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IN THE SUPREME COURT OF FLORIDA

NILS FUTCH,

Petitioner,

vs.

SUPREME COURT CASE NO: SC14-1660
LOWER CASE No: 5D13 - 3457

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

Respondent.
_____/

JURISDICTIONAL BRIEF
ON BEHALF OF THE PETITIONER

DAMORE, DELGADO, ROMANIK
& RAWLINS

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STATEMENT OF THE CASE AND FACTS

The Petitioner, NILS FUTCH, (hereafter "Futch") filed a Petition for Certiorari in the circuit court from an order of the Department sustaining a twelve (12) month revocation of his commercial driver's license effective March 14, 2013. On or about September 3, 2013, the circuit court granted Futch's Petition, quashed the order of the Department and directed the Department to reinstate Futch's driver's license provided no independent grounds to continue the suspension existed. The circuit court order is published as *Futch v. State, Department of Highway Safety and Motor Vehicles,* 21 Fla. L. Weekly Sup. 16b (Fla. 7th Cir. Ct. 2013). The circuit court opinion found "there was no question that Futch had not been accorded procedural due process and the decision of the Hearing Officer cannot stand". The Fifth District "found no error" in this portion of the ruling. The circuit court order discussed the appropriate remedy for the substantial due process violation and noted that the twelve (12) month suspension of Futch's commercial drivers license had commenced on March 14, 2013, and that he had been unable to drive a commercial motor vehicle since that date. The circuit court cited to Article V, Section 5(b) of the Florida Constitution and the decision in *Department of Highway Safety and Motor Vehicles v. Stewart,* 625 So.2d 123 (Fla. 5th DCA 1993) finding that review under the implied consent procedure must be prompt, fair and meaningful enough to meet due process requirements and also the concurring opinion in *Conahan v. Department*

of Highway Safety and Motor Vehicles, 619 So.2d 988 (Fla. 5th DCA 1993) stating that:

> "If it can be shown that citizens of Florida are not being afforded a prompt, fair, meaningful hearing by this statutory procedure, the procedure should be invalidated on due process grounds."

In determining the appropriate remedy for the due process violation the circuit court also cited *Dep't of Highway Safety & Motor Vehicles v. Icaza,* 37 So.3d 309 (Fla. 5th DCA 2010); *Lillyman v. Dep't of Highway Safety & Motor Vehicles,* 645 So.2d 113, 114 (Fla. 5th DCA 1994), *Dep't of Highway Safety & Motor Vehicles v. Chamizo,* 753 So.2d 749, 752 (Fla. 3d DCA 2000) and noted that a stay pending appeal was not available in these proceedings. The circuit court order concluded that " to have such a substantial departure by a Hearing Officer in regard to the due process component of this appeal vitiates that prompt, fair, and meaningful procedure which is this court's constitutional responsibility".

The Department filed a Petition for Certiorari in the Fifth District Court of Appeal. On or about September 23, 2013 the Department vacated Futch's suspension however it has now been reinstated. In *Dep't of Highway Safety & Motor Vehicles v. Futch*, 39 Fla. L. Weekly D1403 (Fla. 5th DCA 2014) the Fifth District opinion found no error in the circuit court's determination that Futch was denied due process but found that the error was with the remedy fashioned by the circuit court. The Fifth District Court of Appeals found that when a circuit court

quashes a hearing officer's order on due process grounds, the matter is to be remanded to the hearing officer for further proceedings citing to multiple case including, *Dep't of Highway Safety & Motor Vehicles v. Icaza,* 37 So.3d 309, 312 (Fla. 5th DCA 2010); *Lillyman v. Dep't of Highway Safety & Motor Vehicles,* 645 So.2d 113, 114 (Fla. 5th DCA 1994); and *Dep't of Highway Safety & Motor Vehicles v. Chamizo,* 753 So.2d 749, 752 (Fla. 3d DCA 2000) which included the same cases cited by the circuit court. The Fifth District did not discuss the circuit court concerns about the lack of prompt, fair and meaningful procedure as applied to the facts of this case. Futch's Motion for Rehearing, Clarification and/or Certification was denied on July 22, 2014. The Petitioner now timely seeks the discretionary jurisdiction of this Honorable Court and submits this brief in support of his position.

SUMMARY OF ARGUMENT

THE DECISION OF THE FIFTH DISTRICT IN EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM ANOTHER DISTRICT COURT OF APPEAL AND THE FLORIDA SUPREME COURT INCLUDING ON THE SAME QUESTION OF LAW.

