So. 2d 728, 729 (Fla. 1991). Section 316.1932(1)(b)(2), Florida Statutes. Pursuant to Donaldson, breath test

results are admissible if evidence of the following is provided by the Department: (1) the breath test was performed substantially in accordance with HRS (now FDLE) rules, with an approved machine and by a qualified technician; and (2) the machine has been inspected in accordance with HRS (now FDLE) rules to assure its accuracy. Id. at 729.

The Breath Alcohol Test Affidavit (Petition App. 3), the Agency Inspection Report (Petition App. 4), and the Department Inspection Report (Petition App. 5), established the foregoing Donaldson requirements and compliance with FDLE rules to render Petitioner's breath test results admissible. The Breath Alcohol Test Affidavit established that Petitioner's breath test was conducted by a certified breath test operator who holds a valid permit to administer breath tests in compliance with FDLE Rule 11D-8.008, FAC, using an Intoxilyzer 8000, which is an approved instrument pursuant to FDLE Rule 11D-8.003(2), FAC, subsequent to a twenty minute observation period in compliance with FDLE Rule 11D-8.007(3), FAC; and in accordance and in compliance with FDLE/ATP Form 37 Operational Procedures – Intoxilyzer 8000 pursuant to FDLE Rules 11D-8.007(4), FAC. The Breath Alcohol Test Affidavit also established that Petitioner's test results were 0.137 and 0.131 grams of alcohol per 210 liters of breath. The Breath Alcohol Test Affidavit is self-authenticating and was in the record for the hearing officer's

consideration pursuant to Rule 15A-6.013(2), Florida Administrative Code. (Petition App. 3).

In addition, the Agency Inspection Report (Petition App. 4) established that the breath test instrument used to conduct Petitioner's breath test was inspected in compliance with Rule 11D-8.006(1), FAC, and found to be providing accurate and reliable results. Rule 11D-8.006(1), FAC, requires that the breath test instrument be inspected at least once each calendar month in accordance with FDLE/ATP Form 39 Agency Inspection Procedures – Intoxilyzer 8000 to assure its accuracy. The June 21, 2006, Agency Inspection Report satisfied these requirements and established compliance with FDLE rules for Petitioner's July 14, 2006, breath test. On the Agency Inspection Report, Agency Inspector Kelly Melville certified that she checked the instrument and found that the instrument does comply with the agency inspection standards of 11D-8.006 F.A.C. See Department of Highway Safety and Motor Vehicles v. Farley, 633 So. 2d 69, 71 (Fla. 5th DCA 1994). Furthermore, on the Agency Inspection Report, Inspector Kelly Melville certified that she holds a valid Florida Department of Law Enforcement Agency Inspector Permit and that she performed the inspection in accordance with the provisions of Chapter 11D-8, FAC. Inspector Kelly Melville testified at Petitioner's formal review hearing. (Petition T3. 14-23). However, her testimony did not rebut the

competent substantial evidence establishing substantial compliance with FDLE rules in the Agency Inspection Report.

In addition to the Breath Alcohol Test Affidavit and Agency Inspection Report, the record evidence also included the Department Inspection Report. (Petition App. 5). On the Department Inspection Report, the FDLE inspector certified that he conducted the inspection in accordance with FDLE/ATP Form 36 Department Inspection Procedures – Intoxilyzer 8000 and found that the instrument does comply with the department inspection standards of 11D-8.004, FAC (Petition App. 5). FDLE Inspector, Roger Skipper, also testified at Petitioner's formal review. Again, as the Fifth District noted in its opinion, his testimony did not rebut the competent substantial evidence of substantial compliance with FDLE rules and the information provided in the Department Inspection Report. (Petition T2.5-21). In fact, Roger Skipper testified during the hearing that an approval study with the 8100.26 software was not required by the rule and specifically testified that only an evaluation was necessary.

Despite the foregoing record evidence, the circuit court found that the Department "failed to adequately meet its burden of demonstrating substantial compliance with FDLE rules." (Petition App. 1). The circuit court held that competent substantial evidence demonstrated that the approval studies did not comply with the requirements of FDLE Rule 11D-8.003 and FDLE Form 34 and

the Department hearing officer, who presided over Petitioner's administrative hearing and ultimately sustained his license suspension, should not have relied upon the breath test results of the Intoxilyzer instrument used to measure the Petitioner's breath alcohol level on the day of his arrest.[3] (Petition App. 1).

