IN THE SUPREME COURT OF FLORIDA

NILS FUTCH,

Petitioner,

vs.

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

DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this Answer Brief, Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department" or "Respondent." Petitioner, Nils Futch, will be referred to as "Petitioner." References to the record on appeal will be made by (R.____). References to the transcript with be made by (T.____). References to Futch's Appendix will be made by (A.____).

ISSUES ON APPEAL

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

II. THE CIRCUIT COURT COMMITTED A MISCARRIAGE OF JUSTICE BY APPLYING THE INCORRECT REMEDY.

1. **The Petitioner's administrative hearing was timey held.**
2. **The Petitioner's driver's license suspension is not moot.**

III. THE DEPARTMENT'S ORDER IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE AND FACTS

On March 14, 2013, at approximately 7:48 p.m., Officer Davila of the Port Orange Police Department observed the Petitioner in actual physical control of his motorcycle when he failed to stop before entering the roadway from a business parking lot called the Roadside Tavern. (R. 40). A traffic stop was conducted by Officer Davila. Upon making contact with the Petitioner, the officer observed that the Petitioner had an odor of an alcoholic beverage on his breath, bloodshot and watery eyes, slow and slurred speech, and he swayed while standing. (R. 41). The Petitioner also had difficulty locating the documents requested. (R. 41). Officer Davila then arrested the Petitioner for DUI. The Petitioner was then read Implied Consent warnings, and he unlawfully refused to submit to the breath test. (R. 40-41).

The Petitioner's driving privilege was administratively suspended for refusing to submit to a breath test. He then requested an administrative formal review hearing. At his hearing, the Petitioner attempted to introduce the testimony of Andy Cospito into the administrative proceeding as an expert witness. (T. 14-18). The hearing officer conducted *voir dire* of the proffered expert and determined that the witness was not presently a law enforcement officer or a credentialed breath test operator; and that the witness was not present during any

portion of Respondent's traffic stop, the refusal to submit to field sobriety testing, the DUI arrest or refusal to submit to breath-alcohol testing. (T. 15).

The hearing officer then afforded Respondent two opportunities to demonstrate the relevance of the witness to the limited issues for the hearing officer's consideration in an administrative refusal suspension review hearing. (T. 16-17). Based on the proffered testimony, the hearing officer determined that the non-fact witness's testimony would not be relevant to the issues presented in the administrative hearing and refused to allow the witness to testify. (T. 18).

The hearing officer subsequently reviewed the record documents and based on her review of the records, the hearing officer made the following factual findings:

> Officer Davila of the Port Orange Police Department observed Mr. Nils Landon Futch in actual physical control of his motorcycle when he failed to yield before entering the roadway from a business parking lot. Officer Davila also observed Mr. Futch swerve around other motorists on the roadway. Officer Davila activated his emergency lights and stopped the driver. Officer Davila made contact with Mr. Futch.
>
> While speaking with Mr. Futch, Officer Davila noticed the following signs of impairment: Mr. Futch stumbled getting off of his motorcycle. An odor of an alcoholic beverage coming from Mr. Futch's breath and his speech was slow and slurred as he spoke. His eyes were bloodshot and watery. Mr. Futch had difficulty

> locating the documents the officer requested. He swayed while standing.
>
> Officer Davila asked Mr. Futch to participate in the Field Sobriety Exercises. Mr. Futch told the officer he would not and he only had three beers. Mr. Futch also told the officer he has a CDL and that the officers could follow him home. Officer Davila placed Mr. Futch under arrest for driving under the influence and transported him to the Port Orange Police Department. Officer Davila read Mr. Futch the Implied Consent Warnings. Mr. Futch refused to provide any breath alcohol samples. Mr. Futch's driving privilege was suspended for one year for refusing to submit to a breath alcohol test. Based on the foregoing, I find the petitioner was placed under lawful arrest for DUI. (R. 77).

Based on these factual findings, the hearing officer determined that the record documents contained competent substantial evidence to support a determination that it was more likely than not that the Petitioner was driving a motor vehicle while under the influence of alcohol, he was lawfully arrested, and refused the arresting officer's request for breath-alcohol testing after having been advised of implied consent. The police officer's suspension was then sustained. The Petitioner then appealed this decision to the circuit court through a petition for writ of certiorari. (R. 79). The Department filed its response to the circuit court's order to show cause. On September 3, 2013, the circuit court granted the Petitioner's petition. (R. 185). The circuit court determined that based on not

