IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2460
FIFTH DCA CASE NO.: 5D09-4648

GARY BERNE,

Petitioner,

vs.

FLORIDA DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF
On Discretionary Review from the Fifth District Court of Appeal

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INTRODUCTION

Petitioner, GARY BERNE, seeks review of the Fifth District Court of Appeal decision in Department of Highway Safety and Motor Vehicles v. Berne, 49 So.3d 779 (Fla. 5th DCA 2010), review granted Case Number: SC10-2460 (Fla., June 30, 2011). The Fifth District accepted second-tier certiorari review, quashing the Circuit Appellate Court's decision, which quashed the decision of an administrative hearing officer that sustained Petitioner's driver's license suspension. The Fifth District Court of Appeal decision accepting second-tier certiorari review was entered on the erroneous premise that it had certiorari jurisdiction to determine that the Intoxilyzer 8000 breath testing machine upon which Petitioner was tested as a result of an arrest for driving under the influence of alcohol was properly approved pursuant to §316.1932, Fla. Stat. (2006). The Fifth District also erroneously determined that subsequent substantial modifications to its electrical and computer component configuration including its 8100.26 software needed to be only evaluated and not approved under Fla. Admin. Code R. 11D-8.003 and §316.1932, Fla. Stat. (2004).

The Circuit Court's decision was consistent with the essential requirements of the law. The Fifth District's decision to accept second-tier certiorari review expressly conflicted with this Court's decisions on second-tier certiorari jurisdiction in Custer Medical Center a/a/o Maximo Masis v. United Automobile

Insurance Company, __ So.3d __, 2010 WL 4340809 (Fla., Nov. 4, 2010), Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), Ivey v. Allstate Insurance Company, 774 So.2d 679 (Fla. 2000), Allstate Insurance Company v. Kaklamanos, 843 So.2d 885 (Fla. 2003) and Combs v. State, 436 So.2d 93 (Fla. 1983). The Fifth District's Opinion also expressly conflicted with State v. Polak, 598 So.2d 150 (Fla. 1st DCA 1992) and §316.1932(1)(a)1.a., Fla. Stat. (2005). Polak requires that breath test instruments and their software utilized in the State of Florida be approved including by rule promulgation pursuant to Chapter 120 of the Florida Administrative Procedure Act and not merely evaluated prior to their use. The Fifth District Court of Appeal's interpretation of FDLE Rule 11D-8003 to allow only for evaluations as opposed to the approval of modifications made to the electrical and computer component configurations of the Intoxilyzer 8000 device also rendered it an invalid exercise of delegative legislative authority pursuant to §120.52(8), Fla. Stat. (2004). The Fifth District's interpretation was also in express conflict with Gaudette v. Florida Board of Professional Engineers, 900 So.2d 574, 578, 581 (Fla. 4th DCA 2004) and Smith v. Florida Department of Corrections, 920 So.2d 638 (Fla. 1st DCA 2005) with regard to the validity of rules that are enacted by administrative agencies that exceed proper enabling statutory authority.

STATEMENT OF THE CASE AND FACTS

The Court having ordered Petitioner's Initial Brief to be filed by July 25, 2011, which is prior to the requirement that the Clerk of the Fifth District Court of Appeal file the original record properly indexed and paginated on or before August 29, 2011, requires Petitioner to provide references to the transcripts and evidence entered at the administrative level which were attached to the Petitioner's Response and Respondent's Petition for Writ of Certiorari filed with the Fifth District Court of Appeal. They will be referred to by the pleading and then the appendix letter or number and the page number of that appendix letter or number, i.e. (Berne's Response App. __, pg. _)

On August 5, 2006 Petitioner, BERNE, was arrested and subsequently submitted to a breath test on an Intoxilyzer 8000 breath testing machine that utilized version 8100.26 software to perform the analysis. After the test results revealed a breath alcohol level in excess of 0.08, Petitioner's driver's license was administratively suspended. Petitioner requested and received a Formal Review Hearing pursuant to §322.2615(6)(a), Fla. Stat. (2005). At the conclusion of that Formal Review Hearing, the hearing officer, who was not an attorney, sustained the suspension of Petitioner's driver's license.

At the hearing which commenced on August 16, 2006, Respondent, Department of Highway Safety and Motor Vehicles, attempted to show that the

Intoxilyzer 8000 machine used to test Petitioner was in compliance with the FDLE Rules by introducing only a Breath Test Result Affidavit (Department's Petition App. 3), an Agency Inspection (Department's Petition App. 4) and a Department Inspection report (Department's Petition App. 5). No evaluation or document that established or showed compliance with the requirements for the approval of the Intoxilyzer 8000 machine for use as a breath testing machine in the State of Florida was ever introduced by Respondent. (Berne's Response App. A, pgs. 4-5)

Petitioner rebutted the aforesaid evidence. At a continued portion of the hearing held on October 12, 2006, Petitioner called as a witness acting Orange County agency inspector, Kelly Melville, who was a civilian employee of the Orange County Sheriff's Department. (Berne's Response App. C, pg. 14) Ms. Melville testified that she was the agency inspector and custodian of the records for the Intoxilyzer 8000 breath testing machine serial #80-000963 which was the machine upon which Petitioner was tested. (Berne's Response App. C, pg. 14) Ms. Melville testified that the agency inspection form showed that the machine upon which Petitioner was tested contained and used software version 8100.26. (Berne's Response App. C, pg. 14) Ms. Melville further testified that she had no personal knowledge as to whether a machine of the same electrical and computer component configuration as Intoxilyzer 8000 machine serial number 80-000963 had ever been properly approved by the Florida Department of Law Enforcement

pursuant to FDLE Rule 11D-8.003. (Berne's Response App. A, pgs. 14-15) Ms. Melville also testified that Intoxilyzer 8000 machines with 8100.26 software in them had, during testing, improperly failed to flag as designed that mouth alcohol levels were present. (Berne's Response App. C, pgs. 22-23)

At another continued hearing on September 22, 2006, Petitioner called as a witness Roger Skipper, a department inspector from the Florida Department of Law Enforcement who was also a civilian employee. (Berne's Response App. B, pg. 5) Mr. Skipper admittedly possessed no degrees in electrical engineering or computer engineering. (Berne's Response App. B, pg. 5) Also submitted by Petitioner into evidence at the hearing was Roger Skipper's testimony at another Formal Review Hearing in Department of Highway Safety and Motor Vehicles v. Hughes which was held on May 18, 2006. (Berne's Response App. C, pg. 9, App. D)

Mr. Skipper, on September 22, 2006, testified that since the initial Intoxilyzer 8000 approval studies on April 30, 2002 and May 29, 2002 had been conducted, there had been no subsequent approval studies conducted on the Intoxilyzer 8000 by FDLE pursuant to FDLE Rule 11D-8.003. (Berne's Response App. B, pg. 6) He noted that version 8100.09 software was in the breath testing machines utilized during the April 30, 2002 study. (Berne's Response App. B, pg. 6) He also testified that 8100.10 software was in the breath testing machines

utilized during the May 29, 2002 approval study. (Berne's Response App. B, pg. 6) He admitted that software version 8100.26 in the machine used on Petitioner's test was not even in existence at the time that the approval studies were conducted on April 30, 2002 and May 29, 2002. (Berne's Response App. B, pg. 20)

Mr. Skipper was not able to advise what types of revisions were made to the sixteen various versions of software that occurred between version 8100.10 utilized on May 29, 2002 and version 8100.26 utilized in Petitioner's case. (Berne's Response App. B, pg. 13) He further admitted that despite FDLE having conducted only an evaluation, no actual approval studies on the Intoxilyzer 8000 with 8100.26 software in it were actually conducted by FDLE. (Berne's Response App. B, pgs. 13-14) Despite the evaluation that was conducted, Mr. Skipper noted the Intoxilyzer 8000 machines were still displaying a systemic problem of computer glitches and malfunctions. (Berne's Response App. B, pgs. 13-14)