The Fifth District did not err when it concluded that the documents introduced into evidence at the hearing revealed that the Petitioner had a blood-alcohol level in excess of 0.08, which raises the presumption that the Petitioner was driving while under the influence of alcohol to the extent that his normal faculties were impaired. The Fifth District further concluded that these documents shifted the burden to the Petitioner to overcome the presumption by showing that the pertinent statutes and the methods approved by FDLE that are incorporated into the administrative rules were not substantially complied with. Instead, the Petitioner attacked the approval of the Intoxilyzer 8000 because it incorporated a

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[3] In fact, approval studies are not a part of the admissibility of breath test results in court. The evaluations referred to by the circuit court as "approval studies" conducted in April and May 2002 were required by Rule, were complied with specifically in May The CMI Intoxilyzer 8000 was APPROVED for evidentiary use on November 5, 2002 by incorporation into Rule 11D-8.003(2), FAC. The "approval studies" DID NOT approve the Intoxilyzer 8000. The incorporation of the make and model breath test instrument into the rule through the rule promulgation process is what approved it. Accordingly, the challenge to the approval of the Intoxilyzer 8000 should have come before an administrative law judge in accordance with Chapter 120, FS, prior to its incorporation into the rules in November 2002.

version of software that had not been approved, when all that is required under the rule is an evaluation.

Thus, the District Court concluded that the Petitioner failed to meet his burden of overcoming the presumption of impairment, and the circuit court applied the wrong law in quashing the administrative order affirming the suspension of Berne's license. As demonstrated below, the record evidence established that the device used to measure the alcohol content of Petitioner's breath was, in fact, approved for evidentiary use, and in holding otherwise, the circuit court misapplied the law by reweighing the evidence.

Furthermore, there is no support for the circuit court's holding that "[d]espite Petitioner's best efforts, the hearing officer failed to consider the discrepancies and problems in the intoxilyzer approval studies performed in April and May of 2002." On the contrary, the final order of license suspension makes it clear that the hearing officer did consider all of Petitioner's motions including the motion to invalidate because he argued the breath testing instrument was unapproved for use in Florida. Each of Petitioner's motions was properly considered and denied. (Petition App. 6).

Florida Administrative Code Chapter 11D-8 was amended on November 5, 2002, to specifically add the CMI, Inc., Intoxilyzer 8000 as an approved breath

test instrument for evidentiary use in Florida. Florida Administrative Code Chapter 11D-8 was again amended on December 9, 2004, to specifically address concerns regarding approval of breath testing instruments. Rule 11D-8.003 reads, as follows:

> **11D-8.003 Approval of Breath Test Methods and Instruments.**
>
> (1) [FDLE] has approved the following method(s) for evidentiary breath testing: Infrared Light Test, also known as Absorption Infrared Light Test.
>
> (2) [FDLE] approves breath test methods and new instrumentation to ensure the accuracy and reliability of breath test results. [FDLE] has approved the following breath test instrumentation for evidentiary use: CMI, Inc. Intoxilyzer 5000 Series- including any or all instruments using one of the following programs: 5000 Basic Software Program; Florida Software Program; R-Software Program; and CMI, Inc. Intoxilyzer 8000 using software evaluated by the Department in accordance with Instrument Evaluation Procedures FDLE/ATP From 34-Rev. March 2004.
>
> (3) [FDLE] has approved the following options for use with Intoxilyzer 5000 Series instruments: Keyboard; simulator recirculation; sample capture; pressure switch setting at no less than two inches and no more than six inches of water.
>
> (4) An [FDLE] inspection performed in accordance with Rule 11D-8.004, F.A.C., validates the approval, accuracy and reliability of an evidentiary breath test instrument.
>
> (5) The Department shall conduct evaluations for approval of new instrumentation under subsection (2) in accordance with Instrument Evaluation Procedures FDLE/ ATP Form 34-Rev. March 2004.

> (6) The availability of approval of new instruments, **software**, options or modifications does not negate the approval status of previously approved instruments, software, options or modifications. (emphasis added).

The foregoing language leaves no room for doubt that the instrument used in this case was approved for evidentiary use in Petitioner's case. Specifically, subsection (6) of Rule 11D-8.003 provides that the availability of approval of new software does not negate the approval status of previously approved instruments. Furthermore, subsection (4) of Rule 11D-8.003 now provides "[an FDLE] inspection performed in accordance with Rule 11D-8.004, F.A.C., validates the approval, accuracy and reliability of an evidentiary breath test instrument." See Florida Administrative Code Rule 11D-8.003(4). Finally, subsection (2) specifically approves the CMI, Inc., Intoxilyzer 8000, which was used to conduct the Petitioner's breath test.