allowing Mr. Cospito to testify, "...there is no question that the [Respondent] has not been accorded procedural due process and therefore the decision of the hearing officer cannot stand." (R. 185). The circuit court held that by failing to allow the Petitioner to present the testimony of his non-fact witness in the administrative hearing, "[t]he constitution was turned on its head in violation of the Fourth and Fourteenth Amendments." (R. 185). The circuit court then considered the proper remedy to be afforded as a result of the evidentiary error. The circuit court quashed the hearing officer's order affirming the administrative refusal suspension and ordered that the Department "forthwith set aside the administrative suspension and reinstate Respondent's driving privilege." (R.185). The Department then sought timely second-tier certiorari review of the circuit court's order. (R. 1-258). The Fifth District Court reversed the circuit court's decision holding that the proper remedy in this case was to remand the case for a new hearing and not simply quash and invalidate the hearing officer's decision. (R. 493-502). The Petitioner now appeals that decision.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal appropriately exercised its discretion and granted certiorari relief where the circuit court violated a clearly established principle of law resulting in a miscarriage of justice when it concluded that the circuit court applied the wrong law by ordering the Department to invalidate the Petitioner's administrative driver's license suspension when the proper remedy would have been to remand the case for a new hearing. Applying the wrong law is a violation of the essential requirements of the law that results in a miscarriage of justice to the Department and to the citizens of the State of Florida. Quashing the administrative order under review and remanding the matter for a new administrative hearing was the only proper remedy for the circuit court below when it determined that there was an evidentiary error, or a due process violation, or a violation of the essential requirements of the law by the Department in the administrative driver's license suspension review hearing.

Despite the fact that the Petitioner's administrative DUI driver's license suspension may have expired, this does not make his underlying driver's license suspension moot. Even after his commercial driver's license suspension or disqualification expires, the suspension remains on the Petitioner's Florida driving record for seventy-five (75) years. Thus, the question of whether he should serve

the suspension period may be moot, but whether the suspension should remain on his driving record is still at issue. If the Petitioner's suspension or disqualification remains on his record, his next DUI or refusal to submit to a lawful breath test will be considered his second. Both State and Federal law provides for longer administrative penalties for each additional DUI as well as prohibitions against issuing the driver a restricted driver's license. *See*, §§ 322.2615(8)(a) and (b), 322.271(2)(a), 322.264(7)(b), 322.264(8) Fla. Stat. (2014).

Apart from the evidentiary error below, it could hardly be argued by the Petitioner that the written record, including all arrest reports, lack competent and substantial evidence that the Petitioner was not lawfully stopped and arrested for DUI and that he unlawfully refused a breath-test. Nor could the Petitioner claim that he did not fail to stop his motorcycle prior to entering onto Nova Road from the Roadside Tavern's parking lot. The Petitioner clearly violated §§ 316.193 and 316.125(2), Fla. Stat. (2014), which resulted in a lawful stop and arrest for DUI. The Petitioner had no legal reason to refuse a lawful breath test, which resulted in the suspension of his driver's licenses and disqualification of his commercial driver's license.

ARGUMENT

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

The Fifth District Court of Appeal correctly quashed the circuit court's order overturning the suspension of Petitioner's driving privilege. Contrary to the Petitioner's assertion, the Department submits that the Fifth District Court of Appeal did not grant the Department's writ of certiorari because the circuit court misapplied the correct law. Instead, the Fifth District granted the writ because the circuit court applied the wrong law when it ordered the Department to invalidate the Petitioner's administrative driver's license suspension when the proper remedy would have been to remand the case for a new hearing. Applying the wrong law is a violation of the essential requirements of the law that results in a miscarriage of justice to the Department and to the citizens of the State of Florida.

Second-tier certiorari by the Fifth District Court of Appeal was appropriate at least on this ground, because if the district court failed to act, the Seventh Judicial Circuit Court will be able to invalidate every administrative driver's license suspension in Volusia County where there was an evidentiary error below and order the Department to issue the driver an unrestricted driver's license where

the circuit court has no authority to do so. *See Dep't of Highway Safety and Motor Vehicles v. Saxlehner*, 96 So. 3d 1002, 1007 (Fla. 3d DCA 2012). *See also Klinker v. Dep't of Highway Safety and Motor Vehicles*, 118 So. 3d 835 (Fla. 5th DCA 2013), *review denied,* 123 So. 3d 558 (Fla. 2013) (holding that circuit court errors in administrative orders result in a miscarriage of justice requiring certiorari relief because circuit court orders have precedential value in the circuit courts and the circuit courts apply the same error to numerous other administrative proceedings involving the suspension of driver's licenses). *Id.* at 836, *citing Dep't of Highway Safety and Motor Vehicles v. Alliston,* 813 So. 2d 141, 145 (Fla. 2d DCA 2002).