The Intoxilyzer 8000 machine was first listed and appeared in FDLE Rule 11D-8.003 that became effective on November 5, 2002. (Berne's Response App. C, pg. 8, App. E) In his testimony, in the Hughes Formal Review Hearing on May 18, 2006, Mr. Skipper advised that dry gas standards were used in the approval process in April and May 2002, even though up until the November 5, 2002 rules, there existed no prior rules allowing the use of dry gas standards in approval

testing or even identifying a source from which dry gas standards could be obtained. (Berne's Response App. D, pgs. 23-25)

Mr. Skipper also admitted that prior to the effective date of FDLE Rule 11D-8.003 on November 5, 2002, the only two approval studies performed by FDLE on the Intoxilyzer 8000 were those conducted on April 30, 2002 and May 29, 2002 respectively. (Berne's Response App. D, pgs. 5, 7, 16, 24, App. G, App. H) Both these approval studies were admittedly conducted pursuant to the July 29, 2001, version of FDLE Rule 11D-8.003 and not the later enacted November 5, 2002 version of FDLE Rule 11D-8.003. (Berne's Response App. C, pg. 8, App. D, pg. 24, App. F) The May 29, 2002 approval study specifically confirmed in writing on the top of page 2, that it was conducted in accordance with Chapter 11D, F.A.C. July 2001 and FDLE/ATP Form 34 Instrument Evaluation Procedures March 2001. (Berne's Response App. H)

Mr. Skipper testified that the two machines involved in the approval study conducted on April 30, 2002, were machine serial numbers: 80-000208 and 80-000209. (Berne's Response App. G, App. D, pg. 5) Mr. Skipper admitted that FDLE Rule 11D-8.003(4)(c) (July 29, 2001) in effect at the time, required the manufacturer to submit to FDLE at least two instruments for the approval evaluation. (Berne's Response App. D, pg. 21, App. F) FDLE Rule 11D-8.003(4) (July 29, 2001), also required the manufacturer to provide at the time of the

approval an operator's/technician's manual, a schematic design of the instrument, and the instrument's maintenance manual if published. (Berne's Response App. F) Mr. Skipper testified that the manufacturer was also required pursuant to FDLE Rule 11D-8.003(4)(j) to provide the "**name and description**" of the software used. (Berne's Response App. D, pg. 22, App. F)

During the April 30, 2002 approval study, Mr. Skipper testified that the two machines he tested contained only described software version 8100.09 which was a completely different version of software than software version 8100.26 which was contained in the Intoxilyzer 8000 machine upon which Petitioner was tested. (Berne's Response App. B, pg. 6, App. D, pgs. 13-14) The alcohol reference solutions used to test both of the machines in the approval study were limited to various alcohol concentrations of: **0.02** grams per 210 liters, **0.05** grams per 210 liters and **0.08** grams per 210 liters. (Berne's Response App. G) Despite FDLE Rule 11D-8.003 and FDLE/ATP Form 34-rev. March 2001 incorporated therein requiring the machines to be tested at additional alcohol concentrations of **0.15** grams per 210 liters, **0.20** grams per 210 liters, **0.30** grams per 210 liters or **0.40** grams per 210 liters, FDLE did not fully conduct testing at these levels. (Berne's Response App. D, pgs. 12-13)

Mr. Skipper also testified that during the April 30, 2002 approval study he used non approved dry gas standard simulator controls manufactured by some

unapproved entity known only as "Scotty". (Berne's Response App. D, pgs. 9-11, App. F, App. G) No provision existed in the July 29, 2001, FDLE rules to test an Intoxilyzer 8000 machine using dry gas standards instead of required simulator solutions. (Berne's Response App. F)

During the course of his April 30, 2002 testing, Mr. Skipper also determined with regard to machine 80-000208 that there were numerous problems with the software which caused sporadic problems including the breath test affidavit being produced by the machine to be printed incorrectly. (Berne's Response App. B, pgs. 14-15, App. D, pg. 15) The machine also displayed malfunctions on sample numbers 5, 12 and 35 involving the mouth alcohol test that was conducted. (Berne's Response App. G, Exceptions page) The machine also showed malfunctions on the 0.20 simulator test when after only the twelfth sample the machine displayed results that were both "low and erratic". (Berne's Response App. D, pg. 14, App. G, Exceptions page) FDLE was forced to prematurely terminate the testing during the April 30, 2002, approval study because it was determined that air was improperly being drawn through the breath hose at the same time that a sample was being drawn from the simulator which Mr. Skipper identified as being symptomatic of a failed one way valve in the machine. (Berne's Response App. D, pg. 13, App. G)

As to the other machine, serial number 80-000209 involved in the April 30, 2002 study, he found that during the 0.02 simulator test the instrument malfunctioned and improperly reported interferent when none was present in simulator sample number 42. (Berne's Response App. G, Exceptions page) During simulator sample number 44 the instrument also improperly reported interferent and alcohol being present during a subsequent "air blank". (Berne's Response App. G, Exceptions page) Mr. Skipper found the instrument also reported interferent when none was known to be present for two more 0.02 samples and for three 0.05 samples. (Berne's Response App. G, Exceptions page) Mr. Skipper then stopped the April 30, 2002 testing even though the machines had purportedly been previously calibrated by CMI. (Berne's Response App. G, Exceptions page)

Another subsequent attempted approval study was conducted by FDLE one month later on May 29, 2002. (Berne's Response App. H, App. D, pgs. 16-17) According to FDLE, this particular approval study was also conducted in accordance with FDLE Rule 11D-8.003 effective July 29, 2001 and FDLE/ATP Form 34 Instrument Evaluation Procedures dated March 2001 made reference to in that rule. (Berne's Response App. D, pg. 17, App. F) Mr. Skipper testified that the May 29, 2002 approval study ended up utilizing only one Intoxilzyer 8000 machine serial number: 80-000208 because the required second machine, Intoxilyzer 8000 serial number: 80-000209 stopped working due to an electrical

short that occurred in the machine during the course of testing. (Berne's Response App. H, App. D, pgs. 17-18)

FDLE Rule 11D-8.003 (July 2001) under which the approval was being conducted required that the manufacturer produce for the approval study at least two intoxilyzer 8000 machines. (Berne's Response App. D, pg. 21, App. F) Mr. Skipper admitted that with regard to the May 29, 2002 testing, the software had been changed in the Intoxilyzer 8000 machine from software version 8100.09 to new software version 8100.10. (Berne's Response App. B, pgs. 6, 14-15, App. H)

During the course of the May 29, 2002 approval study conducted by FDLE on machine number 80-000208, the breath test affidavit as it did on April 30, 2002, once again failed to print correctly. (Berne's Response App. H, Exceptions page) In addition, two exceptions, i.e. malfunctions of the machine were noted during the mouth alcohol test and were found to not be in compliance with FDLE Rule 11D-8-003. (Berne's Response App. H, Exceptions page)

With regard to the other machine, 80-000209, during the second subject test attempt, an interferent was improperly detected during the air blank and the test was improperly aborted by the instrument. (Berne's Response App. H, Exceptions page, App. D, pg. 20) During the third subject test an interferent was again improperly detected and the test was again aborted by the instrument. (Berne's Response App. H, Exceptions page, App. D, pgs. 20-21) FDLE determined there

were no interferents in the room to cause the malfunctions and the machine inexplicably powered itself down. (Berne's Response App. H, Exceptions page) Since the machine was again operating improperly, Mr. Skipper decided that no further testing would be conducted with the instrument. (Berne's Response App. H, App. D, pg. 17)

The approval studies conducted on April 30, 2002 and May 29, 2002 that were introduced into evidence, showed that Intoxilyzer 8000 machines with only software versions 8100.09 and 8100.10 were ever tested by FDLE. (Berne's Response App. B, pgs. 6, 14-15, App. D. pg. 26) The documents and evidence also established that the aforesaid software and Intoxilyzer 8000 machines did not operate properly and did not comply with the FDLE rules and forms that were in effect. (Berne's Response App. G, App. H, App. D. pg. 26) The Intoxilyzer 8000 machine upon which Petitioner was tested in this case contained 8100.26 software which was at least sixteen versions removed from the 8100.09 or 8100.10 that was utilized in the approval studies. (Berne's Response App. B, pg. 7) The Intoxilyzer 8000 machine with 8100.26 software has **never** been subjected to an approval study required under FDLE Rule 11D-8.003. (Berne's Response App. B, pg. 6)

