IN THE SUPREME COURT OF FLORIDA

NILS FUTCH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Case No.: SC14-1660
L.T. Case No(s).: 5D13-3457

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, Petitioner shall be referred to as Petitioner or Futch. Respondent shall be referred to as Respondent or Department. Counsel for Futch is cognizant that a record has been transmitted electronically by the Fifth District and references to that record will be made by (R-), however, as Counsel cannot access the page numbers in the record; Futch's appendix as filed in the Fifth District shall be referred to by the letter "A," followed by the page number utilized in the Fifth District (A-__) for clarity. Futch's Appendix, filed with this brief shall be referred to as by the letter "SA" followed by the page number (SA-__); other than the transcript of the Formal Review on April 16, 2013, in said appendix which shall be referred to as "T" followed by the page number of the transcript (T-___).

STATEMENT OF THE CASE AND FACTS

This case involves a 1 year administrative suspension and disqualification, (hereinafter referred to as suspension) of the "Class C," or commercial driver license (CDL), of Petitioner Futch, effective March 15, 2013, (A-13) (A-45) which expired on or about March 14, 2014. On April 16, 2013, a Formal Review hearing was conducted and a court reporter was present (T-3). Futch made multiple objections to the documents and the hearing officer "reserved" ruling on all objections (T-8). The hearing officer marked Exhibits DDL #1-11,

and including an entirely irrelevant 21 page mutual aid agreement (A- 24-44), and entered them into the record (A- 10-46) (T-5- 8). The Findings of Fact, Conclusions of Law, and Decision, dated April 25, 2013, are (A-4-9) and mention some of the issues raised (A-7). A central issue at the formal review was whether the warrantless stop of Futch was lawful. Counsel filed a written "Motion to Suppress Due To Unlawful Stop," (A-47-71) (T-9), and also argued these issues orally (T-9-14). The sworn charging affidavit (707), (A-14 -16) indicates the officer saw Futch on a Harley Davidson motorcycle travel on Nova Road in a fast manner from the front south entrance parking lot of the Roadside Tavern without stopping. The officer stopped Futch "for failure to stop his vehicle from the parking lot of the Roadside Tavern prior to entering the roadway (F.S. 316.125)." (A-15). The argument was that as there were no traffic or pedestrians effected by the manner in which Futch exited the business, that there was not probable cause to believe a violation of § 316.125, Fla. Statute had been violated. Further, to violate § 316.125(2) the vehicle must "emerge" from a driveway etc. which distinguishes section § 316.125(2) from § 316.125(1) which uses the words "enter or cross." A dictionary definition of emerge was provided (T-13) (A-63). In addition the § 316.125 is intended to require that the driver "have a view of approaching traffic" and yield to all vehicles and pedestrians which "constitute an immediate hazard." To clarify the proper interpretation, Futch provided the relevant portion of the

Department's own "Florida Drivers Handbook" (A-70,71) which became driver's exhibit 1 and states:

> 5.22- Driveways
>
> Drivers entering and exiting a road from a driveway, alley or roadside should yield to vehicles already on the main road and bicyclists and pedestrians on the sidewalk, shared use path or bike lanes.
>
> (A-70,71) (T- 11)

Further, there was no evidence that the driving occurred in a business or residence district as defined in section 316.003 Fl. Statutes. Regarding this critical issue the hearing officer found "he failed to yield before entering the roadway from a business parking lot" (A-6) without finding any vehicle or pedestrian were even approaching. The hearing officer found the "infraction occurred at a business" (A-6), rather than in a "business district," as required by the statute, see copy (A-53). Futch attempted to call a witness, Andrew Cospito, but was not allowed to present or proffer his testimony, see (T-14-18). The relevant portion of the transcript is set out in the circuit court's Order Granting Petition for Certiorari (SA-78-81).

Hearing officer Bradeen cut counsel for Futch, (Counsel), off after two questions and specifically ruled that he could not ask any more questions of Cospito (T-18,19). Counsel continued to object to the unfair, prejudged proceeding and pointed out that Counsel and hearing officer had just gone through the same

argument in the Henderson formal review, 30 minutes prior (T-19). An objection was made to the "biased" proceeding, the lack of due process, and a request for a different hearing officer who would allow a proffer was made (T-19, 20). A motion to recuse was denied (T-20). During closing argument Counsel for Futch reminded Bradeen that Futch had a Commercial Drivers License and his livelihood, and the well being of his family, were critically effected by the proceeding (T-22, 23).

Futch's Petition for Writ of Certiorari in the circuit court (SA-26-55), properly raised 4 issues to wit; ISSUE I: Petitioner Was Denied Procedural Due Process And/Or The Essential Requirements Of Law When The hearing officer refused to allow the expert witness to testify (SA-36-40), ISSUE II: There Was A Lack Of Substantial Competent Evidence To Establish Petitioner Was Lawfully Stopped (S.A.-40-45), ISSUE III: Here as In *DHSMV v. Trimble*, 821 So.2d 1084 (Fla. 1st DCA 2002), the Unexplained Discrepancies in the Documents Result in a Lack of Substantial Competent Evidence (SA- 45-48), and Issue IV: Petitioner Was Denied Procedural Due Process And/Or The Essential Requirements Of Law (SA -48-54). On August 14, 2013, Futch filed copies of multiple authorities (A-86-167), which included multiple circuit court orders which had held the appropriate remedy was to direct the Department to reinstate a drivers license which had been upheld by higher courts.

The circuit court Order Granting Writ of Certiorari (SA-77-88) stated:

> **In this case the procedural due process violation appears to be even more egregious.** In this case, the Hearing Officer called Mr. Futch's witness, Andrew N. Cospito, and began to question him. After there was an objection counsel for Mr. Futch asked if he could question his own witness. The Hearing Officer, in what can only be analyzed as a remarkable event, allowed Mr. Latinsky, Mr. Futch's attorney two questions. In essence, the Hearing Officer allowed the witness to testify but did not let the proponent of the witness ask enough questions to either present evidence or create a reasonable proffer. **The concept of due process, at is rudimentary level, requires notice and an opportunity to be heard. In this case the Constitution was turned on its head in violation of the Fourth and Fourteenth Amendments. As a result this court finds that there is no question that the Petitioner, Nils Futch, has not been accorded procedural due process and therefore the decision of the Hearing Officer cannot stand.**
>
> Emphasis supplied (SA-81-82)

Accordingly the circuit court found the due process violation "egregious" (SA-81). The circuit court briefly discussed the remaining issues raised by Futch and including the argument that use of the word "emerging" in 316.125(2), required a more narrow construction of that section than the use of word "enter" in 316.125(1) and also failed to require proof that the event occurred in a business district as defined in 316. 003(4), but did not find a lack of competent substantial evidence as requested by Futch (SA-82-84).