In *Saxlehner*, 96 So. 3d at 1008, the Third District held:

> the circuit court applied the incorrect statute, and failed to apply the correct statute and administrative regulation, resulting in a departure from clearly established law. This error is capable of repetition in other cases, and would continue to deprive the Department of its ability to sustain a driver's license suspension based upon evidence which is properly admitted and legally sufficient under the existing regulatory scheme. Because the circuit court's decision "could affect many other administrative proceedings involving the suspension of drivers' licenses," *Department of Highway Safety & Motor Vehicles v. Anthol,* 742 So. 2d 813, 813 (Fla. 2d DCA 1999), we

> conclude that the error is "sufficiently egregious or fundamental to fall within the limited scope" of our second-tier certiorari jurisdiction. *See, Kaklamanos,* 843 So. 2d at 890.

The Department submits that quashing the administrative order under review and remanding the matter for a new administrative hearing was the only proper remedy for the circuit court below when it determined that there was an evidentiary error, or a due process violation, or a violation of the essential requirements of the law by the Department in the administrative driver's license suspension review hearing. In *Dodson v. Dep't of Highway Safety and Motor Vehicles*, 120 So. 3d 69 (Fla. 1st DCA 2013), the First District Court of Appeal also held that the proper remedy for a due process violation, an evidentiary violation, or a violation of the essential requirements of the administrative review statute is for the circuit court to quash the administrative order and remand the matter to the hearing officer for a new hearing that meets the essential requirements of the law. *See also Dep't of Highway Safety and Motor Vehicles v. Glor*, 120 So. 3d 69 (Fla. 1st DCA 2013); *Dep't of Highway Safety and Motor Vehicles v. Chamizo*, 753 So. 2d 749, 752 (Fla. 3d DCA 2000) (Where the hearing officer makes a harmful trial error, the remedy is to send the matter back for a new hearing unless error is harmless then the circuit court should affirm).

A similar fact pattern was also addressed by the Fifth District in *Lillyman v. Dep't of Highway Safety and Motor Vehicles*, 645 So. 2d 113 (Fla. 5th DCA 1994), where like here, the hearing officer committed an error in limiting cross-examination on a relevant matter and refusing to allow a proffer, and the circuit court granted the petition and remanded the case for further proceedings consistent with its opinion. Mr. Lillyman sought certiorari review claiming that the circuit court departed from the essential requirements of law in remanding for further proceedings. The Fifth District held in *Lillyman* that "when an evidentiary error is made in an administrative hearing, the remedy is to remand for further proceedings. . . Petitioner is not entitled to dismissal of the license revocation proceeding." *See also Dep't of Highway Safety and Motor Vehicles v. Icaza*, 37 So. 3d 309 (Fla. 5th DCA 2010); *Tynan v. Dep't of Highway Safety and Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005); *Arenas v. Dep't of Highway Safety and Motor Vehicles*, 90 So. 3d 828 (Fla. 2d DCA 2012); *Rudolph v. Dep't of Highway Safety and Motor Vehicles*, 107 So. 3d 1129 (Fla. 2d DCA 2012); *Roark v. Dep't of Highway Safety and Motor Vehicles*, 107 So. 3d 1131 (Fla. 2d DCA 2012); *Pankau v. Dep't of Highway Safety and Motor Vehicles*, 91 So. 3d 923 (Fla. 2d DCA 2012); *Ferrei v. Dep't of Highway Safety and Motor Vehicles*, 91 So. 3d 920 (Fla. 2d DCA 2012); *Gonzalez v. Dep't of Highway Safety and Motor Vehicles*,

91 So. 3d 924 (Fla. 2d DCA 2012); and *Dep't of Highway Safety and Motor Vehicles v. Corcoran*, 133 So. 2d 616 (Fla. 5th DCA 2014).

All of the cases cited above clearly recognize that jeopardy does not attach to an administrative suspension because an administrative suspension is not a criminal matter. In an analogous situation, albeit under another statute, the Second District Court of Appeal stated:

> The Fifth Amendment's Double Jeopardy Clause precludes multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Relying on *Halper*, the petitioners argued that the purpose of the roadside license suspension is punitive and so jeopardy attached before the state prosecuted the criminal charges of driving under the influence.
>
> In *Halper*, the Supreme Court addressed under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause. The Court held that in order to uphold the civil sanction as remedial the sanction had to bear a rational relation to the goal of compensating the government for its actual loss.
>
> A driver's license suspension for refusal to take a chemical test is not remedial in the sense meant by the *Halper* decision. *See Ellis v. Pierce*, 230 Cal. App. 3d 1557, 282 Cal. Rptr. 93 (Cal. App. 1 Dist., 1991). However, neither is it punitive. In Florida, it is clear that the purpose of the statute providing for revocation of a

> driver's license upon conviction of a licensee for driving while intoxicated is to provide an administrative remedy for public protection and not for punishment of the offender. *Smith v. City of Gainesville*, 93 So. 2d 105 (Fla. 1957).

Freeman v. State, 611 So. 2d 1260, 1261 (Fla. 2d DCA 1992).