At the hearing, Mr. Skipper was also shown records from the Florida Department of Law Enforcement pertaining to human breath tests on various Intoxilyzer 8000 machines located throughout the State of Florida using 8100.26

software. (Berne's Response App. B, pgs. 9, 11, App. C, pgs. 7-8, App. I) Mr. Skipper admitted that in order to have a scientifically valid breath sample and test on an Intoxilyzer 8000 machine, the breath sample volume from an individual taking the test must register at a minimum of 1.1 liters. (Berne's Response App. B, pg. 21) Mr. Skipper noted that if the breath volume for the sample was less than 1.1 liters, the result was considered scientifically unreliable and the software in the Intoxilyzer 8000 was supposed to print a message that stated "Volume Not Met". (Berne's Response App. B, pgs. 9-12, 21)

The records from the Florida Department of Law Enforcement showed on each page of the records that there were human breath test results that were misrepresented by the Intoxilyzer 8000 to be scientifically valid when in fact Mr. Skipper knew and admitted that they were not actually scientifically valid because they were based on breath volumes that were actually less than the required 1.1 liters. (Berne's Response App. B, pgs. 12, 21, App. I, pg. 3) In each of these instances, the Intoxilyzer 8000 improperly failed to print the required and designed "Volume Not Met" message despite the low volume. (Berne's Response App. B, pgs. 12, 21) Mr. Skipper noted that by failing to produce the required message, "Volume Not Met", the Intoxilyzer 8000 machine was essentially improperly misrepresenting that the breath test results obtained were scientifically valid even

though he knew they were scientifically invalid. (Berne's Response App. B, pgs. 12, 21)

Despite FDLE's purported previous evaluation of the 8100.26 software without having conducted a full approval study, Mr. Skipper could not provide any explanation for these scientifically unreliable results that were improperly being represented by the Intoxilyzer 8000 to be scientifically reliable. (Berne's Response App. B, pgs. 12-13) He admitted the Intoxilyzer 8000 machine was not working as it was designed to work. (Berne's Response App. B, pgs. 12-14) Mr. Skipper's lone justification for its failings was that Petitioner's expectation of perfection in the breath test results was an unreasonable expectation with respect to the Intoxilyzer 8000. (Berne's Response App. B, pgs. 13-14)

At the hearing Mr. Skipper also acknowledged that the Intoxilyzer 8000 actually printed out breath test readings that were over the legal limit despite the machine reporting breath sample volumes that were only 0.000. (Berne's Response App. B, pgs. 9-10, App. I, pg. 4) The records reviewed by Mr. Skipper showed for Intoxilyzer machine numbers 80-001257 and 80-000963 contained in that exhibit that the machines registered breath alcohol results of .232 and .090 respectively, despite the fact that the machines represented that a .000 or no breath sample volume had even been introduced into the machines. (Berne's Response

App. B, pgs. 9-11, App. I, pgs. 4, 10)[1] The aforesaid test results registered over the legal limit despite the fact the machine showed there was no breath in the machine to analyze. The testimony of Mr. Skipper, the admissions by the Florida Department of Law Enforcement and the documents introduced into evidence clearly established that the 8100.26 software in the Intoxilyzer 8000 did not operate properly, caused admitted scientifically unreliable results to improperly appear as valid scientific tests and did not comply with the FDLE rules. (Berne's Response App. B, pgs. 7-10, 12-14, 19, 21, App. I)

Petitioner also attempted to call as witnesses FDLE employees Laura Barfield and Tanya Shrum, pursuant to Subpoenas and Subpoena Duces Tecums that had been issued and lawfully served upon them. (Berne's Response App. B, pg. 22) Ms. Barfield was actually the author of both approval studies. (Berne's Response App. G, App. H) Ms. Barfield allegedly approved the Intoxilyzer 8000 based on the data generated during the failed testing conducted on May 29, 2002. (Berne's Response App. H) Both witnesses mysteriously failed to appear despite their subpoenas. (Berne's Response App. B, pgs. 22-25)

Petitioner also called as a witness at the hearings Michael Rodriguez, the breath test operator who administered the breath test to Petitioner. (Berne's Response App. A, pg. 5) Mr. Rodriguez also was unable to establish that the

[1] **Intoxilyzer 80-00963 was the actual machine upon which Petitioner was tested**.

machine upon which he administered a breath test to Petitioner had an electrical and computer component configuration that had ever been approved by the Florida Department of Law Enforcement pursuant to FDLE Rule 11D-8.003. (Berne's App. A, pg. 6)

At the hearing, Petitioner moved to set aside the suspension of his driver's license based on the failure of the State to establish that the breath testing device upon which Petitioner was tested had ever been properly approved pursuant to §316.1932, Fla. Stat. (2006) and FDLE Rule 11D-8.003. (Berne's Response App. C, pgs. 10-13, App. D, pgs. 22-25) He also moved to set aside the suspension due to the systemic malfunctions discovered with regard to the Intoxilyzer 8000 machines and its 8100.26 software. (Berne's Response App. C, pgs. 10-13) The hearing officer originally reserved ruling on the motions. (Berne's Response App. C, pg. 13) Following the hearing, the hearing officer entered a written Order denying the motions to set aside the suspension made by Respondent. (Berne's Response App. J)

Following the hearing officer's ruling, Petitioner then filed a Petition for Writ of Certiorari with the Circuit Court of the Ninth Judicial Circuit. On October 23, 2009, the Circuit Court for Orange County granted his Petition for Writ of Certiorari in Berne v. Department of Highway Safety and Motor Vehicles, 17 Fla. L. Weekly Supp. 75a (Fla. 9th Cir. Ct.) (Oct. 23, 2010) and quashed the decision of

the non-lawyer hearing officer finding the Intoxilyzer 8000 machine used to test Petitioner to be unapproved. (Berne's Response App. K)

In doing so, the Circuit Court stated in part:

> Under Florida's "**Implied Consent law**" only **approved** breath testing machines may be used to establish impairment and Florida Administrative Code Rule 11D-8.003 establishes the procedures for the **approval** of such machine. State v. Muldowney, 871 So.2d 911, 913 (Fla. 5th DCA 2004)

Id., (emphasis added)

The Circuit Court also held:

> Whether or not Petitioner's breath was tested on an **approved** device is at the heart of the instant case. Despite 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. **Competent substantial evidence** existed to demonstrate that these approval studies **did not** comply with the requirements of FDLE Rule 11D-8.003 and FDLE Form 34 as argued by Petitioner and noted by the en banc panel in the Atkins [State v. Atkins, 16 Fla. L. Weekly Supp. 251a, (Fla. Orange Cty. Ct. June 20, 2008)] case. Without independent scientific evidence demonstrating the reliability of the Intoxilyzer 8000 with software version 8100.26, the hearing officer should have excluded Petitioner's breath test results.

Id., (emphasis added)

The Circuit Court further held:

> Absent any controlling authority on this point from the Fifth District Court of Appeal, we find that the en banc decision in Atkins to be well reasoned and highly

> persuasive in this specific case, where **Petitioner rebutted the presumption** that the Department complied with the applicable rules and regulations, and the Respondent failed to adequately meet their burden of demonstrating substantial compliance. By failing to do so, this Court finds a reversible error and grants the Petition for Writ of Certiorari.

Id., (emphasis added)

Although not contained in the Opinion of the Fifth District Court of Appeal, the Circuit Court also held:

> The Court finds that the Petitioner met his initial 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 machine. At the hearing, both Roger Skipper and Kelly Melville testified that the machine used to test the Petitioner was an Intoxilyzer 8000 with software version 8100.26. Roger Skipper also testified that the last approvals for the Intoxilyzer 8000 took place on April 30, 2002, (with software 8100.09), and May 29, 2002, (with software 8100.10 (**sic**)). The reports entitled, "CMI, Inc. Intoxilyzer 8000 Instrumentation Evaluation Report," from those respective inspection dates further indicate that the approved software version was at least sixteen updates prior to the version used to test Petitioner. From these reports it clear that the **approval** of the Intoxilyzer 8000 in 2002, was far from a smooth process. As the en banc panel in State v. Atkins, et. al., 16 Fla. L. Weekly Supp. 251a (Fla. 9th Cir. Ct., June 20, 2008) noted in its "Order Granting Defendant's Request to Produce," the head of FDLE's Alcohol Testing Program, Laura Barfield, "testified there "were issues" during the first attempt to evaluate the instruments resulting in the suspension of testing," until they could be repaired and returned to FDLE. During the second round of testing on May 29,

> 2002, only one of the two instruments met all the requirements for the certification in FDLE's Form 34; the other test was cut short when it began to emit smoke.