Regarding the appropriate remedy the circuit court noted that Futch, who had a commercial driver license, had been unable to lawfully operate a commercial motor vehicle since March 15, 2013 (SA-84) and ruled that:

> 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).
>
> 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.
>
> (SA- 87)

Based on the rulings set forth above the circuit court quashed the hearing officer's order and directed the refusal suspension at issue be set aside, (SA-88). On October 13, 2013, the Department filed a Petition for Certiorari and appendix (R-1-258). Futch filed a response arguing the issues, the due process issues as raised in the circuit court, that the remedy imposed was lawful and also that there was a lack of substantial competent evidence to establish petitioner was lawfully stopped (R-260- 477), with an appendix (A-1- 167), (R-310-477).

On July 3, 2014, in *Dep't of Highway Safety & Motor Vehicles v. Futch*, 142 So. 3d 910 (Fla. 5th DCA 2014) (SA-89-97), the Fifth District Court of Appeal (Fifth District) opinion found no error in the circuit court's determination that Futch was denied due process (SA-96), but found that the error was with the

remedy fashioned by the circuit court. The Fifth District found that when a circuit court quashes a hearing officer's order on due process grounds, the matter is required 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 specifically discuss the circuit court concerns about the lack of prompt, fair and meaningful procedure as applied to the facts of this case. The Department filed a Motion for Rehearing/Clarification (R-503-508), which stated in part that the Fifth District had "misspoke" and that the law is well settled that a misapplication of the law is not a basis for certiorari relief (R- 506). Futch's Motion for Rehearing, Clarification and/or Certification was filed July 11, 2014 (R-509-531). Both requests for rehearing were denied on July 22, 2014 (R-535). On April 24, 2015, this honorable court issued an order accepting jurisdiction in this cause.

SUMMARY OF ARGUMENT

ISSUE I

THE FIFTH DISTRICT APPLIED THE WRONG STANDARD BY QUASHING THE ORDER OF THE CIRCUIT COURT BASED UPON A FINDING "THAT THE CIRCUIT COURT MISAPPLIED THE LAW."

The decision below *Dep't of Highway Safety & Motor Vehicles v. Futch*, 142 So. 3d 910 (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 on second tier certiorari review conflicts with multiple opinions of this court and other district courts of appeal including *Nader v. Florida Dep't of Highway Safety & Motor Vehicles*, 87 So.3d 712 (Fla. 2012), *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) . In fact the Department initially pointed out this error in its Motion for Rehearing (R- 506). The correct standard would require a finding the circuit decision violated a clearly established principle of law resulting in a miscarriage of

justice, see *Nader*, supra. The decision of the circuit court should not have been quashed.

ISSUE II

THE CIRCUIT COURT DID NOT VIOLATE A CLEARLY ESTABLISHED PRINCIPLE OF LAW WHICH RESULTED IN A MISCARRIAGE OF JUSTICE.

This case involves a 12 month suspension of the Futch's commercial driver license. The circuit court determined that Futch was denied due process of law by the Department hearing officer and described the due process violations as egregious. The circuit court also found that the hearing officer departed from her role as a neutral and detached magistrate and failed to preserve the impression of neutrality. The Fifth District found no error in the circuit court's determination that Futch was denied due process. The circuit court order states:

> 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]
>
> 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.

Based upon the wording of the applicable statutes it appears that invalidation is a proper remedy for a due process violation. The circuit court was attempting to apply the Florida implied consent scheme in a manner which was consistent with the requirements of the Florida Constitution and found that the appropriate remedy was to promptly invalidate the suspension of Futch's CDL. The circuit court was correct that based upon the specific facts of this case, the applicable statutes, and the applicable provisions of the Florida Constitution the court could find, that invalidation was the appropriate remedy. On the facts of this case as a stay pending review was not available, if the circuit court cannot provide prompt, meaningful relief such as directing invalidation, then Futch's right to judicial review, as applied, was illusory or at a minimum was not sufficiently meaningful as to comply with the requirements of the Florida Constitution. The ruling of the circuit court was not a departure of the essential requirements of law resulting in the miscarriage of justice and should not have been quashed.

ISSUE III

THERE WAS A LACK OF COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD TO ESTABLISH THE WARRANTLESS STOP WAS LAWFUL.

Futch was, while driving a motorcycle, stopped for an alleged violation of 316.125; for not stopping when exiting the parking lot of a business. The statute states:

> 316.125. Vehicle entering highway from private road or driveway or emerging from alley, driveway or building:
> (1) The driver of a vehicle **about to enter or cross** a highway from an alley, building, private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered which are so close thereto as to constitute an immediate hazard.
> (2) The driver of a vehicle **emerging** from an alley, building, private road or driveway within a business or residence district shall stop the vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across the alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon and shall yield to all vehicles and pedestrians which are so close thereto as to constitute an immediate hazard.
>
> (Emphasis supplied)

Futch argues that there was no competent, substantial, evidence in the record that he was within a business or residential district as defined in 316.003, or that any vehicles or those pedestrians were so close as to constitute an immediate hazard when he entered the roadway from the parking lot. Further, Futch maintains the word "emerging" from a driveway, etc., in section (2) must have a more narrow construction than the words "enter or cross" in section (1). Futch

maintains there was a lack of competent, substantial evidence in the record to establish that the warrantless stop was lawful.