As previously stated, an FDLE inspection was performed on the instrument at issue in this case. The Department Inspection Report concerning Intoxilyzer 8000, Serial Number 80-000963 was submitted to the Department by FDLE and introduced into evidence at Petitioner's formal review hearing. (Petition App. 5). The Inspection Report certifies that FDLE checked the instrument and found that it complied with the inspection standards of Chapter 11D-8 of the Florida Administrative Code. Importantly, FDLE performed a total of fifty (50) test runs

using reference solutions containing various concentrations of alcohol and the instrument yielded results within an average standard deviation of only .0006 g/210L from the actual reference amounts, thus demonstrating the instrument's ability to accurately and reliably measure samples containing alcohol.

In addition, the Department Inspection Report, Agency Inspection Report, and Breath Alcohol Test Affidavit all record the software version used during each event. It is illogical that FDLE would conduct a Department Inspection on an instrument that wasn't approved by them using a software version that did not meet the requirements of Rule11D-8.003, FAC. As a matter of public record, the evaluation of software version 8100.26 was conducted on January 4, 2006, in accordance with Chapter 11D-8, FAC and FDLE/ATP Form 34 Instrument Evaluation Procedures.

In Department of Highway Safety and Motor Vehicles v. Falcone, 983 So. 2d 755 (Fla. 2d DCA 2008) the Second District held that the Department is not required to prove that the intoxilyzer machine was in compliance. Dep't of Highway Safety and Motor Vehicles v. Mowry, 794 So. 2d 657, 659 (Fla. 5th DCA 2001). Instead, the driver has the burden of establishing that the intoxilyzer machine was not in compliance. Id. However, once a driver submits proof that an intoxilyzer machine was not in substantial compliance with the appropriate

regulations, DHSMV must prove that there was substantial compliance. Id. at 757.[4]

In the instant case, as in Falcone, the Petitioner did not introduce any evidence that the instrument used to administer his breath test was not approved, accurate or reliable as provided by Rule 11D-8.003(4). FDLE has made clear that if it has inspected a particular instrument in accordance with Rule 11D-8.004, F.A.C., the device shall be deemed "approved, accurate and reliable" for evidentiary use. Here, Petitioner did not present any evidence that FDLE failed to comply with its own rules or that the instrument used in the instant case with software 8100.26 was not valid for use. On the contrary, FDLE Inspector Roger Skipper testified that another additional approval was not required for software 8100.26. (Petition T2.20). The instrument, an Intoxilyzer 8000, was approved in 2002. According to Skipper, the software was not developed until a later date and **was properly evaluated for use in the Intoxilyzer**, but there was no need for another approval. (Petition T2.20). The instrument was approved in the rule and the software was evaluated by FDLE prior to use. A new software version does not

[4] In Falcone, the Second District concluded that the Department met the requirements of section 316.1934(5) by providing documentation establishing the date of performance of the most recent required maintenance on the intoxilyzer. There were three documents submitted at the hearing: the breath alcohol test affidavit; the agency inspection report; and the department inspection report.

negate the aproval of the Intoxilyzer 8000. The only thing that can negate its approval is its removal from Chapter 11D-8, FAC.

Contrary to the circuit court's holding there was simply no evidence in the record presented by Petitioner that the software 8100.26 was not evaluated for use or that the methods employed by FDLE failed to comply with its Rules. Quite the opposite, the evidence in the record was that software 8100.26 was evaluated prior to use and therefore FDLE is in strict compliance with Rule 11D-8.003(2), FAC. (Petition T2.20). Furthermore, the hearing officer in the instant case also had before him a copy of the CMI Inc., Intoxilyzer 8000 Instrumentation Evaluation Report, prepared by FDLE on February 10, 2005, based on the Intoxilyzer 8000 evaluation conducted on April 30, 2002. (Petition App.7), the CMI, Inc., Intoxilyzer 8000 Instrumentation Evaluation Report, prepared by FDLE on February 10, 2005, based on the Intoxilyzer 8000 evaluation conducted on May 29, 2002. This evaluation concluded that the Intoxilyzer 8000, successfully completed the evaluation process and all analytical results were within the acceptable range. The May 2002 evaluation report, dated February 10, 2005, specifically states that the Intoxilyzer 8000 was approved for use in Florida. (Petition App.8).