As a result, the circuit courts are limited to quashing the administrative order under review, and the circuit court *must* remand the matter to the Department in order to afford the Department an opportunity to remedy the administrative error. Thus, quashing the administrative order under review and remanding this matter for a new administrative hearing is the only proper remedy if the appellate court determines there has been an evidentiary error, a due process violation, or a violation of the essential requirements of the law by the Department in the administrative driver's license suspension review hearing. *See, Lillyman, Icaza, Tynan, Dodson.*

The law is equally well-settled that when conducting certiorari review of an administrative order, the circuit court is not permitted to direct the administrative agency to take any particular action on remand. *See Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838 (Fla. 2001), holding that:

> [o]n certiorari the appellate court only determines whether or not the tribunal or administrative authority

> whose order or judgment is to be reviewed has in the rendition of such order or judgment departed from the essential requirements of the law and upon that determination either to quash the writ of certiorari or to quash the order reviewed.
>
> When the order is quashed, as it was in this case, *it leaves the subject matter, that is, the controversy pending before the tribunal, commission, or administrative authority, as if no order or judgment had been entered and the parties stand upon the pleadings* and proof as it existed when the order was made with the rights of all parties to proceed further as they may be advised to protect or obtain the enjoyment of their rights under the law in the same manner and to the same extent which they might have proceeded had the order reviewed not been entered.
>
> The appellate court has no power in exercising its jurisdiction in certiorari *to enter a judgment on the merits of the controversy* under consideration nor to direct the respondent to enter any particular order or judgment.

Id. at 787 So. 2d 838, 843(emphasis supplied). *See Dodson*, 120 So. 3d at 69, holding that "when the appellate court is considering a petition for writ of certiorari, it has only two options—deny or grant the petition, and quash the order at which the petition is directed." *Id.* at 69, *citing, Clay Cnty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1180-81 (Fla. 1st DCA 2007). Since this is an administrative proceeding, and as such, if the appellate court determines there has been error, the appellate court is limited to quashing the administrative order under review and remanding the matter to the Department to afford the Department an opportunity to remedy the error.

Florida law also states that the issuance of driver's license is an administrative function within the sole purview of the Department over which the circuit court has no discretion. *Dep't of Highway Safety and Motor Vehicles v. Parsons*, 719 So. 2d 339 (Fla. 5th DCA 1998) (*citing Dep't of Highway Safety and Motor Vehicles v. Sinclair*, 697 So. 2d 230 (Fla. 4th DCA 1997) (A Circuit Court lacks authority to order the Department to issue a restricted driver's license to an individual). *See also Dep't of Highway Safety and Motor Vehicles v. Grapski*, 696 So. 2d 950 (Fla. 4th DCA 1997). Thus, in a case where an appellate court grants a petition for writ of certiorari on behalf of a driver challenging the administrative final order of a hearing officer, the circuit court must remand the case for the Department to take appropriate actions of either issuing a new administrative final order invalidating the driver's license suspension, or rescheduling a new hearing to correct a procedural or evidentiary error made during the previous hearing.

The Department submits that the term "further proceedings" is not necessarily limited to a new hearing *de novo*. Recently, in *Dep't of Highway Safety and Motor Vehicles v. Azbell*, 154 So. 3d 461 (Fla. 5th DCA 2015), the Fifth District further clarified the *Futch* opinion and held that where a hearing officer makes an erroneous evidentiary ruling that denied the licensee due process, the court should direct the trial court to order a new hearing. *Id.* at 462. The Fifth

District further held in *Azbell* that if the circuit court determines that the Department fails to meet its evidentiary burden then a new hearing should not be held by the Department. *Id.* In the instant case, the Fifth District agreed with Futch's argument and the circuit court's order and determined that the hearing officer below made an erroneous evidentiary ruling that denied the Petitioner due process. However, the Fifth District correctly held that the lawful remedy for this erroneous evidentiary ruling was to remand the case for a new hearing, and not to order an invalidation of Futch's DUI administrative suspension.

In any situation where the appellate court grants a writ of certiorari, the appellate court must always remand the case back to the lower tribunal for further proceedings consistent with the opinion. Depending on the reason for the remand, that could equate to a direction to the Department to either hold a new hearing, or to issue a new final order invalidating the driver's DUI administrative suspension. Otherwise, the appellate court's decision and mandate would be ineffectual. In this case, the Petitioner's administrative DUI suspension will remain on the Petitioner's driver's record unless and until the Department's hearing officer enters an order that invalidates the administrative suspension. *See* § 322.2615(8), Fla. Stat. (2014). The Legislature vested the Department's hearing officer *alone* with the responsibility for sustaining or invalidating the administrative suspension, and the

circuit courts simply cannot perform the Department's functions as an executive agency of the State and usurp the hearing officer's responsibilities for their own when conducting administrative review.