STANDARD OF REVIEW

This appeal involves pure questions of law. Therefore, the proper standard of review is de novo, *see Armstrong v. Harris,* 773 So.2d 7, 11 (Fla.2000); *R.J.L. v. State*, 887 So. 2d 1268, 1280 (Fla. 2004)

Introduction to Issues

Futch's position is that, regarding the administrative suspension of his CDL judicial review delayed a pending second Formal Review, is prompt, meaningful, judicial review denied; in violation of the Florida Constitution. The Fifth District has found "no error in the circuit court finding that Futch was denied due process." In *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1078 (Fla. 2011) this Court stated that "Whether denominated a "right" or a "privilege," the loss of a driver's license is most definitely an extreme hardship" and found that a driver was entitle to a meaningful process to review the lawfulness of the suspension. As noted in *Dixon v. Love,* 431 U.S. 105, 113 (1977), holders of commercial licenses are those most likely to be affected by the deprival of driving privileges. Futch maintains that consistent with *Hernandez*, the loss of his commercial driver's license is an extreme hardship and consistent with the Florida Constitution, he was entitled to a prompt and meaningful administrative

hearing followed by prompt and meaningful judicial review. Unfortunately, as the adverse party employs the non-attorney hearing officers, the appearance of neutrality is not always present, as occurred in this case. The fact that numerous decisions of the hearing officers are quashed by the judiciary, such supports the argument that prompt judicial review is essential to providing due process of law. In *Younghans v. State*, 90 So. 2d 308, 310 (Fla. 1956), this Court stated, "In a case where the term of imprisonment imposed is short, the trial court might also consider whether the denial of bail would render nugatory the right to appeal from the judgment of conviction; Cf. *Patterson v. United States*, 75 S.Ct. 256, 99 L.Ed. 1296." Multiple appellate decisions establish that it is not uncommon for the entire term of a suspension to be served before judicial review can be completed. Futch maintains that as the circuit court correctly determined that his Formal Review hearing conducted by the Department was not sufficiently meaningful to comport with due process concepts on the appropriate remedy was to vacate the suspension/disqualification. The Fifth District utilized an incorrect standard in quashing the remedy provided. Once this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, the Court has discretionary jurisdiction over all issues; see *Savoie v. State,* 422 So.2d 308 (Fla.1982), and *Murray v. Regier*, 872 So. 2d 217, 223 (Fla. 2002), Futch also briefed the competent,

substantial evidence issue, which was properly raised at each level of these proceedings.

ISSUE I

THE FIFTH DISTRICT APPLIED THE WRONG STANDARD BY QUASHING THE ORDER OF THE CIRCUIT COURT BASED UPON A FINDING "THAT THE CIRCUIT COURT MISAPPLIED THE LAW."

The decision below *Dep't of Highway Safety & Motor Vehicles v. Futch*, 142 So. 3d 910 (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. It is interesting to note that in its Motion for Rehearing/Clarification (R-506), at paragraph 8, the Department cited the correct standard and argued that the Fifth District "misspoke" when it utilized this standard. 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)).
>
> 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." In *Nader* this court reaffirmed that second tier

certiorari review was reserved for those situations "where there was a violation of clearly established principles of law resulting in a miscarriage of justice." Here the Fifth District did not focus on the "seriousness," see *Nader*, of any error and did not find that a miscarriage of justice had occurred. In Issue II and III, Futch argues that the circuit court ruling was not in error and did not result in a miscarriage of justice.

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.")

In its order the circuit court recognized the correct general law; *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 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, 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 that the Fifth District quashed the ruling of the circuit court based upon a finding that, the "circuit court misapplied the law when it directed DHSMV to set aside the suspension," as opposed to finding the circuit decision violated a clearly established principle of law resulting in a miscarriage of justice; the decision below should be quashed, see generally *Dobrin v. Florida Dept. of Highway Safety & Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004).

ISSUE II

THE CIRCUIT COURT DID NOT VIOLATE A CLEARLY ESTABLISHED PRINCIPLE OF LAW WHICH RESULTED IN A MISCARRIAGE OF JUSTICE

II(A) Introduction: In *Nader,* supra this court reaffirmed that second tier certiorari review was reserved for those situations "where there was a violation of clearly established principles of law resulting in a miscarriage of justice." It is argued that in order for the implied consent scheme and related proceedings to

comport with the requirements of the Florida Constitution, see generally *Hernandez v. Dep't of Highway Safety and Motor Vehicles*, 74 So.3d 1070 (Fla. 2011), certain fundamental criteria apply. In addition to being facially constitutional, the applicable statutes and administrative rules must be applied in a constitutional manner, see e.g. *DHSMV v. Stewart*, 625 So.2d 123 (Fla. 5th DCA 1993), finding statutes must be applied in a prompt, fair and meaningful manner. Futch and all drivers should be entitled to prompt judicial review, as with the passing of each day, the limited relief available becomes less meaningful. It is extremely logical to conclude that many meritorious Petitions for Certiorari are simply not filed simply because the lack of stay substantially limits the relief actually available. Futch was clearly entitled to a neutral hearing officer, see e.g. *DHSMV v. Pitts*, 815 So.2d 738 (Fla. 1st DCA 2002) and *Department of Highway Safety & Motor Vehicles v. Griffin*, 909 So. 2d 538 (Fla. 4th DCA 2005), which strongly cautioned the "hearing officers that they must take extraordinary care to be as impartial and neutral as the members of the judiciary are required to be." The circuit court found that the Hearing Officer substantially violated Futch's right to due process of law and departed from her role as a neutral magistrate (S.A.- 85) and provided relief. In light of multiple due process violations the Department's Petition failed to establish that the circuit court violated a clearly established principle of law which resulted in a miscarriage of justice. The circuit court

order considered the fact that Futch could not drive a commercial motor vehicle from the date of the offense until either a year expired or this implied consent litigation was concluded and stated:

> 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.
>
> (SA- 87)

Consistent with *Nader*, there is a societal interest in ending litigation within a reasonable length of time and eliminating the amount of judicial labors involved in multiple appeals. This societal interest also supports the circuit court order.

Based upon the fact that the decision in *Dep't of Safety v. Stockman*, 709 So. 2d 179, 180 (Fla. 5th DCA 1998) finding's that the circuit court "as the direct reviewing court, had the inherent power and discretion to suspend an administrative suspension order under section 322.2615 pending certiorari review," was overturned in *Anderson v. Dep't of Highway Safety & Motor*

Vehicles, 751 So. 2d 749, 750 (Fla. 5th DCA 2000); see also *State Dept. of Highway Safety & Motor Vehicles v. Peterson*, 754 So. 2d 156 (Fla. 2d DCA 2000); and *State Dept. of Highway Safety & Motor Vehicles v. Begley*, 776 So. 2d 278, 278 (Fla. 1st DCA 2000), the circuit court could not stay the suspension of Futch's CDL pending a final disposition of the issues. While Futch agrees with the argument rejected in *Begley,* that the question of whether to grant or deny a stay is a procedural matter to be governed by the rules of practice and procedure adopted by the supreme court under Article V, section 2 of the Florida Constitution, this argument could not be made in the circuit court as it was foreclosed by binding precedent such as *Anderson.* Futch requests this honorable court to find his rights were violated and it was not a miscarriage of justice to direct the Department to invalidate his suspension. While the district courts of appeal have denied challenges based upon the use of non-lawyer hearing officers, see *Griffin* and *Pitts* supra, it is still reasonable to consider that the implied consent scheme as applied, appears to result in a system where due process violations and concerns are common. Some rulings supporting this position are listed in "*footnote 1*" below. [1] Based upon the frequency of erroneous rulings the right to prompt

[1] Examples of such opinions include *Wilcox v. Dept of Highway Safety and Motor Vehicles*, 22 Fla. L. Weekly Supp. 8a (Fla. 4th Cir. Ct., July 7, 2014); *Winters v. Dept of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 994a (Fla. 13th Cir. Ct., May 21, 2014); *Shi v. Dept of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 620a (Fla. 9th Cir. Ct., March 13, 2014); *Detlefsen v. Dept of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 1022a (Fla.