Based on the foregoing, the record evidence established substantial compliance with the requirements of Rule 11D-8. While Petitioner argues that the

software used in his intoxilyzer was not approved, this is simply not the case. Furthermore, argument of counsel is not evidence. Pursuant to Rule 11D-8.003(2), the intoxilyzer 8000 used to perform Petitioner's breath test was approved for use in the State of Florida by FDLE on November 5, 2002. In accordance with Rule 11D-8.003(2) the Intoxilyzer 8000 is approved using software evaluated by the Department in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34-Rev. March 2004. Petitioner did not present any evidence to rebut the competent substantial evidence in the record, even during FDLE Inspector Roger Skipper's testimony that the Intoxilyzer 8000 is an approved instrument, that software version 8100.26 had been evaluated by FDLE prior to its use, and that Petitioner's breath test was conducted on an instrument that complied with all FDLE rules.

It is noteworthy that other Florida circuit and county courts have rejected similar arguments. Schamp v. Department of Highway Safety and Motor Vehicles, 16 Fla. L. Weekly Supp. 634 (Fla. 18th Cir. Ct. April 29, 2009)(Petitioner contends that the evidence failed to establish that the Intoxilyzer used in this case complied with Fla. Admin. Rule 11D-8.003(5) and Form 34, because it did not establish that the Intoxilyzer was using the same micron bands described on the US DOT Conforming Products List." The Department (DHSMV) provided a response regarding the CMI filter letters and the "Court agrees with

what the Department has said. Petitioner's argument on this point is refuted by the evidence.."); Carver v. Department of Highway Safety and Motor Vehicles, 15 Fla. L. Weekly Supp. 42 (Fla. 18th Cir. Ct. Nov. 5, 2007) (Petitioner argues that the breath test results are unreliable because the breath testing machine, the Intoxilyzer 8000, was not properly approved pursuant to FDLE Rule 11D08.003. In November of 2002, the FDLE approved the Intoxilyzer 8000 for use in the State of Florida as an evidentiary breath instrument to measure alcohol. See Rule 11D-8.003, FAC. On March 27, 2006, the Intoxilyzer 8000 replaced the Intoxilyzer 5000. Thus, at the time the Petitioner submitted to a breath alcohol test in October 2006, the Intoxilyzer 8000 was an FDLE-approved machine); State v. Damian Bair, et al., 16 Fla. L. Weekly Supp. 984 (Fla. 18th Cir. Ct. , Aug. 10, 2009)(No merit to claim that Intoxilyzer 8000 used to test defendants' breath is not approved for evidentiary use in state where evidence established that Intoxilyzer 8000, which was evaluated and approved by FDLE, is same instrument listed on Department of Transportation Conforming Products List); State v. McClung, 15 Fla. L. Weekly Supp. 908 (Fla. Cty. Court, 4th Cir. July 23, 2008)(Claim that Intoxilyzer 8000 is not approved instrument because of micron bands machine may use is speculative, theoretical and hyper-technical.).

2. The circuit court below erred when it shifted the burden to the Department.

The circuit court below committed a miscarriage of justice when it ignored the fact that it was the driver's burden to come forward with some evidence of noncompliance. Without a demonstration of noncompliance, the Petitioner's attack is nothing more that "speculative and theoretical." State v. Friedrich, 681 So. 2d 1157, 1163 (Fla. 5th DCA 1996); Department of Highway Safety and Motor Vehicles v. Mowry, 794 So. 2d 657 (Fla. 5th DCA 2001); Department of Highway Safety and Motor Vehicles v. Cochran, 798 So. 2d 1128 (Fla. 5th DCA 2001); Dehart, 799 So. 2d at 1080. See also Department of highway Safety and Motor Vehicles v. Russell, 793 So. 2d 1073 (Fla. 5th DCA 2001).

Furthermore in Department of Highway Safety and Motor Vehicles v. Mowry, 794 So. 2d 657, 659-660 (Fla. 5th DCA 2001), in rejecting a similar attack on an Intoxilyzer instrument, the Fifth District held, as follows:

> Since the burden is not on the Department, and in light of the fact that a license suspension proceeding is civil in nature, the burden fell upon Mowry to come forward with evidence of noncompliance, much as the proponent of an affirmative defense must come forward with evidence in other types of civil proceedings. Placing the burden upon her does not offend notions of due process because of the civil nature of a license suspension proceeding and because the Department is only required to establish that the individual had an unlawful blood-alcohol level by a preponderance of the evidence. §322.2615(7), Fla. Stat. (1999).