Id., (emphasis added)

Dissatisfied with the Opinion of the three Circuit Court Judges in Berne, Id., Respondent filed a Petition for Writ of Certiorari with the Fifth District Court of Appeal. The Fifth District Court of Appeal accepted second-tier certiorari jurisdiction, issuing an original Opinion on October 8, 2010 and a corrected Opinion on November 30, 2010 in Department of Highway Safety and Motor Vehicles v. Berne, 49 So.3d 779 (Fla. 5th DCA 2010). (App. A) The Opinion quashed the Circuit Court's decision by interpreting FDLE Rule 11D-8.003 to require only an evaluation instead of an approval of the 8100.26 software in the Intoxilyzer 8000 machine. It also disregarded the Circuit Court's finding that the Intoxilyzer 8000 machine itself had never initially been properly approved as a result of the malfunctions and failures of the Intoxilyzer 8000 machine in the approval studies that were conducted on April 30, 2002 and May 29, 2002. In doing so, the Fifth District also ignored that its interpretation of FDLE Rule 11D-8.003 to require only an evaluation as opposed to an approval of 8100.26 software, rendered FDLE Rule 11D-8.003 to be an invalid exercise of delegative legislative authority pursuant to §120.52(8), Fla. Stat. (2004). The Fifth District Court of Appeal did not address the statutory requirements of §316.1932(1)(a)1.a., Fla. Stat.

(2004) and §316.1932(1)(a)2.g., Fla. Stat. (2004) which specifically restricted FDLE's authority and powers to approving or disapproving breath test machines and accompanying paraphernalia.

The Fifth District Court of Appeal found that Petitioner failed to meet his burden of overcoming the presumption of impairment and that the Circuit Court applied the wrong law in quashing the administrative Order affirming the suspension of Petitioner's license. The Fifth District Court of Appeal indicated a concern that the Circuit Court would continue to apply the wrong law in future cases and therefore granted certiorari jurisdiction.

Petitioner then filed a Motion for Rehearing, Rehearing En Banc and for Certification of Express Conflict. This motion was denied on November 30, 2010.

Petitioner, BERNE, then invoked this Court's discretionary jurisdiction. Petitioner alleged conflict between the Fifth District's decision in this case and decisions of this Court, and other district courts of appeal on the issues of second-tier certiorari jurisdiction, statutorily required approval of breath testing devices utilized for breath testing in the State of Florida, and the interpretation of FDLE Rule 11D-8.003 that rendered it to be an invalid exercise of delegated legislative authority under Chapter 120 of the Florida Administrative Procedure Act.

On June 30, 2011, this Court issued its Order accepting jurisdiction.

SUMMARY OF ARGUMENT

A. THE FIFTH DISTRICT DID NOT HAVE SECOND-TIER CERTIORARI JURISDICTION TO ENTER ITS DECISION IN THIS MATTER.

The Fifth District improperly exercised second-tier certiorari jurisdiction on the sole basis that it disagreed with the Circuit Appellate Court's interpretation of case law and §316.1932(1)(a)1.a. and (1)(a)2.g., Fla. Stat. (2004) and Fla. Admin. Code R. 11D-8.003 otherwise known as FDLE Rule 11D-8.003. The Fifth District Court of Appeal merely disagreed with the holding of the Circuit Court without supplying a proper sufficient legal basis for second-tier certiorari review in express and direct conflict with Custer Medical Center a/a/o Maximo Masis v. United States Automobile Insurance Company, __ So.3d __, 2010 WL 4340809 (Fla., Nov. 4, 2010), Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), Ivey v. Allstate Insurance Company, 774 So.2d 679 (Fla. 2000), Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885 (Fla. 2003) and Combs v. State, 436 So.2d 93 (Fla. 1983). Its decision also expressly and directly conflicts on the issue of second-tier certiorari jurisdiction with Department of Highway Safety and Motor Vehicles v. Edenfield, 58 So.3d 904 (Fla. 1st DCA 2011), Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007) and its own decisions in Department of Highway Safety and Motor Vehicles

v. Roberts, 938 So.2d 513 (Fla. 5th DCA 2006) and Dorian v. Davis, 874 So.2d 661 (Fla. 5th DCA 2008).

District Courts of Appeal are required to apply only a two prong test on second-tier certiorari review: (1) whether the Circuit Court applied the correct law and (2) whether the Circuit Court afforded procedural due process. See Miami-Dade County v. Omnipoint Holdings, Inc., 863 So.2d 195, 199 (Fla. 2003). Following these principles, a district court should grant second-tier certiorari relief "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice". Custer, __ So.3d __, 2010 WL 4340809 (Fla. 2010). When the established law provides no controlling precedent, however, certiorari relief cannot be granted because "[w]ithout such controlling precedent, [a district court] cannot conclude that [a circuit court] violated a clearly established principle of law. Ivey, 774 So.2d at 682. (internal quotations omitted). A District Court cannot create a newly established principle of law in order to quash a Circuit Court's decision on that basis. District Courts have never been allowed to review decisions, under the guise of certiorari jurisdiction simply because they are dissatisfied with the results of a decision of a circuit court sitting in its appellate capacity. Ivey, 774 So.2d at 683.

The decision of the Fifth District Court amounted to improperly allowing Respondent in this case to have a second appeal that usurped the final appellate

jurisdiction of the Circuit Court in contravention of the Florida Constitution. See Custer Medical Center a/a/o Maximo Masis v. United States Automobile Insurance Company, __ So.3d __ 2010 WL 4340809 (Fla. Nov. 4, 2010) citing Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995). Any legal error by the Circuit Court, if any, did not violate the essential requirements of the law and could not be the subject of second-tier certiorari review. See Housing Authority of City of Tampa v. Burton, 874 So.2d 6, 9 (Fla. 2d DCA 2004) ("unlike application of incorrect law, the misapplication of correct law by Circuit Court sitting in its appellate capacity generally does not constitute a violation of clearly established law resulting in a miscarriage of justice").

B. THE FIFTH DISTRICT DECISION EXPRESSLY CONFLICTED WITH OTHER DISTRICT COURT OF APPEAL CASES AND IMPROPERLY RESTRICTED AND NARROWED THE BREADTH AND SCOPE OF THE CIRCUIT COURT OPINION THAT THE INTOXILYZER 8000 MACHINE ITSELF AND WITH 8100.26 SOFTWARE WAS UNAPPROVED BASED ON THE FAILURE OF THE MACHINE TO COMPLY WITH §316.1932, FLA. STAT. (2010) AND FDLE RULE 11D-8.003.

The Fifth District Court of Appeal's Opinion overlooked that the analysis used by the Circuit Court below relied upon established law and was identical to the analysis employed by the Third District Court of Appeal in Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007). Florida's Implied Consent law under §316.1932, Fla. Stat. (2006) imposes a primary statutory requirement that the Intoxilyzer 8000 be approved if it is to be

used as a breath testing device in the State of Florida. The Fifth District's decision places the requirement of approval in §316.1932, Fla. Stat. (2006) in direct conflict with its interpretation of FDLE Rule 11D-8.003 to require only evaluation. The Fifth District Court of Appeal overlooked that in the event of a conflict between a statute and an administrative regulation on the same subject the statute governs Florida Department of Revenue v. A. Duda & Sons, 608 So.2d 881 (Fla. 5th DCA 1992).