4th Cir. Ct., Aug. 1, 2013); *Gibson v. Dept of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 1034a (Fla. 7th Cir. Ct., June 10, 2013); *Boney v. Dept of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 1114b (Fla. 4th Cir. Ct., March 18, 2013); *Thompson v. Dept of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 917a (Fla. 4th Cir. Ct., July 30, 2012); *Fuller v. Dept of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 296b (Fla. 7th Cir. Ct., Dec. 17, 2012); *Scarborough v. Dept of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 918a (Fla. 7th Cir. Ct., July 14, 2011)(A. 56); *Gabriel v. Dept of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 916a (Fla. 7th Cir. Ct., April 18, 2011); *Perez v. Dept of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 1085b (Fla. 13th Cir. Ct., July 21, 2010); *Bell v. Dep't of Highway Safety and Motor Vehicles*,13 Fla. L. Weekly Supp. 756a (Fla. 4th Cir. Ct. May 15, 2006), *Victor v. Dept of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 110a (Fla. 9th Cir. Ct., Aug. 31, 2004); *Millard v. Dept of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 289a (Fla. 9th Cir. Ct., Aug. 6, 2004); *Lane v. Dept of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 598a (Fla. 7th Cir. Ct., Nov. 10, 2003); *Brown v. Dept of Highway Safety and Motor Vehicles,* 10 Fla. L. Weekly Supp. 849a (Fla. 4th Cir. Ct., September 15, 2003); *Dow v. Dep't of Highway Safety and Motor Vehicles,*10 Fla. L. Weekly Supp. 219a (Fla. 4th Cir. Ct., Feb. 27, 2003); *Verner v. Dep't of Highway Safety and Motor Vehicles,* (Fla. 4th Cir. Ct., Feb. 6, 2003); *Kurashev v. Dep't of Highway Safety and Motor Vehicles,* 10 Fla. L. Weekly Supp. 149a (Fla. 4th Cir. Ct., Feb. 6, 2003) ; *Hill v. Dept of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 19a (Fla. 11th Cir. Ct., Nov. 19, 2002)*Caruso v. Dep't of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 655a (Fla. 4th Cir. Ct., Aug. 9, 2002)(A. 95); *Bogard v. Dep't of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 658a (Fla. 7th Cir. Ct., Aug. 9, 2002) ; *Friesland v. Dep't of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 75b (Fla. 4th Cir. Ct., Dec. 17, 2001); *Gonzalez v. Dept of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 75a (Fla. 4th Cir. Ct. Nov. 30, 2001)(; *Blackburn v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 807a (Fla. 4th Cir. Ct., Oct. 23, 2001); *George v. Dep't of Highway Safety and Motor Vehicles* 8 Fla. L. Weekly Supp. 677a (Fla. 4th Cir. Ct., Aug. 29, 2001) ; *Chapman v. Dept of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 268a (Fla. 4th Cir. Ct., Feb. 7, 2001)(; *Corcoran v. Dept of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 269a (Fla. 4th Cir. Ct., Dec. 7, 2000); *Panken v. Dept of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct., Sept. 18, 2000). Please note this Footnote is copied from Petitioner's Initial Brief on Merits in *Wiggins* v. *Dept of Highway Safety and Motor Vehicles* ; Case Number SC14-2195 with the permission of Attorney Cohen.

judicial review, as applied, is a critical component of a system that complies with the Florida Constitution. The fact that the hearing officer who denied Futch due process of law is employed by the adverse party rather than a neutral judge is also an appropriate consideration in determining an appropriate remedy.

In *Dep't of Highway Safety & Motor Vehicles v. Clay*, 152 So. 3d 1259, 1260 (Fla. 5th DCA 2014), Judge Cohen in his concurrence noted an "apparent fundamental unfairness" in these proceedings stating:

> I agree that our precedent provides an opportunity to cure a due process violation in this context. I write separately to express concern about an apparent fundamental unfairness in these administrative proceedings. The transcripts reflect that at least some hearing officers exhibit a palpable predisposition. This is improper. Whether a proceeding is administrative or judicial, the parties are entitled to an impartial arbiter, and the record in this case—and in many that we see on appeal—does not reflect that. A neutral arbiter is the linchpin of due process and the foundation upon which the system of justice is built.
>
> For years, we have instructed hearing officers that citizens are entitled to subpoena and present witnesses at hearings. *See Klinker v. Dep't of Highway Safety & Motor Vehicles,* 118 So.3d 835, 839 (Fla. 5th DCA 2013); *Dep't of Highway Safety & Motor Vehicles v. Auster,* 52 So.3d 802, 804–05 (Fla. 5th DCA 2010); *Lee v. Dep't of Highway Safety & Motor Vehicles,* 4 So.3d 754, 757 (Fla. 1st DCA 2009); *see also Dep't of Highway Safety & Motor Vehicles v. Pitts,* 815 So.2d 738 (Fla. 1st DCA 2002). And yet, time after time, these decisions are ignored.
>
> Emphasis Supplied

If a hearing is fundamentally unfair, as in *Futch* or *Clay*, then a meaningful remedy should be provided rather than simply requiring the driver to attend multiple Formal Review hearings. As argued by Futch at his formal review the refusal of the Department hearing officers to allow a proffer of Cospito's testimony was not an isolated mistake but a recurring policy. For example the Order Granting Amended Petition for Writ of Certiorari in *Gibson v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Wkly Supp. (Fl. 7th Cir. Ct. 2013) (SA-105-108) confirms that as of January 11, 2013, another hearing officer had refused to allow the proffer of witness Andrew Cospito's testimony, however in *Gibson,* the Department conceded the suspension should be vacated (SA-108). The due process was repetitive and intentional as opposed to an isolated error, however, not all the drivers filed Petitions. Under the facts of this case the circuit court should have the inherent power to provide a meaningful remedy consistent with Article V, § 5(b) Florida Constitution .