> If Mowry wished to meet her burden of establishing noncompliance with the regulations by the Department, she could have, pursuant to section 322.2615(6)(b), subpoenaed the breath test technician and Intoxilyzer documents. She chose not to do so, however. Without a showing of noncompliance of the regulations by Mowry, her allegations are nothing more than "speculative and theoretical." State v. Friedrich, 681 So. 2d 1157, 1163 (Fla. 5th DCA 1996), *rev. denied*, 690 So. 2d 1299 (Fla. 1997). Under the circumstances of the instant case, it would require considerable speculation to conclude that Mowry was not intoxicated and that the test results were false given the record evidence of her breath tests of .143 and .137, both of which were well above the statutory minimum of .08.

Like Mowry, the Petitioner had an opportunity to present evidence to support his theory that the Intoxilyzer 8000 was inaccurate or not properly maintained. Petitioner was unable to present a single witness or a single document to support his theory and asked the hearing officer to base his findings on mere speculation and argument. Thus, in rejecting Petitioner's argument, Hearing Officer Owes made a sound decision based on the record evidence. The hearing officer properly found that the maintenance procedures and documents used in conducting Petitioner's breath test were in compliance with FDLE rules and properly determined that the Petitioner's breath test results were admissible. The hearing officer's determination that all procedures were followed in compliance with FDLE rules was supported by competent substantial evidence and consistent

with the essential requirements of law. Therefore, it was error for the lower court to reject the hearing officer's decision to consider Petitioner's breath test results. Department of Highway Safety and Motor Vehicles v. Satter, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

3. The circuit court below erred when it reweighed the evidence.

Next, the circuit court committed a miscarriage of justice when it divested the Department hearing officer of the role of finder of fact and reweighed the evidence concerning whether there was competent and substantial evidence to support the administrative suspension of the Petitioner's driver's license. It is neither the function nor the prerogative of a circuit court to reweigh evidence and make findings when it undertakes the review of a decision of an administrative forum. State of Florida, Department of Highway Safety and Motor Vehicles v. Allen, 539 So. 2d 20 (Fla. 5th DCA 1989).

There is no question that Hearing Officer Owe's decision to sustain the Petitioner's driver's license suspension was supported by competent substantial evidence. "For the results of a defendant's breath test to be admissible, the State must establish that the test was made in substantial conformity with the applicable administrative rules and statutes." State v. Donaldson, 579 So. 2d 728 (Fla. 1991)(underscore added). The Department met this burden with the breath test

result affidavit, agency inspection report, and Department inspection report. (Petition App. 3, 4, 5). It was then Petitioner's burden to come forward with some evidence of noncompliance. Contrary to the circuit court's holding, Petitioner did not come forward with any evidence of noncompliance.

In fact, the circuit court does not point to any evidence presented by Petitioner of noncompliance. The circuit court held that "[d]espite Petitioner's best efforts, the hearing officer failed to consider the discrepancies and problems presented in the Intoxilyzer approval studies performed in April and May of 2002 … these approval studies did not comply with FDLE Rule 11D-8.003 and FDLE Form 34, as argued by Petitioner and noted by the en banc panel in the *Atkins* case." (Petition App. 1). In reaching this conclusion, the circuit court misapplied the law resulting in a miscarriage of justice. Argument of counsel is not evidence. See National Advertising Company v. Broward County, 491 So. 2d 1262 (Fla. 4th DCA 1986) citing Hewitt, Colemen & Associates v. Lymas, 460 So. 2d 467, 468 (Fla. 4th DCA 1984), rev. denied, 471 So. 2d 43 (Fla. 1985); see also Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So. 2d 1015 (Fla. 4th DCA 1982).

Furthermore, the circuit court's reliance on testimony presented in the criminal case, State v. Adkins, et al., 16 Fla. L. Weekly Supp. 251 (Fla. 9th Cir. Ct. June 20, 2008) was contrary to law. Adkins involved a motion to produce in a criminal prosecution for DUI. The circuit court relied on testimony presented by

witnesses including the head of FDLE's Alcohol Testing Program, Laura Barfield, in the Adkins proceeding that was not before the hearing officer in the instant case and therefore not part of the record below. It was inappropriate for the circuit court in a certiorari proceeding to consider the testimony presented by Laura Barfield or any other witness in a criminal hearing that was not presented to the hearing officer at Petitioner's formal review. Laura Barfield DID NOT testify at Petitioner's formal review despite Petitioner having had the opportunity to enforce a subpoena for her appearance. Therefore, her live testimony was not in the record before the hearing officer for consideration. As such, her testimony as well as the testimony and evidence presented in the Adkins hearing was not relevant to a review of whether the hearing officer's finding in the instant case was supported by competent substantial evidence and complied with essential requirements of law.