The Circuit Court below, consistent with its obligations on certiorari review, properly decided in part that there was not competent substantial evidence in the record to find that the Intoxilyzer 8000 was approved with 8100.26 software given all the evidence in the record and despite the very limited evidence presented by Respondent. The Fifth District Court of Appeal violated even its own precedence in Dorian v. Davis, 874 So.2d 661, 663-664 (Fla. 5th DCA 2004) when it improperly reweighed whether substantial competent evidence existed to support the Circuit Court's decision. By not leaving that issue to be decided by the Circuit Court, the Fifth District Court of Appeal improperly placed itself in express and direct conflict with the First District Court of Appeal in State v. Polak, 598 So.2d 150 (Fla. 1st DCA 1992) which has found that the breath testing machine as a whole and not just its component parts must be reapproved and not merely evaluated when it is modified.

The specific powers and duties granted by the enabling statute for FDLE in §316.1932(1)(a)2.g., Fla. Stat. (2004) specifically restricts the Florida Department of Law Enforcement's authority and powers by providing that the Florida Department of Law Enforcement shall only have authority to "**approve or disapprove**" breath test instruments and "**accompanying paraphernalia**" for use pursuant to the driving and boating under the influence provisions. The Fifth District Court of Appeal's interpretation of FDLE Rule 11D-8.003(2) (2004) to allow only for the "evaluation" of software as opposed to the "approval" of software rendered it to be an illegal invalid exercise of delegated legislative authority pursuant to §120.52(8), Fla. Stat. (2004). The Fifth District Court of Appeal's Opinion expressly conflicts with Gaudette v. Florida Board of Professional Engineers, 900 So.2d 574, 578, 581 (Fla. 4th DCA 2004) and Smith v. Florida Department of Corrections, 920 So.2d 638 (Fla. 1st DCA 2005) with regard to rules that are enacted by administrative agencies without proper enabling statutory authority.

ARGUMENT

THE RULING OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE STANDARD OF REVIEW FOR SECOND-TIER CERTIORARI REVIEW AND AS A RESULT DIRECTLY AND EXPRESSLY CONFLICTS WITH MULTIPLE DECISIONS INVOLVING VARIOUS AREAS OF FLORIDA LAW.

A. THE FIFTH DISTRICT DID NOT HAVE SECOND-TIER CERTIORARI JURISDICTION TO ENTER ITS DECISION IN THIS MATTER.

In essence the Fifth District Court of Appeal merely disagreed with the holding of the Circuit Court without supplying a proper sufficient legal basis for second-tier certiorari review in express and direct conflict with Custer Medical Center a/a/o Maximo Masis v. United Automobile Insurance Company, __ So.3d __, 2010 WL 4340809 (Fla., Nov. 4, 2010), Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), Ivey v. Allstate Insurance Company, 774 So.2d 679 (Fla. 2000), Allstate Insurance Company v. Kaklamanos, 843 So.2d 885 (Fla. 2003), Combs v. State, 436 So.2d 93 (Fla. 1983), Department of Highway Safety and Motor Vehicles v. Edenfield, 58 So.3d 904 (Fla. 1st DCA 2011) and Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007).

Unlike an appeal, common law certiorari is an entirely discretionary exercise of jurisdiction by the Court and is not taken as a matter of right. See G-W Dev. Corp. v. Village of North Palm Beach Zoning Bd. of Adjustment, 317 So.2d 828, 830 (Fla. 4th DCA 1975). A common law certiorari proceeding is considered original in the sense that the subject matter of the action or proceeding before the Court is not to be reinvestigated, tried and determined upon the merits generally as upon appeal at law or writ of error. See Haines City Community Development v.

Heggs, 658 So.2d at 525-26 (quoting Basnet v. City of Jacksonville, 18 Fla. 523, 527 (1882)). A Circuit Court Appellate decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to the facts, is not a departure from the essential requirements of law remediable by certiorari. Ivey v. Allstate Insurance Company, 774 So.2d at 682, Department of Highway Safety and Motor Vehicles v. Edenfield, 58 So.3d 904, 906 (Fla. 1st DCA 2011) ("unlike application of incorrect law, misapplication of correct law by a Circuit Court sitting in its appellate capacity generally does not constitute a violation of clearly established law resulting in a miscarriage of justice"). See also Housing Authority of City of Tampa v. Burton, 874 So.2d 6, 9 (Fla. 2d DCA 2004).

The policy behind prohibiting certiorari to function as a second appeal is that the Circuit Court possesses final appellate jurisdiction in cases originating in administrative proceedings. See Custer Medical Center a/a/o Maximo Masis v. United States Insurance Company, __ So.3d __ 2010 WL 4340809 (Fla. Nov. 4, 2010). As this Court noted in Custer Medical Center, Id. citing Haines,:

> ...if the role of certiorari were expanded to review the correctness of the Circuit Court's decision, it would amount to a second appeal that usurps the final appellate jurisdiction of the Circuit Court in contravention of the Florida Constitution. See Id. at 526 n. 4. This would deprive litigants of the final judgments obtained in the Circuit Court and ignore "societal interests in ending litigation within a reasonable length of time and

> eliminating the amount of judicial labors involved in multiple appeals".

Id.

By improperly expanding its scope of review, the Fifth District Court of Appeal below:

> created a new category of appellate review never before recognized under Florida law and in express and direct conflict with authority to the contrary. District Courts have never been allowed to review decisions, under the guise of certiorari jurisdiction, simply because they are dissatisfied with the result of a decision of the Circuit Court sitting in its appellate capacity. Certiorari relief should not be afforded so differently in our various appellate courts.

Ivey, 774 So.2d at 683.

District Courts should consider the nature of the error and grant a Petition for Writ of Certiorari "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice". Combs, 436 So.2d at 96 (emphasis supplied). A misapplication or an erroneous interpretation of correct law does not rise to the level of a violation of a clearly established principle of law. Department of Highway Safety and Motor Vehicles v. Edenfield, 36 Fla. L. Weekly 523a (Fla. 1st DCA March 10, 2011). This Court has definitively stated that certiorari cannot be used to grant a second appeal to correct the existence of mere legal error. See e.g., Ivey, 774 So.2d at 682-83.

Any legal error by the Circuit Court, if any, did not violate the essential requirements of law and could not be the subject of second-tier certiorari review. In Ivey v. Allstate Insurance Company, 774 So.2d 679, 683 (Fla. 2000) this Court noted that at the time of the decision of the Circuit Court there were no Florida cases squarely discussing the issue involved. Without such controlling precedent this Court found that a District Court could not conclude that a Circuit Court violated a "clearly established principle of law". This Court in Ivey went on to note:

> In this case, it is clear that the Third District merely disagreed with the Circuit Court's interpretation of the applicable law, which as explained in Heggs, was an improper basis for common law certiorari…The Third District's decision did not even purport to consider why the Circuit Court's decision constituted a denial of procedural due process, application of incorrect law, or a miscarriage of justice as required by this Court's precedence. Rather, the District Court below expressly created a new category of appellate review never before recognized under Florida law and in express and direct conflict with authority to the contrary...

Id. at 683

The decision of the Fifth District Court of Appeal misapprehended and overlooked that Respondent in this case was improperly asking the Fifth District Court of Appeal to consider in the form of a second appeal the issue as to whether the breath testing device upon which Petitioner was tested was properly approved. The result is an express conflict with the opinions of this Court as to the proper

standard of review for second-tier certiorari review of Circuit Court Decisions rendered in their appellate capacity. The Fifth District improperly created a newly established principle of law in order to quash the Circuit Court's decision on the approval of the Intoxilyzer 8000 that was based on established law at the time.

In quashing the decision of the Circuit Court below, the Fifth District Court of Appeal usurped the appellate authority of the Circuit Court. It ignored the underpinning of the Circuit Court ruling, that Florida's Implied Consent law under §316.1932, Fla. Stat. (2006) imposed a primary statutory requirement that the Intoxilyzer 8000 machine itself be approved by FDLE if it is to be used as an "approved" breath testing device. The Circuit Court held in, Berne v. Department of Highway Safety and Motor Vehicles, 17 Fla. L. Weekly Supp. 75a (Fla. 9th Cir. Ct.)(Oct. 23, 2010) that:

> Under Florida's "Implied Consent law" only **approved** breath testing machines may be used to establish impairment and Florida Administrative Code Rule 11D-8.003 establishes the procedures for approval of such machines. State v. Muldowney, 871 So.2d 911, 913 (Fla. 5th DCA 2004).