In *Veiner v. Veiner*, 459 So. 2d 381 (Fla. 3d DCA 1984), the Third District held that,

> it is settled that upon remand with general directions for further proceedings, a trial judge is vested with broad discretion in handling or directing the course of the cause thereafter. *City of Pensacola v. Capital Realty Holding Co., Inc.*, 417 So. 2d 687, 688 (Fla. 1st DCA 1982); *St. Joe Paper Co. v. Adkinson,* 413 So. 2d 107 (Fla. 1st DCA 1982). The trial court reacquired jurisdiction over the cause upon the issuance of our mandate. *Murphy v. Murphy,* 378 So. 2d 27 (Fla. 3d DCA 1979). Obviously it had to do so or otherwise our mandate would have been an exercise in futility. The trial court clearly had jurisdiction on remand to correct its error. It had a number of options for doing so.

Id. at 383.

Thus, under *Veiner*, it is only logical to conclude that without a remand for further proceedings in every case in which the circuit court grants a writ of certiorari against the Department, the Department cannot reacquire jurisdiction to correct the error it made, including the removal of the DUI suspension placed on the Petitioner's driver's license record, and the mandate issued would have been

done in futility. *See Lias v. Anderson & Shah Roofing, Inc.*, 867 So. 2d 599 (Fla. 1st DCA 2004). Contrary to the circuit court's order, the State's strong safety interests in protecting its citizens and the motoring public from holders of commercial driver's licenses who choose to drive while using intoxicants are simply not served by invalidating an administrative suspension based on an error subsequently made by the Department's hearing officer or, for that matter, by any delay in the circuit courts in ruling on the first-tier petition. This is especially true where, as here, the fact that the motorist who has a commercial driver's license was driving while intoxicated, and refused to submit to breath-testing is not even in dispute. The circuit court violated the essential requirements of the law and the process due to be afforded to the Department when it failed to conduct a harmless error analysis in its order or remand for further proceedings.

II. THE CIRCUIT COURT COMMITTED A MISCARRIAGE OF JUSTICE BY APPLYING THE INCORRECT REMEDY.

The Petitioner next argues that by committing an evidentiary error, he was denied a prompt and meaningful hearing and the circuit court correctly invalidated his administrative driver's license suspension. He also claims that his hearing was "fundamentally unfair" and that a remand would not be a "meaningful" remedy. In support of his assertions, the Petitioner assails the Fifth District's decision to

remand his case for a new hearing with various accusations against the Department, the administrative hearing officers, and essentially the lawfulness of all administrative hearings held under section 322.2615, of the Florida Statutes. In fact, most of the arguments made throughout Issue II appear to be intended to appeal to this Court's sentiment rather than a discussion regarding any legal conflict in the district courts of this State. [1]

As discussed above in Issue I, it is well-established law throughout this State that the only lawful remedy for an evidentiary error is to remand the case for a new hearing. Any delay in the full reinstatement of his driving privilege caused by the remand is not considered a due process violation. In fact, the purpose of the remanded hearing is to provide the driver additional due process in his post deprivation challenge. In *Dep't of Highway Safety and Motor Vehicles v. Degrossi*, 680 So. 2d 1093 (Fla. 3d DCA 1996), the Third District Court of Appeal addressed the question of whether a court has the authority to stay an administrative license suspension pending appellate review. The Third District held that a court does not have the authority to stay an administrative license suspension pending an appeal.

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1. A petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of § 322.2615, Fla. Stat. *See, City of Miami v. Sinopoli*, 869 So. 2d 580 (Fla. 3d DCA 2004), *citing, Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195 (Fla. 2003)(finding that the constitutionality of the ordinances must be determined in *original* proceedings before the circuit court. *Id.*

In its holding, the court stated that "[t]he risk to an individual of an erroneous suspension is far outweighed by the state's compelling interest in removing intoxicated drivers from public roadways." *Id.* at 1096. The Third District went on to explain the rationale of its decision as follows:

> Simply, the trial court lacks jurisdiction to stay an administrative revocation which is not part of the punishment involved in the criminal conviction. Because driving is a privilege, it follows that revocation of that privilege does not constitute punishment. Rather, the revocation or suspension of this conditional privilege merely returns the parties to their prior non-privileged status. Since mandatory suspension is not a criminal penalty, but instead a civil sanction unrelated to an appeal of the criminal conviction, the trial court does not have jurisdiction to enter a stay.

Degrossi at 1095-1096 (footnote omitted).

It is a well-established principle that driving is a privilege, not a right. *Smith v. City of Gainesville*, 93 So. 2d 105 (Fla. 1957). Because driving is not a right, as with many other activities, the government has the power to regulate the privilege to drive subject to the condition that the licensee will perform the activity safely and competently. *See, Thornhill v. Kirkman*, 62 So. 2d 740 (Fla. 1953). This includes the power to revoke, suspend, or deny a license if the licensee fails to comply with certain conditions and fails to act responsibly. *See, Degrossi*, 680 So.