The record reflects that Petitioner failed to present any evidence at his administrative formal review hearing to dispute the accuracy or approval of the Intoxilyzer 8000 used to perform his breath test or show that the instrument was not working properly on July 21, 2006. Thus, by a preponderance of the evidence, the hearing officer found that the Intoxilyzer 8000 was working properly and determined that the Petitioner's breath alcohol level results were accurate.

The circuit court committed a miscarriage of justice when it ignored the record evidence establishing that the Intoxilyzer was operated and maintained in accordance with FDLE rules and instead found that "the hearing officer failed to consider the discrepancies and problems presented" when no discrepancies and problems were presented to the hearing officer and there was no evidence that the hearing officer failed to consider what was presented by Petitioner.

Furthermore, Petitioner asked the circuit court below to usurp the hearing officer as trier of fact. In this case, the competent substantial evidence before the hearing officer included the breath test affidavit, as well as both annual and monthly inspection reports. The affidavit and the report constitute competent and substantial evidence, and also satisfied the Farley requirements and established compliance with FDLE rules for the Petitioner's breath test. See Department of Highway Safety and Motor Vehicles v. Farley, 633 So. 2d 69 (Fla. 5th DCA 1994). See also State v. Irizarry, 698 So. 2d 912 (Fla. 4th DCA 1997) (breath test results affidavit was presumptive proof of the results of an authorized test to determine the alcohol content of the breath). Furthermore, in Irizarry, the district court concluded "that the affidavit was admissible without proof that the testing of the machine showed it to be accurate." Id. at 914.

In making its finding, the circuit court below misapprehended and overlooked well settled law that it is the hearing officer's responsibility as trier of

fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact. See id; Department of Highway Safety v. Dean, 662 So. 2d 371, 373 (Fla. 5th DCA 1995); and Department of Highway Safety and Motor Vehicles v. Satter, 643 So. 2d 692, 695 (Fla. 5th DCA 1994). In this case, it is clear that the circuit court incorrectly reweighed the evidence presented to the hearing officer and reversed the hearing officer's decision by determining that there was not competent and substantial evidence to support the hearing officer's decision. The circuit court erred by making findings of fact contrary to those of the hearing officer in spite of the competent substantial evidence contained in the record below supporting the hearing officer's ruling. See DHSMV v. Stewart, 625 So.2d 123 (Fla. 5th DCA 1993). The term "competent substantial evidence" was defined in De Groot v. Sheffield, 95 So.2d 912, 916, (Fla. 1957) as follows:

> We have used the term 'competent substantial evidence' advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. Becker v. Merrill, 155 Fla. 379, 20 So. 2d 912; Laney v. Board of Public Instruction, 153 Fla. 728, 15 So. 2d 748. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. Jenkins v.

> Curry, 154 Fla. 617, 18 So. 2d 521. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.' Schwartz, American Administrative Law, p. 88; The Substantial Evidence Rule by Malcolm Parsons, Fla. Law Review, Vol. IV, No. 4, p. 481; United States Casualty Company v. Maryland Casualty Company, Fla. 1951, 55 So. 2d 741; Consolidated Edison Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126.

The duty of the circuit court on certiorari review of a decision of an administrative agency is limited to whether the agency's actions accorded procedural due process, observed the essential requirements of law, and were supported by substantial competent evidence. Campbell v. Vetter, 392 So. 2d 6 (Fla. 4th DCA 1980), petition for review denied, 399 So. 2d 1140 (Fla. 1981). The record in the instant case supports the findings of the hearing officer. Therefore, the circuit court committed a miscarriage of justice in overturning the ruling below

4. The limited scope of the hearing officer.

Finally, the circuit court overlooked the fact that neither §322.2615, Fla. Stat., nor Rule 15A-6.013(2), F.A.C., both of which govern these administrative hearings, specifically mention or require any maintenance reports, Instrumentation

Evaluation Reports, or any specific documents produced by or for the Intoxilyzer 8000 instrument. Instead, Rule 15A-6.013(2)(d), F.A.C., provides, as follows:

> (2) The hearing officer shall consider any report or photocopies of such report submitted by a law enforcement officer, correctional officer or law enforcement or correctional agency relating to the arrest of the driver, the administration or analysis of a breath or blood test, the maintenance of a breath testing instrument, or a refusal to submit to a breath, blood, or urine test, which has been filed prior to or at the review. Such reports, which ***shall*** be in the record for consideration by the hearing officer, include:
>
> (d) **The results of any breath or blood test documenting the driver's alcohol level.** (emphasis added) [5]
>
> Specifically, the hearing officer's scope of review **shall**

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[5] Rule 15A-6.013(2)(a)-(k)(2007):
(a) The uniform traffic citation or notice of suspension issued to the driver;

(b) An affidavit stating the officer's grounds for belief that the person arrested was in violation of s. 316.193;

(c) An affidavit of any breath, urine or blood test refusal, submitted by a law enforcement officer;
(e) The officer's alcohol influence report or a description of the field sobriety test;
(f) Any video or audio tape of the driver incidental to the arrest, including any field sobriety test performed or attempted to be performed by the driver;
(g) Notice of Commercial Driver's License/Privilege Disqualification, HSMV Form 72005;
(h) Certification of Blood Withdrawal, FDLE/ICP Form 11;
(i) Breath Test Result Affidavit, FDLE/ICP Form 14;
(j) Blood Test Result Affidavit, FDLE/ICP Form 15; or

(k) Agency Inspection Checklist, FDLE/ICP Form 24.

> **be limited,** per the statute, and the hearing officer can **only** consider:
>
> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances;
>
> 2. Whether the person was placed under lawful arrest for a violation of §316.193; and
>
> 3. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in §316.193.
>
> § 322.2615(7)(b), Florida Statutes.

When these criteria are met, section 322.2615(8)(a), Florida Statutes, states that the hearing officer shall sustain the suspension in question. The circuit court has misapprehended the statutorily limited scope of review. The holding of the circuit court interjects an additional element for the hearing officer to consider which is not included within that limited scope. Pursuant to the statute, the hearing officer need only determine "[w]hether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level ("BAL") of 0.08 or higher as provided in §316.193." Here, there was more than ample competent, substantial evidence to support the hearing officer's very specific determination that Petitioner had a BAL of .08 or higher. That element of the hearing officer's limited inquiry was satisfied. Under the circuit court's decision, the hearing

officer is required to make additional findings concerning the approval of the Intoxilyzer. This is simply not required, nor even permitted, under the statute's limited scope of review and places an additional burden upon the Department that is neither envisioned, nor permitted, under the statute.

The circuit court's holding directly conflicts with decisions of several District Courts of Appeal. Specifically, the First District and Second District have noted the limited scope of review of the hearing officer.

> We hold that the Department, as an element of its burden in a civil administrative hearing to review a suspension of driving privileges, has no obligation to establish that an approved test was ready and available if the defendant had elected to take the test. **Such an element of proof is not expressly contained in the issues delineated in section 322.2615(7)(b) 1.-4 .** See State Department of Highway Safety v. DeShong, 603 So.2d 1349 (Fla. 2d DCA 1992). For purposes of a civil statute regulating a privilege, we see no reason to imply such an additional element . See State v. Hoch, 500 So.2d 597, 601 (Fla. 3d DCA 1986), review denied, 509 So.2d 1118 (Fla.1987) ("A driver's license is a privilege, not a right, and the state may strictly regulate that privilege.").

State, Dept. of Highway Safety and Motor Vehicles v. Berry, 619 So.2d 976 (Fla. 2d DCA 1993) (emphasis supplied). "By basing its decision on matters outside the permissible scope of review, the court applied incorrect law. Skaggs Albertson's v. ABC Liquors, Inc., 363 So.2d 1082 (Fla.1978); Dep't of Highway Safety & Motor Vehicles v. Favino, 667 So.2d 305 (Fla. 1st DCA 1995); Haskins,

752 So.2d at 626." State, Dept. of Highway Safety and Motor Vehicles v. Porter, 791 So.2d 32 (Fla. 2d DCA 2001). See also, Department of Highway Safety and Motor Vehicles v. Coleman, 787 So.2d 90 (Fla. 2d DCA 2001) ("the hypothetical validity of a refused test is not relevant to review the administrative suspension of a driver's license.", quoting, Department of Highway Safety and Motor Vehicles v. Riggen, 654 So.2d 221, 222 (Fla. 1st DCA 1995)).