Id., (emphasis added)

The Circuit Court, consistent with its required role for certiorari review, ruled on established law and decided there was competent substantial evidence in the record to find that the Intoxilyzer 8000 machine itself and with 8100.26 software was not approved. In this regard the Circuit Court held:

> Whether or not the Petitioner's breath was tested on an **approved** device is at the heart of the instant case. Despite 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 2002. **Competent substantial evidence existed** to demonstrate that these approval studies **did not** comply with the requirements of FDLE Rule 11D-8.003 and FDLE 34 as argued by Petitioner and noted by the en banc panel in the Atkins [State v. Atkins, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 30, 2008] case. Without independent scientific evidence demonstrating the reliability of the Intoxilyzer 8000 with software version 8100.26, the hearing officer should have excluded Petitioner's breath test results.

Id., (emphasis added)

The Circuit Court further held:

> Absent any controlling authority on this point from the Fifth District of Appeal, we find that the en banc decision in Atkins to be well reasoned and highly persuasive in this specific case where **Petitioner rebutted the presumption** that the Department complied with the applicable rules and regulations, and the Respondent failed to adequately meet their burden of demonstrating substantial compliance. By failing to do so, this Court finds a reversible error and grants the Petition for Writ of Certiorari.

Id., (emphasis added)

Although not contained in the Opinion of the Fifth District Court of Appeal, the Circuit Court also held:

> The Court finds that the Petitioner met his initial 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. At the hearing both Roger Skipper and Kelly Melville testified that the machine used to test the Petitioner was an Intoxilyzer 8000 with software version 8100.26. Roger Skipper also testified that the last approval studies for the Intoxilyzer 8000 took place on April 30, 2002, (with software 8100.09) and May 29, 2002 (with software 8100.10 (sic)). The reports entitled, "CMI, Inc. Intoxilyzer 8000 Instrumentation Evaluation Report," from those respective inspection dates further indicate that the approved software version was at least sixteen updates prior to the version used to test the Petitioner. From these reports it is clear that the **approval** of the Intoxilyzer 8000 in 2002 was far from a smooth process. As the en banc panel in State v. Atkins, et al., 16 Fla. L. Weekly Supp. 251a (Fla. 9th Cir. Ct. June 2008) noted in its Order Granting Defendants' Request to Produce" the head of FDLE's Alcohol Testing Program, Laura Barfield, "testified there "were issues" during the first attempt to evaluate the instruments resulting in the suspension of testing" until they could be repaired and returned to FDLE. During the second round of testing on May 29, 2002, only one of the two instruments met all of the requirements for certification in FDLE's Form 34; the other test was cut short when it began to emit smoke.

Id., (emphasis added)

The Circuit Court found that despite 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. The Circuit Court held that competent substantial evidence existed to demonstrate that the approval studies did not comply with the approval requirements of FDLE Rule 11D-8.003 and FDLE Form 34 as argued by Petitioner and noted by an en banc

County Court panel decision in State v. Atkins, 16 Fla. L. Weekly Supp. 251a (Fla. Cty. Ct. June 20, 2008).

The Fifth District Court of Appeal ignored, that the Circuit Court held, that Petitioner had met his initial 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 machine. The Fifth District Court of Appeal ignored that the Circuit Court noted that Roger Skipper testified that the last approval studies for the Intoxilyzer 8000 took place on April 30, 2002 (with software 8100.09) and May 29, 2002 (with software 8100.10). The Fifth District ignored that the Circuit Court found that the Intoxilyzer 8000 machine itself could not pass the testing to the point where the FDLE approval testing had to be suspended and the tests had to be cut short because the tested machines malfunctioned including emitting smoke.

In also ignoring the underpinning of the Circuit Court's ruling that the Intoxilyzer 8000 itself with 8100.09 and 8100.10 software had not been initially properly approved by FDLE, the Fifth District Court of Appeal also disregarded its own decision in Dorian v. Davis, 874 So.2d 661, 663-664 (Fla. 5th DCA 2004). Dorian held that in second-tier certiorari review the District Appellate Court is "out of the business of determining whether or not competent substantial evidence

exists to support an administrative decision". The Fifth District Court of Appeal improperly reweighed whether there existed competent substantial evidence.

The Fifth District's reweighing that the documents submitted into the record by Respondent were sufficient to meet its burden despite what the Circuit Court found was Petitioner's substantial and competent evidence to the contrary was not only improper but also expressly and directly conflicted with Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007), (Circuit Court applied correct law where driver submitted proof Intoxilyzer machine was not in compliance with the FDLE rules). The rationale of Wejebe was part of the established law that existed when the Circuit Court in this case ruled that Petitioner introduced substantial competent evidence that the machine did not comply with §316.1932, Fla. Stat. (2006) and FDLE Rule 11D-8003.

The Fifth District in its decision stated that the Agency Inspection Report, Department Inspection and Breath Test Affidavit were competent substantial evidence to support that the Intoxilyzer 8000 was properly inspected and maintained, that it performed appropriately and that it provided accurate and reliable results. The Fifth District overlooked or misapprehended factually that the Agency Inspection Report under FDLE Rule 11D-8.006 neither mentions or even relates to the approval of the Intoxilyzer 8000 under §316.1932, Fla. Stat. (2006). The Fifth District Court of Appeal also overlooked or misapprehended that the

Department Inspection Report under FDLE Rule 11D-8.004 also does not even mention or even relate to the approval of the Intoxilyzer 8000 under §316.1932, Fla. Stat. (2006). Finally the Fifth District Court of Appeal also failed to realize that the Breath Test Affidavit also does not even mention or even relate to the approval of the Intoxilyzer 8000 machine under §316.1932, Fla. Stat. (2006).

The Breath Test Affidavit shows its sole and only purpose is to create a rebuttable presumption that the test was "**administered**" in accordance with Chapter 11D-8, Florida Administrative Code. In no way does it show or even mention that the Intoxilyzer 8000 machine was "**approved**" as required by §316.1932, Fla. Stat. (2006). The approval as opposed to the administration of the Intoxilyzer 8000 machine under §316.1932, Fla. Stat. (2006) is a wholly separate requirement and issue that must be determined separate and apart from the Breath Test Result Affidavit, Agency Inspection Report and Department Inspection Report. The approval of the Intoxilyzer 8000 under §316.1932, Fla. Stat. (2006) has nothing to do with whether the test was "administered" in accordance with FDLE Rule 11D-8.004 or FDLE Rule 11D-8.006.

Even the language of §316.1934(5), Fla. Stat. (2006) recognized this distinction when it stated the test must be "authorized by S. 316.1932 or S. 316.1933". "Authorized" when applied to the express language of §316.1932, Fla. Stat. (2006) means approved. Drivers are required to take only "approved" breath

tests under §316.1932, Fla. Stat. (2006). Nothing in the Breath Test Result Affidavit stated that the test was authorized by §316.1932 or §316.1933, Fla. Stat. (2006). Therefore the granting of second-tier certiorari review by the Fifth District was completely improper in light of the rulings of this Court and other District Courts of Appeal, including its own decisions. See Department of Highway Safety and Motor Vehicles v. Roberts, 938 So.2d 513 (Fla. 5th DCA 2006).

B. THE FIFTH DISTRICT DECISION EXPRESSLY CONFLICTED WITH OTHER DISTRICT COURT OF APPEAL CASES AND IMPROPERLY RESTRICTED AND NARROWED THE BREADTH AND SCOPE OF THE CIRCUIT COURT OPINION THAT THE INTOXILYZER 8000 MACHINE ITSELF AND WITH 8100.26 SOFTWARE WAS UNAPPROVED BASED ON THE FAILURE OF THE MACHINE TO COMPLY WITH FLORIDA STATUTE 316.1932 AND FDLE RULE 11D-8.003.