II(B). The circuit court did not violate the essential requirements of law resulting in a miscarriage of justice by directing that the administrative suspension be set aside as the applicable statutes authorize invalidation as a remedy.

The statutes at issue § 322.2615 in general and § 322.64 both indicate that the remedy for failure to hold a timely hearing is invalidation. It is not surprising that numerous circuit courts have directed the Department to invalidate a suspension and remove it from the driver's history. The 2013 amendments also

require invalidation if the arresting officer or breath test officer fails to appear at a formal review after being subpoenaed by the driver. For example, Sec 322.64, which authorizes a law enforcement officer on behalf of the department to disqualify the holder of a commercial driver license if the license holder is arrested for a violation of 316.193, and refused a breath test currently states in relevant sections:

> § 322.64, Fla. Stat. **Holder of commercial driver license; persons operating a commercial motor vehicle; driving with unlawful blood-alcohol level; refusal to submit to breath, urine, or blood test**
>
> (9) **A request for a formal review hearing or an informal review hearing shall not stay the disqualification. If the department fails to schedule the formal review hearing within 30 days after receipt of the request therefore, the department shall invalidate the disqualification.** If the scheduled hearing is continued at the department's initiative or the driver enforces the subpoena as provided in subsection (6), the department shall issue a temporary driving permit limited to noncommercial vehicles which is valid until the hearing is conducted if the person is otherwise eligible for the driving privilege. Such permit shall not be issued to a person who sought and obtained a continuance of the hearing. The permit issued under this subsection shall authorize driving for business purposes only.
> (10) A person who is disqualified from operating a commercial motor vehicle under subsection (1) or subsection (3) is eligible for issuance of a license for business or employment purposes only under s. 322.271 if the person is otherwise eligible for the driving privilege. **However, such business or employment purposes license shall not authorize the driver to operate a commercial motor vehicle.**

> (11) The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test. However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath or blood test. **If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the department shall invalidate the disqualification.**
> (12) The formal review hearing and the informal review hearing are exempt from the provisions of chapter 120. The department may adopt rules for the conduct of reviews under this section.
> (13) **A person may appeal any decision of the department sustaining the disqualification from operating a commercial motor vehicle by a petition for writ of certiorari to the circuit court** in the county wherein such person resides or wherein a formal or informal review was conducted pursuant to s. 322.31. **However, an appeal shall not stay the disqualification.** This subsection shall not be construed to provide for a de novo review.

The legislature's use of the word "appeal" is consistent with the Florida Constitution and indicates an intent that the circuit court be allowed to provide meaningful judicial review. Further, consistent with 322.64 (9) and (11), it appears that the legislature intended that a failure by the government to provide a prompt and fair hearing would result in the invalidation of the suspension which is the most logical remedy. It should be noted that 322.2615 contains language very similar to 322.64 in most sections. It is argued that the circuit court has the authority to quash the order sustaining the suspension and that as Futch's "due process hearing" has been continued substantially outside of the statutory 30 day

period; due to the Departments actions that the applicable statutes authorize invalidation. The ruling of the circuit court was not a departure from the essential requirements of law and should not have been quashed.

II (C). Cases finding that a court may quash without remanding for a second hearing:

In *Robinson v. DHSMV,* 18 Fla. L. Wkly Supp. (Fl. 6th Cir. 2011), (A-159-161) the court stated:

> The Petition for Writ of Certiorari is granted based on the precedent of *Pfleger* and a conclusion that Dale William Robinson's due process rights were violated by Off. Giordano's unexcused, unexplained non-appearance at the administrative formal review hearing. Therefore, the "Findings of Fact, Conclusions of Law and Decision" entered by the Hearing Officer on May 4, 2011, is quashed.
>
> If he is otherwise eligible, the Department of Highway Safety and Motor Vehicles shall reinstate Dale William Robinson's driving privilege and remove from Dale William Robinson's permanent driving record any entry that reflects the administrative suspension sustained by the May 4, 2011, Decision of the Hearing Officer.

Certiorari was denied in ***Dep't of Highway Safety & Motor Vehicles v. Robinson,*** 93 So.3d 1090 (Fla. 2d DCA 2012,) review denied 112 So.3d 83 (Fla. 2013) wherein the court stated:

> Robinson filed a petition for writ of certiorari in the circuit court seeking review of the hearing officer's decision. Robinson claimed that the hearing officer violated due process by failing to invalidate the suspension of his license after the arresting officer failed to appear at the hearing. The circuit court agreed and held that

> Giordano's unexcused absence from the formal review hearing violated Robinson's due process rights. The court quashed the decision of the administrative hearing officer and reinstated Robinson's driving privileges. In its second-tier certiorari petition to this court, the DHSMV seeks review of the circuit court's decision.
>
> Emphasis supplied

Accordingly *Robinson* stands for the proposition that a circuit court may quash and direct the Department to reinstate based upon a due process violation. After rendering the Futch opinion, the Fifth District in *Dep't of Highway Safety & Motor Vehicles v. Azbell*, 154 So. 3d 461, 462 (Fla. 5th DCA 2015), found that remand was not appropriate in cases involving a lack of substantial competent evidence, stating in part, " To grant a new hearing in situations like this simply affords Petitioner another bite at the apple and could result in an endless series of hearings until it finally presents sufficient evidence to support suspension." It was in part the potential for multiple hearings and certiorari petitions that caused the circuit court to find that Futch's suspension should be invalidated. In *Dobrin v. Dep't of Highway Safety & Motor Vehicles*, 9 Fla. L. Wkly. Supp 355a (Fla. 7th Cir. Ct. March 2002) (A-96-98), quashed *Dep't of Highway Safety & Motor Vehicles v. Dobrin*, 829 So. 2d 922, 923 (Fla. 5th DCA 2002) decision quashed sub nom. *Dobrin v. Florida Dept. of Highway Safety & Motor Vehicles*, 874 So. 2d 1171 (Fla. 2004), the circuit court ruling, which directed the Department to delete the suspension from the drivers record, was reinstated by this court. It is interesting to note that as Mr. Dobrin was initially suspended on September 2,