By quashing the judgment of the circuit court because the appellate court concluded that the circuit court misapplied the law as opposed to applying the wrong law the opinion is in express and direct conflict with multiple opinions of the Florida Supreme court and other district courts of appeal. In *Dep't of Highway*

Safety & Motor Vehicles v. Robinson, 93 So. 3d 1090, 1092 (Fla. 2d DCA 2012), rev. denied, 112 So.3d 83 (Fla. 2013) the Second District stated "Applying the correct law incorrectly does not warrant certiorari review." In *Highway Safety & Motor Vehicles v. Edenfield*, 58 So. 3d 904, 906 (Fla. 1st DCA 2011) the First District Court of Appeal stated: "a misapplication or an erroneous interpretation of the correct law does not rise to the level of a violation of a clearly established principle of law." The ruling of the circuit court was an application of the correct law to a new set of facts and was an attempt to provide a remedy consistent with Futch's right to due process of law.

The opinion is also inconsistent with *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So. 3d 815 (Fla. 2d DCA 2012) which quashed based upon a due process violation during the formal review procedure and found that the suspension at issue should be invalidated without a new hearing. McLaughlin stands for the proposition that a court has the authority in an appropriate case to quash and remand for invalidation rather than a new hearing.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT IN EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM ANOTHER DISTRICT COURT OF APPEAL AND THE FLORIDA SUPREME COURT INCLUDING ON THE SAME QUESTION OF LAW.

The decision below *Dep't of Highway Safety & Motor Vehicles v. Futch*, 39 Fla. L. Weekly D1403 (Fla. 5th DCA 2014) states:

> Because we conclude that the circuit court misapplied the law when it directed DHSMV to set aside the suspension and reinstate Futch's driver's license, we grant the petition for writ of certiorari, quash the order of the circuit court, and remand for further proceedings consistent with this opinion.
>
> Emphasis supplied

The opinion of the Fifth District by finding that a misapplication of the law authorizes the issuance of a writ of certiorari conflicts with multiple opinions of this court and other district courts of appeal. In *Dep't of Highway Safety & Motor Vehicles v. Robinson*, 93 So. 3d 1090, 1092 (Fla. 2d DCA 2012), rev. denied, 112 So. 3d 83 (Fla. 2013) the Second District stated:

> In a second-tier certiorari proceeding, this court has a narrow standard of review. We review the opinion to determine whether the circuit court afforded procedural due process and whether it applied the correct law. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla.1982). "**Applying the correct law incorrectly does not warrant certiorari review.**" *Stranahan House, Inc. v. City of Fort Lauderdale,* 967 So.2d 1121, 1125 (Fla. 4th DCA 2007) (citing *Ivey v. Allstate Ins. Co.,* 774 So.2d 679 (Fla.2000)).
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> Emphasis supplied

This principle was also applied in *State, Dept. of Highway Safety & Motor Vehicles v. Edenfield*, 58 So. 3d 904, 906 (Fla. 1st DCA 2011) finding that "a misapplication or an erroneous interpretation of the correct law does not rise to the level of a violation of a clearly established principle of law". In *Custer Med. Ctr.*

v. United Auto. Ins. Co., 62 So. 3d 1086, 1093 (Fla. 2010) this court explained this principle stating " a circuit court appellate decision made according to the forms 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 facts, is *not* a departure from the essential requirements of law remediable by certiorari". This standard was also discussed in *Nader v. Florida Dept. of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012), finding that, appellate courts must exercise caution not to expand certiorari jurisdiction to review the correctness of the circuit court's decision and noting that "this would deprive litigants of the finality of judgments reviewed by 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." Additional cases finding that misapplying the correct law does not authorize certiorari relief include *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000), *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So.2d 1121, 1125 (Fla. 4th DCA 2007), *Fassy v. Crowley*, 884 So. 2d 359, 364 (Fla. 2d DCA 2004), *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) and *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1043 (Fla. 2d DCA 2012) (misapplication or an erroneous interpretation of the correct law does not rise to the level of a violation of a clearly established principle of law.").