> Also, section 322.2615(7), Florida Statutes (1991), **specifically limits the scope of review** of a license suspension for refusal to take a test to the consideration of whether the law enforcement officer had probable cause to believe the person was driving or in actual control of a motor vehicle while under the influence of alcohol; whether the person was placed under lawful arrest for driving under the influence; **whether the person refused to submit to any breath, blood, or urine test when requested to do so**; and whether the person was advised of the consequences of refusal. There is no requirement that the state validate the hypothetical test which would have been given but for the refusal.

Conahan v. Department of Highway Safety and Motor Vehicles, 619 So.2d 988, 989 (Fla. 5th DCA 1993) (emphasis supplied).

This limited scope of review is also recognized by other jurisdictions.

> Thus, the unambiguous language of § 28-1321(K), which limits the scope of the hearing to "only the [four] issues" prescribed therein, combined with the obvious spirit, purpose, context, and effect of the implied consent statute, see Norgord, establish a clear legislative intent to limit the issues for administrative review, not expand them to include consideration of the constitutional

> validity of the investigatory stop leading to a criminal DUI arrest.

Tornabene v. Bonine ex rel. Arizona Highway Dep't, 203 Ariz. 326, 54 P.3d 355, 362 (App.2002).

Pursuant to §322.2615, Fla. Stat., and Rule 15A-6.013, F.A.C., the hearing officer did exactly what was required and considered the Breath Test Results Affidavit, as well as the Agency and Department Inspection Reports. (Petition App. 3, 4, 5). Hearing Officer Owes clearly complied with the relevant law and had competent substantial evidence to support his findings. Therefore the hearing officer's decision should have been upheld by the circuit court.

Respondent's procedural and substantive due process rights were protected throughout the administrative process and the hearing officer did not in any way abuse his discretion. The findings of fact were based on competent substantial evidence and conformed to the essential requirements of law. "It is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination." Cohen v. School Board of Dade County, Florida, 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984).

The Department's mission is to promote and protect the public safety. Laws against drunk driving must be interpreted liberally in favor of the public interest and against the private interest of the driver. §Section 322.42 expressly encourages liberal construction of the statutory provisions of chapter 322, and states as follows:

> This chapter shall be liberally construed to the end that the greatest force and effect may be given to its provisions for the promotion of public safety.

Furthermore, the Fifth District Court of Appeal has determined in Conahan v. Department of Highway Safety and Motor Vehicles, 619 So. 2d 988 (Fla. 5th DCA 1993) that the suspension procedures in s. 322.2615, Florida Statutes (2005), make it clear that the interest in a driver license is a privilege and that the risk of an erroneous deprivation is slight in light of the statutory requirements and that the public interest in highway safety is great. Sections 322.2615, Florida Statutes (2005), as well as Rule 15A-6.013(2), Florida Administrative Code, specifically authorize the Department's actions in this case. There was competent substantial evidence in the record of compliance with FDLE rules to render Respondent's breath test admissible. Respondent did not rebut the presumption created by the documentary evidence that there was substantial compliance with the FDLE rules. Without a demonstration of noncompliance, the Respondent's attack is nothing more that "speculative and theoretical." Wissell v. State, 691 So.2d 507 (Fla. 2nd

DCA 1997); State v. Friedrich, 681 So.2d 1157, 1163 (Fla. 5th DCA 1996). Since Respondent failed to demonstrate any defect in the breath test, the hearing officer, as trier of fact, properly determined that the breath test was in substantial compliance with FDLE rules.

The circuit court committed a miscarriage of justice when it reweighed the evidence. In concluding that the record before the hearing officer demonstrated "discrepancies and problems in the approval of the intoxilyzer" and that the approval studies did not comply with FDLE rules, the circuit court reweighed the evidence and based its holding on conclusions reached by another court in its faulty review of testimony presented only to that tribunal. It is neither the function nor the prerogative of a circuit court to reweigh evidence and make findings when it undertakes the review of a decision of an administrative forum. State of Florida, Department of Highway Safety and Motor Vehicles v. Allen, 539 So. 2d 20 (Fla. 5th DCA 1989). In sum, the circuit court's reweighing of the evidence in the instant case resulted in a miscarriage of justify requiring reversal.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Honorable Court deny Petitioner's appeal and affirm the Fifth District Court of Appeal's Order quashing the circuit court's Order Granting Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this ____ day of August, 2011, to Stuart I. Hyman, Esq., 1520 East Amelia Street, Orlando, FL 32803.

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief is typed in Times New Roman 14- font and is in compliance with Fla. R. App. P. 9.210(a)(2) and 9.100(l).

____
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