2001, his one year suspension (A-97), expired several days prior to the Fifth District's ruling in his case. 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 quashed based upon the *McLaughlin*, in *Hosey v. Dep't of Highway Safety & Motor Vehicles,* 147 So. 3d 1056 (Fla. 2d DCA 2014), *Pankau v. Dep't of Highway Safety & Motor Vehicles*, 147 So. 3d 1031, 1032 (Fla. 2d DCA 2014), and *Ferrai v. Dep't of Highway Safety & Motor Vehicles*, s 147 So. 3d 1030 (Fla. 2d DCA 2014). *Forth v. Dep't of Highway Safety & Motor Vehicles*, 148 So. 3d 781, 782 (Fla. 2d DCA 2014), involves facts similar to those in Futch as the hearing officer departed from the required neutrality in reference to, an expert witness, Mr. Daniels. Remand was found inappropriate as the term of suspense expired prior to the circuit court quashing the administrative order. In *Dep't of Highway Safety & Motor Vehicles v. Gaputis*, 148 So. 3d 788 (Fla. 2d DCA 2014), 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, see also *Clay*. The circuit court should have the authority to quash without remanding for a new hearing in an appropriate case.

II (D). If Prompt, Meaningful Review is not Provided then System is Unconstitutional as Applied

Article I, section 21 states:

> **SECTION 21. Access to courts.**—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The circuit court in this instance was concerned about the length of time necessary to obtain judicial review and also the lack of a stay pending review. Consistent with the reasoning in *Younghans v. State*, 90 So. 2d 308, 310 (Fla. 1956), the circuit court was concerned that as term of suspension was 12 months, remanding for a second formal would render nugatory the right to judicial review of the administrative suspension. Under the facts of this case the circuit court utilized its authority consistent with the Florida Constitution to provide redress for an injury without delay as discussed herein. As the delay was caused by the actions of a hearing officer, which violated due process concepts, the circuit court found it appropriate to provide meaningful relief which would not evade judicial review.

In *Conahan v. DHSMV*, 619 So.2d 988 (Fla. 5th DCA 1993) the concurrence states:

> I agree that the instant petition for certiorari should be denied. Petitioner has brought to our attention, however, that at least one circuit judge in this district has ruled that the evidentiary and fact-finding procedures of section 322.2615, Florida Statutes, do not meet minimum due process requirements, at least as applied in some cases. This judge has expressed, based on his own observations, that the Department's hearing officers at times have not conducted the fair, impartial review of evidence that is expected from such "formal" hearing.
>
> If it can be shown that the 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.
>
> (Emphasis supplied.)

In *DHSMV v. Stewart*, 625 So.2d 123 (Fla. 5th DCA 1993) the Court stated:

> In short, the Florida procedure is "prompt," "fair" and meaningful" enough to meet the requirements of due process and is facially valid. Lower courts may find, under the facts of a specific case, that a suspendee's rights have not been respected, but respondent's in these cases suffered no such deprivation.
>
> (Emphasis supplied.)

Here the circuit court specifically found that such a deprivation had occurred. In fact the circuit court described the due process violation as "egregious," (SA- 81) and a 'substantial departure" (SA-87). The circuit court also found that it

appeared the Department hearing officer "departed from her role as a neutral and detached magistrate" which is a fundamental component of due process (SA-85).

In *Mackey v. Montrym*, 443 U.S. 1, 11, 99 S.Ct. 2612, 2617, 61 L.Ed.2d 321 (1979) the Court noted that irreparable damage occurs when a person is denied their drivers license stating:

> More particularly, the driver's interest is in continued possession and use of his license pending the outcome of the hearing due him. **As we recognized in *Love*, that interest is a substantial one, for the Commonwealth will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post suspension review procedures.** 431 U.S., at 113, 97 S.Ct., at 1728.
>
> (Emphasis supplied.)

In this instance Futch has 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). In *Thomas v. Fiedler* the Federal District Court stated:

> The driver's opportunity to present his/her story is extremely misleading if the examiner is to accept the account of the police report as the true statement of events. And the availability of prompt judicial review is almost non-existent as the statute is presently enforced, except in some counties. **Finally, the success in vacating suspensions highlights the risk of erroneous deprivation.** Those cases where the suspension was vacated for lack of a record highlight the informal manner in which this statute is applied. No evidence of

> the ultimate number of judicial vacations has been provided to assist the state.
>
> (Emphasis supplied.)

As a practical matter it appears that some Department hearing officers have a bias in favor of sustaining the suspension as opposed to being neutral with this case being a good example. In *Fiedler* the court also stated:

> From the foregoing discussion, it is apparent that the hearing provided by the statute does not provide a meaningful hearing at a meaningful time, and violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The hearing does not, however, violate any of plaintiff's rights as guaranteed by the Fifth Amendment for they are not compelled to give testimony at the administrative hearing. The statute fails to satisfy the requirements of the U.S. Constitution at the hearing stage of the suspension procedure.
>
> The constitutional deficiency in the statute at the hearing stage would not entitle plaintiffs to the relief sought if the statute provided judicial review of those administrative proceedings in a manner which meets the requirements of both due process and equal protection of the laws. On its face, the statue does provide a mechanism whereby this could be accomplished. <u>However, as interpreted by the department's regulation, and as applied by the different judicial circuits within Wisconsin, the statute fails to safeguard plaintiffs' constitutional rights. Judicial review is often not provided at a meaningful time, and often the review is less than a meaningful hearing. Therefore, the statute as applied violates plaintiff's due process rights.</u>
>
> (Emphasis supplied.)

In *Thomas v. Fiedler,* after the United States District Court ruling was issued; the Wisconsin legislature amended the scheme to address the deficiencies noted and the 7th Circuit Court of Appeals vacated the judgment as moot. Critical amendments were enacted to address the District Courts concerns by providing for

judicial stay pending review and that the administrative suspension would be vacated after 60 days if no stay or judicial rulings were entered. Florida should also construe and apply the statutory scheme in a constitutional manner.

II (E). The Florida Constitution vests the Circuit Court with the Power and Duty to Review this Administrative Action and to Issue All Writs Necessary and Proper to the Complete Exercise of their Jurisdiction:

As noted by the circuit court decision Florida Constitution Article V, § 5(b) states:

> **b) Jurisdiction.--**The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary th or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

As the circuit court has the power of direct review of administrative actions, the circuit court should have the power to provide meaningful relief; as meaningful judicial review of Department's actions is essential to providing due process of law. In *Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So.2d 1070 (Fla. 2011) the Florida Supreme Court stated:

> Whether denominated a "right" or a "privilege," the loss of a driver's license is most definitely an extreme hardship. In *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), the United States Supreme Court stated: "Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood." In the almost forty years since *Bell* was decided, driving has become an increasingly important part of American life and a near necessity in obtaining and maintaining employment. The *Bell* Court explained:

> Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. *In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment*. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement *whether the entitlement is denominated a "right" or a "privilege."* *Id*. (Emphasis Added) (Citations Omitted)

And also stated:

> Here, the interpretation of the statutes urged by DHSMV would allow the DHSMV to suspend a driver's license without reasonable notice and no possibility of a meaningful process to review the lawfulness of the suspension.
>
> A reading of section 322.2615 to prohibit review of an unlawful license suspension would lead to an unreasonable result that would render the statutory scheme constitutionally infirm.