2d at 1094; *see also* § 322.271, Fla. Stat. (2014). In *Lite v. State*, 617 So. 2d 1058 (Fla. 1993), this Court held that there is no property interest in possessing a driver license, and that driving is a privilege that can be taken away or encumbered as a means of meeting a legitimate legislative goal. The Legislature declared its intent in § 322.263, Fla. Stat. (2014), which provides, in relevant part:

> It is declared to be the legislative intent to:
>
> (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state.
>
> (2) Deny the privilege of operating a motor vehicle on public highways to persons who, by their conduct and record have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies.

Id.

Chapter 322, Florida Statutes, should be construed so that the greatest force and effect may be given to the promotion of public safety. This is expressed in § 322.42, Fla. Stat., and was recognized in *Dep't of Highway Safety and Motor Vehicles v. Bender*, 497 So. 2d 1332, 1334 (Fla. 2d DCA 1986).

Notwithstanding the above, the Department submits that the constitutionality of § 322.2615, Fla. Stat., was addressed in *Dep't of Highway Safety and Motor Vehicles v. Stewart and Henry*, 625 So. 2d 123 (Fla. 5th DCA 1993), whereupon

the Fifth District upheld the constitutionality of the procedures set forth in section 322.2615 "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 respondents in these cases suffered no such deprivation." *Id.* at 124. In *Mackey v. Montrym*, 443 U.S. 1 (1979), the United States Supreme Court found, as follows:

> The Due Process Clause simply does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations. Thus, even though our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error, the 'ordinary principle' established by our prior decisions is that 'something less than an evidentiary hearing is sufficient prior to adverse administrative action.' And, when prompt post deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.
>
> *Id.*

Furthermore, in *Conahan v. Dep't of Highway Safety and Motor Vehicles*, 619 So. 2d 988 (Fla. 5th DCA 1993), the Fifth District Court of Appeal noted that in similar proceedings held pursuant to § 322.2615, Fla. Stat., make it clear that the interest in a driver's license is a privilege, that the risk of an erroneous deprivation

is slight in light of the statutory requirements, and that the public interest in highway safety is great. Further, the admissibility requirements for administrative review of license suspensions are more relaxed than the admissibility requirements in a civil or criminal trial. *See, Dep't of Highway Safety & Motor Vehicles v. Anthol*, 742 So. 2d 813 (Fla. 2d DCA 1999). Here, administrative due process has been afforded when the suspended motorist receives notice of the administrative suspension, a timely scheduled administrative review hearing and the subpoenas that the suspended motorist requests for the fact witnesses identified in the record documents. *See, Dep't of Highway Safety and Motor Vehicles v. Corcoran,* 133 So. 2d 616 (Fla. 5th DCA 2014); *Klinker,* 118 So. 3d at 835.

The Department further contends that the mere fact that hearings held pursuant § 322.2615, Fla. Stat., are held before hearing officers employed by the Department does not, in of itself, make the administrative hearings either unfair or not meaningful. This concern was recognized and addressed by this Court in *Dusseau v. Metropolitan Dade County Bd. of County Comm'rs,* 794 So. 2d 1270 (Fla. 2001), whereupon this Court explained the competent substantial evidence standard in first tier certiorari review thusly:

> [T]he 'competent substantial evidence' standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations

> and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the **agency's superior technical expertise and special vantage point in such matters.** The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience-and is inherently unsuited-to sit as a roving "super agency" with plenary oversight in such matters. (emphasis added).

Dusseau, 794 So. 2d at 1275-76.

In *Stewart and Henry*, 625 So. 2d at 124, the Fifth District also examined an argument alleging that since the hearing officers are employees of the Department it was therefore unfair to have these hearing officers preside over cases brought by the Florida Highway Patrol, whose testimony and paperwork they evaluate, since in essence, they are fellow employees and are all employed by the Department. The Fifth District held that this Department-employed hearing officer procedure is not inherently unfair in a constitutional sense. The court also recognized that in other jurisdictions procedures similar those objected to in the case, have been upheld. *Citing, Butler v. Dep't of Pub. Safety and Corrections*, 609 So. 2d 790 (La. 1992); *Snelgrove v. Dep't of Highway Safety and Motor Vehicles*, 194 Cal. App.3d 1364, 240 Cal. Rptr. 281 (1987).