The circuit court order, see *Futch v. State, Department of Highway Safety and Motor Vehicles,* 21 Fla. L. Weekly Sup. 16b (Fla. 7th Circuit Court 2013), concluded:

> This court respectfully recognizes *Lillyman* and *Chamizo, as* Judge Perkins did in *Fuller.* Suspension has been in place for six (6) months measured to the date of this decision. If remanded to the Hearing Officer for rehearing the matter would then be reheard and if a Petition for Certiorari was necessary, nearly a full year would have been expended. Unfortunately, a stay pending appeal is currently not available. *Anderson v. Department of Highway Safety and Motor Vehicles,* 751 So.2d 749 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D502a]
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> As was the case in Fuller this court feels that the equities in this situation gravitate in favor of the Petitioner having the benefit of a prompt, fair, and meaningful procedure. To have such a substantial departure by a Hearing Officer in regard to the due process component of this appeal vitiates that prompt, fair, and meaningful procedure which is this court's constitutional responsibility.

In its order the circuit court recognized the correct general law which is clearly established as the Fifth District cited the same cases. The circuit court then applied the correct law to a new set of facts involving a commercial drivers license consistent with *Nader v. Florida Dep't of Highway Safety & Motor Vehicles*, 87 So.3d 712 (Fla. 2012). The circuit court was concerned that the law as applied to the facts including a "substantial" due process departure by the Department's hearing officer resulted in the lack of a prompt, fair and meaningful procedure as applied to the facts of this particular case and was attempting to provide an appropriate remedy consistent with the Florida Constitution and the

applicable statutes. In *Mackey v. Montrym*, 443 U.S. 1, 11, 99 S.Ct. 2612, 2617, 61 L.Ed.2d 321 (1979) the United States Supreme Court stated that the "duration of any potentially wrongful deprivation of a property interest is an important factor" and found that the scheme was not facially unconstitutional as a prompt post suspension hearing was available. It this instance Futch had not actually received a prompt and meaningful hearing. This situation is similar to that addressed in *Thomas v. Fiedler*, 700 F.Supp. 1527 (E.D.Wis.1988), (driver's license suspension statute unconstitutional as applied), appeal dismissed as moot, 884 F.2d 990 (7th Cir.1989). If should be noted that the typical formal review Sec. 322.2615(9), Fla. Stat (2013), and the section pertaining to commercial drivers license holders including Futch Sec. 322.64(9), Fla. Stat. (2013) both authorize invalidation as a remedy for failure to schedule a formal review hearing within thirty (30) days of receipt of a request so it is clear that the legislature has authorized invalidation as a remedy for unnecessary delay.

In *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So. 3d 815 (Fla. 2d DCA 2012), a case involving a due process violation, the Second District held that when the suspension period expired while the matter was on review other than quashing the administrative order, no further proceedings are necessary on remand because the issue of the validity of the suspension of Mr. McLaughlin's driver's license is moot. Circuit court rulings requiring remand were

recently quashed based upon the McLaughlin in *Forth v. Dep't of Highway Safety & Motor Vehicles*, 39 Fla. L. Weekly D1352 (Fla. 2d DCA 2014) (Motion for rehearing pending), *Pankau v. Dep't of Highway Safety & Motor Vehicles*, 39 Fla. L. Weekly D1675a (Fla. 2d DCA, Aug. 8, 2014)) (Motion for rehearing pending) and *Ferrai v. Dep't of Highway Safety & Motor Vehicles*, 39 Fla. L. Weekly D1674b(Fla. 2d DCA, Aug. 8, 2014)) (Motion for rehearing pending). In *Dep't of Highway Safety & Motor Vehicles v. Gaputis*, 39 Fla. L. Weekly D1679a (Fla. 2d DCA, Aug. 8, 2014) (Motion for rehearing pending), a due process violation was found by the circuit court and no remand ordered. The Second District denied the Departments petition finding McLaughlin was the correct law. The McLaughlin decision and its progeny authorize the circuit court to remand for invalidation but in conflict thereto the Fifth District decision in Futch appears to require further administrative proceedings in all cases involving due process violations. It is respectfully suggested that whether a circuit court on first tier review may find that on the facts of a particular case that the appropriate remedy for a substantial due process violation at a formal review combined with a lack of prompt, fair and meaningful review is invalidation rather than remand for a new hearing is an important issue.

CONCLUSION

Respectfully, the Petitioner requests this court accept jurisdiction and review this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished via e-mail to Kimberly A. Gibbs, Esquire, Department of Highway Safety and Motor Vehicles, Department of Highway Safety and Motor Vehicles at kimgibbs@flhsmv.gov and mariannеallen@flhsmv.gov this 28th day of August, 2014.

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I HEREBY CERTIFY that the font size in the Petitioner's pleading is New Times Roman 14 point.