Emphasis supplied

The circuit court should have the authority to provide Futch a meaningful process for judicial review of the suspension of his CDL, prior to the suspension being either substantially served or completely served. Under .322.2615 and 322.64, a driver has the right to "appeal" the decision of the Department review of the order "by a writ of certiorari to the circuit court." "[F]irst-tier certiorari review is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal ...." *Broward Cnty. v. G.B.V. Int'l, Ltd.,* 787 So.2d 838, 843 (Fla.2001); see also *Dep't of Highway Safety & Motor Vehicles v. Futch*, 142 So. 3d 910, 913 (Fla. 5th DCA 2014). The statutes should be construed to allow the

circuit court upon first tier direct review to provide prompt and meaningful relief to persons such as Futch consistent with the mandates of the Florida Constitution. Futch and other litigants should not be deprived of the finality of judgments reviewed by the circuit court and there is a societal interest in ending litigation with a reasonable length of time and eliminating or minimizing multiple appeals, see generally *Nader v. Florida Dept. of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012).

II (F). Conclusion:

The record in this case establishes that the circuit court found that a substantial violation(s) of due process had occurred and this finding was affirmed by the Fifth District. In this instance Futch's CDL (A-8), was suspended on March 14, 2013 and his non-CDL permit expired on April 29, 2013 (A-81). Futch driving record shows no DUI convictions or prior refusal or ubal suspensions (A-45-46); yet he was denied eligibility to apply for even a non-CDL restricted license for 90 days, see 322.2615(9) Fla. Statutes 2012. It is critical that the first formal review hearing be fair and meaningful as irreparable harm occurs as soon as the suspension goes into effect. Based upon the facts of this case, it was consistent with the guarantee of due process of law and the right to judicial review without delay contained in the Florida Constitution for the circuit court to issue a writ requiring that the suspension at issue be promptly invalidated. To find that the

circuit court on first tier certiorari review, as set out in section 322.2615 and 322.64, lacks the authority to determine that the suspension of a commercial drivers license should be invalidated based upon a substantial due process violation, and is always required to remand for a second hearing, and is to deprive the circuit court of the ability to provide prompt and meaningful relief as applied to the facts of this case. The circuit court ruling did not violate a clearly established principle of law or result in a miscarriage of justice.

ISSUE III

THERE WAS A LACK OF COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD TO ESTABLISH THE WARRANTLESS STOP WAS LAWFUL.

If the lower court assigns an erroneous reason for its decision, the decision will be affirmed where there is some other different reason or basis to support it; see *In Re Yohn's Estate*, 238 So.2d 290, 295 (Fla.1970). Futch properly raised the issue as to the proper interpretation of the wording of Section 316.125 Fl. Statutes 2012, and whether the sworn information in the record was facially sufficient to establish a lawful, warrantless, stop occurred. It is respectfully argued that the suspension of Futch's commercial driver's license should have been invalidated as the sworn police report (707), did not include sufficient information to establish that a lawful, warrantless, stop and detention, occurred in this case. This issue was properly raised below (SA-40-45); and was discussed and rejected by the circuit

court, and is mentioned only in footnote 1 of the Fifth District opinion. As this issue is dispositive and involves the correct construction of a statute, it is requested that this court exercise its discretionary jurisdiction over these issues, see *Savoie v. State,* 422 So.2d 308 (Fla.1982), and *Murray v. Regier*, 872 So. 2d 217, 223 (Fla. 2002).

In *Dobrin v. Florida Dept. of Highway Safety and Motor Vehicles*, 874 So.2d 1171 (Fla. 2004), the Florida Supreme Court applied the same standards as utilized to determine the lawfulness of a warrantless stop and detention as are utilized in a criminal case and found the affidavit at issue contained insufficient factual allegations to establish a lawful stop. Judge Monaco's concurrence in *DHSMV v. Roberts,* 983 So.2nd 513 (Fla. 5th DCA 2006) states:

> If the State is going to rely on written affidavits to support license suspensions, then the affidavits ought to have sufficient factual information to assure those acting on the writings that due process has been satisfied. Speculation should never be sufficient in place of facts.
>
> (Emphasis supplied.)

Here Futch has maintained that the 707 lacks sufficient factual information to establish probable cause for a violation of Sec. 316.125. According to the charging affidavit, Petitioner was stopped, detained, and arrested without any type of a warrant. Regarding the initial stop, the police report states that Futch, on a motorcycle, exited a business parking lot "in a fast manner" without stopping, and states in most relevant part:

> ."..stopped him for failure to stop his vehicle from the parking lot of Roadside Tavern prior to entering the roadway (F.S. 316.125). Nils stated again that he was sorry, and stated he did not see any traffic coming, so he didn't think he had to stop."

Futch maintains the affidavit was insufficient to establish the warrantless stop, lawful. The warrantless stop of Defendant's vehicle, his detention and arrest are presumptively unconstitutional. The State has the burden of establishing that the warrantless stop was lawful, *see e.g., Palmer v. State*, 753 So.2d 679 (Fla. 2d DCA 2000), *Sunby v. State*, 845 So.2d 1006 (Fla. 5th DCA 2003), *Maurer v. State*, 668 So.2d 1077 (Fla. 5th DCA 2003).

In this instance the stop was based on an alleged failure to "stop" while exiting a parking lot in violation of § 316.125, Fla. Statute (A-55), which states in relevant sections:

> 316.125. Vehicle entering highway from private road or driveway or emerging from alley, driveway or building:
> (1) The driver of a vehicle **about to enter or cross** a highway from an alley, building, private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered which are so close thereto as to constitute an immediate hazard.
> (2) The driver of a vehicle **emerging** from an alley, building, private road or driveway within a business or residence district shall stop the vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across the alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon and shall yield to all vehicles and pedestrians which are so close thereto as to constitute an immediate hazard.
>
> (Emphasis supplied.)