Contrary to the Petitioner's assertions about all of the Department's hearing officers inability to be impartial, numerous courts throughout the State have given great deference to the hearing officer's judgment and ability as fact finders. In *Dep't of Highway Safety and Motor Vehicles v. Marshall*, 848 So. 2d 482 (Fla. 5th DCA 2003), the Fifth District held that a hearing officer is not even required to believe unrebutted testimony. The Fifth District held, as follows:

> The only evidence that Marshall was misled was her own self-serving testimony, which the hearing officer rejected. *Cf. Department of Highway Safety v. Dean*, 662 So.2d 371 (Fla. 5th DCA 1995) (finder of fact is not required to believe unrebutted testimony of witness). Although Marshall had the opportunity to subpoena witnesses, she did not subpoena Officer MacDowell to confirm the statements she alleges the officer made to her.

Id. at 486.

In *Dep't of Highway Safety and Motor Vehicles v. Luttrell*, 983 So. 2d 1215 (Fla. 5th DCA 2008), the Fifth District again held that in this type of administrative hearing, the hearing officer is not required to believe the testimony of any witness, even if unrebutted. The Fifth District further held in *Luttrell* that "to accept the position that a hearing officer was required to accept the unrebutted testimony of a licensee (or any other witness) would eviscerate the statute. As we observed in

Marshall and *Dean*[2] the hearing officer was free to accept or reject the licensee's testimony." *Id.* at 1217. (citation omitted). The hearing officer may give more weight to the documentary evidence provided by law enforcement while giving less weight or ascribing less credibility to the uncorroborated and self-serving testimony of the suspended driver. This is the duty and privilege of the hearing officer as fact finder.

The Petitioner also assails the fact that Department hearing officers are not attorneys. First, there is nothing in the record that actually indicates hearing officer Bradeen's level of education. Second, no matter her level of education, the Petitioner fails to cite to anywhere in the record in which this hearing officer, who is an Administrative Judge in this state, was either biased against him, unable to understand the evidence before her or the arguments made by the Petitioner's counsel. The simple fact that the hearing officer committed an evidentiary error or disagreed with the Petitioner's argument does not make her unqualified to judge his case.

The Petitioner disregards *Gurry v. Dep't of Highway Safety and Motor Vehicles*, 902 So. 2d 881 (Fla. 5th DCA 2005), whereupon the Fifth District held that "we also agree with the circuit court that Gurry's final argument that the

2. *Dep't of Highway Safety and Motor Vehicles v. Dean*, 662 So. 2d 371 (Fla. 5th DCA 1995).

hearing officer had to be a lawyer is without merit. There is no statutory or constitutional requirement, that we are aware of, that requires hearing officers for the Department be attorneys." *Id.* He also disregards *Dep't of Highway Safety and Motor Vehicles v. Tidey*, 946 So. 2d 1223 (Fla. 4th DCA 2007), in which the district court held that "section 322.2615(6)(b), Florida Statutes, authorizes the department to conduct formal review hearings before hearing officers 'employed by the department,' and in *Dep't of Highway Safety and Motor Vehicles v. Griffin*[3], 909 So. 2d 538 (Fla. 4th DCA 2005), "we held that the department's use of non-lawyer employees as hearing officers passes constitutional muster." *Id.* at 541. Furthermore, both the United States and Florida Supreme Courts have spoken to the issue of the requirement of due process in relation to the qualifications of the fact finder. "Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000), *quoting*, *Parham v. J.R.*, 442 U.S. 584, 606, (1979).

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3. In *Griffin,* , the Fourth District specifically declared "that the procedural scheme employed by the Department of using non-lawyer hearing officers does not run afoul of the state or federal constitutions nor the due process rights of the motorists." *Griffin*, 909 So. 2d at 541

1. The Petitioner's administrative hearing was timey held.

Although the Petitioner cites to specific subsections within §§ 322.64 and 322.2615, Fla. Stat. (2014), which specifically mandate when an administrative suspension or disqualification shall be invalidated by the Department, nowhere in those same statutes has the Legislature required that the Petitioner's suspension be invalidated for an evidentiary error. Contrary to the Petitioner's assertions, the subsections found within §§ 322.64 and 322.2615 that mandate invalidation simply do not apply to the facts of this case where his administrative hearing was timely held and no witnesses failed to appear. While §§ 322.64(6) and 322.2615(6), Fla. Stat., do require the Department to *schedule* a hearing to be held within 30 days of a driver's request for one, it does not require that such hearing be *completed* within that time. Nor do the statutes prohibit this case from being remanded for a new hearing.

The Petitioner fails to cite a single case, statute or rule that says that administrative hearings held pursuant to Chapter 322 cannot be continued past 30 days of the driver's request. In fact, both sections 322.2615(9) and 322.64(9) Florida Statutes, expressly provide that the Department may continue a formal review hearing on its own initiative, so long as it issues the driver a temporary driving permit valid until the hearing is conducted. The following is the pertinent language of § 322.2615(9), Fla. Stat.:

A request for a formal review hearing or an informal review hearing shall not stay the suspension of the person's driver license. If the department fails to schedule the formal review hearing within 30 days after receipt of the request therefor, the department shall invalidate the suspension. **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 that shall be valid until the hearing is conducted if the person is otherwise eligible for the driving privilege. Such permit may not be issued to a person who sought and obtained a continuance of the hearing. (emphasis added).