The decision of the Circuit Court was based on established statututory law and case law. §316.1932(1)(a)1.a., Fla. Stat. (2006) provides that a person who accepts the privilege extended by this State of operating a motor vehicle within this State by so operating the vehicle gives his consent to submit to an "**approved**" chemical test or physical test of his breath. §316.1932(1)(f)1., Fla. Stat. (2006) requires FDLE to not only approve a method of administration, but in addition to "specify precisely" the test or tests that are "**approved**" by the Department of Law Enforcement for reliability of result and ease of administration. Reading both the aforesaid statutory sections in paramateria with one another, it is clear that FDLE must specify precisely the breath testing machine that has been "**approved**" for use

in the State of Florida. It is not enough for FDLE to just approve a methodology, it must specify precisely the breath testing machine configuration that can be said to be the approved breath testing machine for use in the State of Florida. See State v. Polak, 598 So.2d 150 (Fla. 1st DCA 1992).

In State v. Polak, 598 So.2d 150 (Fla. 1st DCA 1992) the First District Court of Appeal found that a modification made to a component part of the breath test machine required a new approval. In doing so, the First District Court of Appeal noted that the bypass of the Taguchi sensor cell on an Intoximeter breath machine constituted such modification of the breath test instrument so as to require recertification or reapproval by the Department of Health and Rehabilitative Services at that time in order for the instrument to be an approved instrument under the Implied Consent statute. In State v. Muldowney, 871 So.2d 911 (Fla. 5th DCA 2004) even the Fifth District Court of Appeal acknowledged the importance of having an approved breath testing device pursuant to statutory procedure and that an individual's privileges and freedom should not be jeopardized by the results of a "mystical machine". Id. at 913. By improvidently granting second-tier certiorari review, the Fifth District's interpretation of FDLE Rule 11D-8.003 to allow evaluation of software was in express and direct conflict with the aforesaid decisions on the issue of approval which were in effect when the Circuit Court made its decision on the approval of the Intoxilyzer 8000.

The Second District Court of Appeal in Yankey v. Department of Highway Safety and Motor Vehicles, 6 So.3d 633, 637 (Fla. 2d DCA 2009) when evaluating the relationship between §322.2615, Fla. Stat. (2009) and §316.1932, Fla. Stat. (2009) unequivocally stated:

> Construing these provisions together, under Sections 316.1932(1)(a)2 and (b)(2) the breath test result is valid for purposes of Chapter 322, and **specifically Section 322.2615**, if performed substantially according to methods **approved** by the Department.

Id., (emphasis added)

From the foregoing it can only be concluded that in order for a breath test result to be valid for purposes of §322.2615, Fla. Stat. (2006) it is required that the breath testing device be of an electrical and computer component configuration that has been "approved" by the Florida Department of Law Enforcement in compliance with §316.1932, Fla. Stat. (2006) and FDLE Rule 11D-8.003. The fundamental underpinning of the Circuit Court Opinion was that the whole Intoxilyzer 8000 machine itself was not approved pursuant to §316.1932, Fla. Stat. (2006) and that the non approval of 8100.26 software was only one aspect of the reason why the Intoxilyzer 8000 machine as a whole was not approved under Florida's Implied Consent law.

§120.52(8), Fla. Stat. (2004) in defining an invalid exercise of delegated legislative authority, provides in part:

> …An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation….Statutory language granting rule making authority or generally describing the powers and functions of an agency shall be construed to extend **no further** then implementing or interpreting the specific powers and duties conferred by the same statute.

(emphasis added)

The specific powers and duties granted by the enabling statute for FDLE was §316.1932(1)(a)2.g., Fla. Stat. (2004). The enabling statute for FDLE specifically restricted the Florida Department of Law Enforcement's authority and powers by providing that the Florida Department of Law Enforcement shall only:

> Have authority to **approve or disapprove** breath test instruments and **accompanying paraphernalia** for use pursuant to the driving and boating under the influence provisions and related provisions located in this Chapter and Chapter 322 and 327.

(emphasis added)

The prior 2001 and 2002 versions of FDLE Rule 11D-8.003 required pursuant to and in compliance with the aforesaid enabling statute, that FDLE specifically "approve" the Intoxilyzer 8000 machine and software utilized by it. The Fifth District Court of Appeal improperly interpreted the later 2004 version of FDLE Rule 11D-8.003 to allow FDLE to only evaluate as opposed to approve the software utilized in the Intoxilyzer 8000.

Nowhere in §316.1932(1)(a)1.a., Fla. Stat. (2004) did the express language allow or authorize FDLE to require a driver to submit to a breath test machine that has only been evaluated with its software as opposed to having been approved with its software. The Fifth District Court of Appeal's interpretation of FDLE Rule 11D-8.003 to require only an evaluation of software and not approval of software would be in direct derogation of §316.1932(1)(a)2.g., Fla. Stat. (2004) which expressly restricted FDLE's authority to only "approve or disapprove" breath test instruments and "accompanying paraphernalia". If not actually part of the Intoxilyzer 8000 machine the 8100.26 software is surely "accompanying paraphernalia" that goes along with it.

The Fifth District Court of Appeal's holding that FDLE Rule 11D-8.003(2) allows only for the "evaluation" of software as opposed to the "approval" of software is gravely misplaced. This argument and interpretation allowing only for evaluation and not approval constitutes an illegal invalid exercise of delegated legislative authority pursuant to §120.52(8), Fla. Stat. (2004). FDLE has and had no specific statutory authority to enact a regulation or rule that does anything less than "approve" or "disapprove" breath test instruments and "accompanying paraphernalia" as set forth in §316.1932(1)(a)2.g., Fla. Stat. (2004). Since FDLE has and had no statutory authority under §316.1932(1)(a)2.g., Fla. Stat. (2004) to pass rules whereby they only evaluated software and breath test machines instead

of approving or disapproving software and breath test instruments, any such rule would constitute an invalid exercise of delegated legislative authority and be in express and direct conflict with Gaudette v. Florida Board of Professional Engineers, 900 So.2d 574, 578, 581 (Fla. 4th DCA 2004) and Smith v. Florida Department of Corrections, 920 So.2d 638 (Fla. 1st DCA 2005) with regard to rules that were enacted by administrative agencies without proper enabling statutory authority.

In Gaudette v. Florida Board of Professional Engineers, 500 So.2d 574 (Fla. 4th DCA 2004), the Fourth District Court of Appeal found that the creation of a requirement by the Board of Professional Engineers, allowing only graduates of certain accredited schools to become engineers, exceeded the legislature's statutory delegation of authority. As such the Court found the requirement to be an invalid exercise of delegated legislative authority. Id. at 581. In doing the Fourth District Court noted:

> Although courts should give great weight to an agency's construction of a statute that it is charged with enforcing and interpreting, Section 120.68(7)(d) provides in material part that the court may "set aside agency action" when it finds that the agency has "erroneously interpreted a provision of the law and [that] a correct interpretation compels a particular action. (citations omitted)

Id. at 576-577

In Smith v. Florida Department of Corrections, 920 So.2d 638 (Fla. 1st DCA 2005) the Court found that an administrative rule allowing the Department of Corrections (DOC) to charge inmates for photographic copying services was an invalid exercise of delegated legislative authority. The Court specifically found that the administrative rule which allowed the DOC to charge for photographic copying services was not supported by a specific grant of legislative authority thereby rendering it to be invalid. Id. at 641-643

The mere evaluation as opposed to the "approval" of the Intoxilyzer 8000 with 8100.26 software pursuant to the 2004 version of FDLE Rule 11D-8.003 would likewise make the rule contradictory and inconsistent with Fla. Admin. Code R. 11D-8.002(12). FDLE Rule 11D-8.002(12) defines an "approved breath alcohol test" as a minimum of two samples of breath collected within fifteen (15) minutes of each other, analyzed using an "**approved**" breath test instrument. FDLE Rule 11D-8.002(12) expressly provides that an "approved breath alcohol test" is required to take place on a "approved" breath test instrument and not merely an evaluated breath test instrument or a breath test instrument using only evaluated as opposed to approved software.

The Fifth District's interpretation of FDLE Rule 11D-8.003(2) (2004) to only require evaluation of software was also inconsistent and contradictory to Fla. Admin. Code R. 11D-8.002(21). FDLE Rule 11D-8.002(21) defines an

"evidentiary breath test instrument" as a breath test instrument "**approved**" by the Department under Rule 11D-8.003 F.A.C. Therefore in order to be used as an "evidentiary breath test instrument" under the FDLE Rules, the Intoxilyzer 8000 with 8100.26 software in it must be "**approved**". The aforesaid rule does not include by its express language an Intoxilyzer 8000 machine with 8100.26 software that has merely been evaluated by FDLE.