Business District doesn't mean any business, as interpreted by the hearing officer, but is defined as:

> **(4) Business district.--**The territory contiguous to, and including, a highway when 50 percent or more of the frontage thereon, for a distance of 300 feet or more, is occupied by buildings in use for business.

§ 316.003, Fla. Stat.. Residence District is defined in 316.003(38):

> **(38) Residence district.--**The territory contiguous to, and including, a highway, not comprising a business district, when the property on such highway, for a distance of 300 feet or more, is, in the main, improved with residences or residences and buildings in use for business.

It is clearly possible for a business, such as the Roadside Tavern, to be in an area where for a distance of 300 feet or more, the area is not occupied by buildings improved for use as a business or residence. What is not stated in the 707 is:

> A) That the motorcycles action met the definition of the word "emerged" from an alley, building, private road or driveway as opposed to simply "entering " a roadway from a parking lot;
>
> B) That any driveway was located within a business or residence district;
>
> C) Whether there was a sidewalk in the area;
>
> D) That any vehicles or pedestrians were so close as to constitute an immediate hazard;

It is argued that the sworn affidavit was required to be sufficient to establish the elements, the civil citation in this particular case. As in *Baker v. Hayes*, 3 So. 2d 590, 591 (Fla. 1941), the record is silent on certain predicate facts and "serves

to exemplify the reason for a better affidavit." It is clear in this case is that there was no evidence that the offense occurred in a business or residential district as defined. There is also no evidence that vehicles or pedestrians were so close as to constitute an immediate hazard in this instance. Further, the definition of the word "emerge" in Merriam Webster Dictionary, as provided to the hearing officer, includes "to come out into view" (A- 63). It is argued that Section 316.125(2) should be narrowly construed to apply only to a vehicle which is "emerging" (i.e. leaving an area where view of approaching traffic on the street is obscured), only within a business or residential district and only if pedestrians or vehicles are so close as to be endangered. The use of the term "emerge" in § 316.125(2) should be construed to have a different meaning then the words "enter or cross" in section § 316.125(1).

Recently in *State v. Nelson*, 40 Fla. L. Weekly D1095 (Fla. 5th DCA May 8, 2015) (S.A. 98-104), the Fifth District considered a case where the appellants conceded that the trial court misinterpreted Sec. 316.125(2), by finding it only applied in a failure to yield situation. The court noted that "subsection one does not apply to business or residential districts, subsection two does, and it is undisputed that the events in all three cases occurred in a business district."

In contrast Futch has continuously argued that there must be competent, substantial evidence that he was in a business or residential district as a predicate to finding a

lawful stop due to an alleged violation of 316.125(2). In Nelson the appellants apparently did not argue that use of the word "emerge" in sections 316.125(2), required a different construction than use of the words "about to enter or cross" in 316.125(1). It is argued that selection of the word "emerge" should also be given meaning. In Nelson the case was remanded to clarify the location of the vehicles and whether a sidewalk existed in the relevant areas. If this Court agrees with the interpretation in Nelson, then it may be irrelevant in considering 316.125(2), that no vehicles or pedestrians were so close as to constitute an immediate hazard. The proper construction of the word "emerge" would still be a valid issue as well as the lack of competent, substantial evidence in the record to establish Futch's driving occurred in business or residential zone as defined in the applicable statutes.

In interpreting other civil traffic infraction statutes, courts have held that a vehicle could not be stopped unless the driving affected other vehicles or caused a reasonable safety concern, see e.g. *S.A.S. v. State*, 884 So.2d 1167 (Fla. 2d DCA 2004). This reasoning was followed in *Hurd v. State*, 958 So.2d 600 (Fla.4th DCA 2007) stating:

> However, the failure to maintain a single lane alone cannot establish probable cause when the action is done safely. *See, e.g., Crooks v. State*, 710 So. 2d 1041 (Fla. 2d DCA 1998) (no violation where evidence showed driving did not place any other vehicles in danger); *Jordan v. State, 831 So. 2d 1241 (Fla. 5th DCA 2002).*

In this instance there was no evidence that the manner in which Futch emerged from the parking lot affected any pedestrians or vehicle or caused any type of safety concern. The Florida Constitution requires that a penal statute be narrowly construed in favor to the citizen, s*ee DHSMV v. Meck*, 468 So.2d 993 (Fla. 5th DCA 1984), (A- 54-56), *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) and *Maxwell v. State*, 110 So.3d 958 (Fla. 4th DCA 2013), (A-57-60), stating:

> Because both of these competing interpretations are plausible, and persons of reasonable intelligence could differ on which was intended, the statute is at the very least ambiguous and "must be strictly construed most favorably to the accused. "*Polite v. State*, 973 So. 2d 1107, 1112 (Fla. 2007).
>
> As we said earlier, our task is not to find which of these reasonable constructions was in fact intended by the Legislature. Our role is simply to determine whether the statute is susceptible to a construction which would place Appellant's conduct beyond its reach, thereby implicating the Rule of Lenity. *See* § 775.021(1), Fla. Stat. (2008). We hold that it is. The trial court's judgment of conviction is reversed.
>
> (Emphasis supplied.)

As in *Meck*, supra the driver's handbook is consistent with the interpretation suggested by the *Futch* stating:

> 5.22- Driveways
>
> Drivers entering and exiting a road from a driveway, alley or roadside should yield to vehicles already on the main road and bicyclists and pedestrians on the sidewalk, shared use path or bike lanes.
>
> (A-69) (T- 11)

If the statute is narrowly construed then Futch's act of exiting a parking lot without stopping would not be a violation. The record establishes that the affidavit was facially insufficient to establish a lawful stop in several areas, and consistent with *Dobrin* and *Roberts*, the administrative suspension should be quashed.

CONCLUSION

It is respectfully requested that this honorable court quash the ruling of the Fifth District in this cause for the reasons set out herein. Whether a circuit court can provide meaningful relief by directing invalidation of a suspension based upon a substantial due process violation is a question of great public importance. It is fundamentally unfair to have a system where a right to judicial review is provided by the applicable statute and the Florida Constitution but as applied judicial review is frequently not available until after the entire suspension period has expired.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed in Times New Roman 14.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished via e-mail to Jason Helfant, Esquire, Department of Highway Safety and Motor Vehicles, Department of Highway Safety and Motor Vehicles at jasonhelfant@flhsmv.gov and alejandraperez@flhsmv.gov this 2nd day of July, 2015.

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