The Fifth District Court of Appeal ignored the underpinning of the Circuit Court ruling that Florida's Implied Consent law under §316.1932, Fla. Stat. (2004) imposed a primary **statutory** requirement that the Intoxilyzer 8000 machine itself be approved by FDLE if it is to be used as an "approved" breath testing device. If FDLE 11D-8.003 was construed to require only an evaluation as opposed to approval it would be in conflict with §316.1932, Fla. Stat. (2004) requiring an approved breath test. In the event of a conflict between a statute and an administrative regulation on the same subject, the statute governs. Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So.2d 881 (Fla. 5th DCA 1992). The approval requirements of §316.1932, Fla. Stat. (2004) take precedence over any interpretation of FDLE Rule 11D-8.003 allowing only for evaluation.

The Circuit Court, consistent with its required role for certiorari review, decided there was competent substantial evidence in the record to find that the Intoxilyzer 8000 machine itself with 8100.26 software was not approved as

required by statute. The record evidence before the Circuit Court specifically established that an Intoxilyzer 8000 machine containing the 8100.26 software has never previously been subjected to an approval study or approved by the Florida Department of Law Enforcement pursuant to §316.1932, Fla. Stat. (2004), FDLE Rule 11D-8.003 or instrument evaluation procedures FDLE/ATP Form 34, revised March 2004, incorporated by reference in FDLE Rule 11D-8.003. The aforesaid electrical and computer component configuration of the Intoxilyzer 8000 machine upon which Petitioner was tested has also never been included in FDLE Rule 11D-8.003 and promulgated pursuant to Chapter 120, Florida Statutes otherwise known as the Florida Administrative Procedure Act. Unpromulgated rules cannot be used to establish compliance with the statutory requirements of §316.1932(1)(f)1, Fla. Stat. (2006). See State v. Reisner, 584 So.2d 141, 144 (Fla. 5th DCA 1991), rev. denied 591 So.2d 184 (Fla. 1991).

The Fifth District Court of Appeal's decision also ignores the plain fact that the 8100.26 software was not even in existence until approximately four years after the Intoxilyzer 8000 machine initially appeared on November 5, 2002, in FDLE Rule 11D-8.003(2). FDLE Inspector Roger Skipper admitted that prior to the effective date of FDLE Rule 11D-8.003 on November 5, 2002, there had been only two approval studies performed by FDLE on the Intoxilyzer 8000, i.e. April 30,

2002 and May 29, 2002. Neither approval study involved 8100.26 software. Instead they involved 8100.09 and 8100.10 software.

The Fifth District Court of Appeal also misapprehended or overlooked that in relying on Mr. Skipper's testimony in the hearing below, he never actually stated what type of evaluation the 8100.26 software had undergone. The Fifth District Court of Appeal overlooked that Mr. Skipper stated in the hearing that when FDLE did evaluate it, it worked only one time. There were many other times it was not performing as required and that FDLE was still in the process of investigating why the 8100.26 software did not work. The Fifth District Court of Appeal overlooked the following questions and answers by Mr. Skipper at the Formal Review hearing below:

> Question: I understand. But when you did evaluate it, it just worked that one time, but, obviously there was other times that it is not doing what it's supposed to do.
>
> Skipper: **Right**. That's why we're in the process of investigating why it did this.
>
> Question: Right. Despite your evaluations, there has been we'll call them computer glitches maybe at this point. You know what they are, but the machine was not working the way it was supposed to work.
>
> Skipper: **Right**. Nothing is perfect, so we don't expect anything to work perfectly all the time.

(Berne's Response pg. 13) (emphasis added)

The Fifth District Court of Appeal overlooked that the Circuit Court's decision on approval below was also more expanded than the limited aspect of whether the 8100.26 software was approved. The Fifth District based its decision on the limited issue as to whether the 8100.26 software has been evaluated as opposed to approved and not on whether the Intoxilyzer 8000 machine as a whole with or without 8100.26 software was actually approved in compliance with FDLE Rule 11D-8.003 during the course of the April 30, 2002 and May 29, 2002 approval studies. The Circuit Court's decision certainly went beyond just the evaluation of the software and actually found that the approval process from the April 30, 2002 and May 29, 2002 approval studies was inadequate to establish that the Intoxilyzer 8000 machine had even initially been properly approved. The Circuit Court was correct and had the authority to find that once Petitioner had submitted competent substantial evidence that the Intoxilyzer machine was not in compliance with the approval requirements of the statute and the rule, Respondent was then required to prove that there was substantial compliance. See Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007).

In the instant case, the Circuit Court, as did the Circuit Court in Wejebe, found that the Department did not meet its burden below to show compliance with the statutes and the FDLE rules. Had the 8100.26 software been put through a

prior approval process including rule promulgation under the Administrative Procedure Act in Chapter 120, Florida Statutes as required, the public would have had input and access to supplement FDLE's questionable handling of the approval of the Intoxilyzer 8000 machine. The public, however, was never given this opportunity because FDLE chose to use the 8100.26 software without promulgating its approval as required through the Administrative Procedure Act and testing it pursuant to FDLE Rule 11D-8.003 through an approval study. See State v. Reisner, 584 So.2d 141, 144 (Fla. 5th DCA 1991), rev. denied 591 So.2d 184 (Fla. 1991).

How the Intoxilyzer 8000 machine can be approved for use in the State of Florida even though it does not work properly or accurately is even more "mystical" than the "mystical" electrical and computer components contained within the machine. It defies intellectual honesty and would seem disingenuous for the State of Florida to claim that the Intoxilyzer 8000 machine was an approved breath testing machine that works accurately when its own records and admissions show that the machine is only sporadically accurate and many times misrepresents readings that are scientifically invalid as being scientifically valid when real human subjects like Petitioner are tested. Even more astounding is the fact that the Intoxilyzer 8000 machine as shown by the documents admitted at the Formal Review Hearing is printing breath test results of 0.90 and .232 which are over the

legal limit and in one case almost three times the legal limit, despite the fact that the breath sample volume stated by the machine was 0.000. A 0.000 breath volume shows that there is no breath in the machine for the machine to even conduct an analysis on.

The Fifth District also improperly disregarded FDLE Rule 11D-8.003(5) in its approval versus evaluation analysis. FDLE Rule 11D-8.003(5) provides:

> [FDLE] shall conduct evaluations for **approval** of **new** instrumentation under subsection (2) in accordance with instrumentation evaluation procedures FDLE/ATP Form 34, revised March 2004.

(emphasis added)

Since the Intoxilyzer 8000 machine with 8100.26 software was "new instrumentation", FDLE pursuant to the aforesaid rule was required to conduct evaluations for "approval" of the "new" instrumentation and not just mere evaluations without approval.

The Circuit Court's decision that the Intoxilyzer 8000 was not approved was based on established case law and statutory law on the issue. The Fifth District's exercise of second-tier certiorari review improperly reweighed the evidence in violation of the constraints of second-tier certiorari review. It improperly changed established law and improperly created new law. As a result it has now created express and direct conflict with various decisions of this Court and other District

Courts of Appeal on second-tier certiorari review of Circuit Court decisions by District Courts of Appeal.

CONCLUSION

Petitioner respectfully requests that the Court quash the Fifth District's decision in this case on the basis that (1) no second-tier certiorari jurisdiction existed below; (2) §316.1932, Fla. Stat. (2006) and FDLE Rule 11D-8.003 required that a breath test instrument and any software associated with it be approved and not merely evaluated before it could be used to conduct breath testing in the State of Florida and (3) that an interpretation of FDLE Rule 11D-8.003 to allow only evaluation as opposed to approval of breath testing devices constituted an invalid exercise of delegated legislative authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Heather Cramer, Assistant General Counsel, Post Office Box 540609, Lake Worth, Florida 33454-0609 by mail this _____ day _____2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this foregoing brief complies with the font standards required by Fla. R. App. Pr. 9.210(a).

_____
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