Furthermore, Section 322.264(9), Fla. Stat., states:

(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 therefor, 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. (emphasis added).

Id.

The foregoing language reflects the legislature's recognition that formal review hearings may be continued beyond thirty days of a driver's request and that a continuation is not considered a due process violation. The statutes also provide that a request for a hearing "does not stay the suspension." Then, after requiring the Department to schedule a hearing within thirty days of the request, the statutes immediately provide that the Department may continue the hearing as long as the driver is granted a temporary driving permit. That condition, that drivers are allowed to drive pending the continuation of their hearings at the Department's initiative, reflects the Legislature's understanding that formal review hearings may be extended well beyond thirty days.

In the instant case, the Department did, in fact, schedule Petitioner's formal review pursuant to both statute and administrative rule. Petitioner's hearing was scheduled to be held within 30 days after the request was received and the department notified him of the date, time, and place. Because the formal review hearing was scheduled within the 30 days, invalidation of the suspension pursuant to sections 322.2615 or 322.64 is not applicable in the instant case.

The Petitioner's reliance on § 322.264(11), Fla. Stat., is also misplaced and unavailing. This section deals with the non-appearance of a subpoenaed witness. Though § 322.264(11), Fla. Stat., states that the suspension shall be set aside where

the arresting officer fails to appear, it is clear from the record in this matter that no witnesses "failed to appear," nor does the record reflect that the Petitioner objected to the non-appearance of any witnesses. Basically, the statute contemplates when the date of a hearing arrives and one of the enumerated subpoenaed witnesses simply fails to appear. This scenario did not occur in this case. Contrary to the Petitioner's argument, the statute does not require an invalidation for an evidentiary error during their testimony.

Furthermore, no part of §§ 322.2615 or 322.264, Fla. Stat., prohibits a subpoenaed arresting officer from requesting a continuance prior to an administrative hearing or states that their request for a continuance prior to a hearing will be considered a "failure to appear" requiring an invalidation of the suspension. In fact, both §§ 322.2615(6)(c) and 322.64(6)(c). Fla. Stat. (2014), specifically states that "the failure of a subpoenaed witness to appear at the formal review hearing is not grounds to invalidate the suspension." Accordingly, Petitioner's due process rights were satisfied.

Next, although there is no evidence that the Petitioner actually sought a stay of his license suspension in this case, any stay potentially sought by the Petitioner would circumvent the statutory process and thwart the intent and purpose of the

law. In 1953, this Court ruled on the validity of the Department's authority to summarily suspend a licensee.

> [W]e do not overlook the right and liberty of appellant to use the highways as guaranteed by the Bill of Rights. At the same time none of these liberties are absolutes but all may be regulated in the public interest. It would produce an intolerable situation on the public highways to subscribe to a theory that they could not be summarily regulated in the interest of the public. So long as summary regulations are reasonable and reasonably executed we will not disturb them.

Thornhill v. Kirkman, 62 So. 2d 740 (Fla. 1953).

Furthermore, Florida law expressly forbids a stay of the license suspension pending review. *See* §§ 322.2615(13), 322.28(5), and 322.272, Fla. Stat. It is the expressed intent of the Florida Legislature to prohibit suspended, revoked or canceled drivers from driving on the highways of this state while their appeals are pending.

> A court may not stay the administrative suspension of a driving privilege under s. 322.2615 or s. 322.2616 during judicial review of the departmental order that resulted in such suspension, *and a suspension or revocation of a driving privilege may not be stayed upon an appeal of the conviction or order that resulted in the suspension or revocation.*

§ 322.28(5), Fla. Stat. (2014).(emphasis added).

Courts have repeatedly held that § 322.28(5), Fla. Stat., prohibits a court from staying the administrative suspension of a driving privilege during judicial review of the order resulting in the suspension. *See, Dep't of Highway Safety and Motor Vehicles v. Begley*, 776 So. 2d 278 (Fla. 1st DCA 2000); *Dep't Of Highway Safety And Motor Vehicles v. Olivie*, 753 So. 2d 593 (Fla. 3d DCA 2000); *Dep't of Highway Safety and Motor Vehicles v. Peterson*, 754 So. 2d 156 (Fla. 2d DCA 2000); *Dep't of Highway Safety & Motor Vehicles v. DeGrossi*, 680 So. 2d 1093 (Fla. 3d DCA 1996); *Anderson v. Dep't of Highway Safety & Motor Vehicles*, 751 So. 2d 749 (Fla. 5th DCA 2000).

2. The Petitioner's driver's license suspension is not moot.

The Department submits that despite the fact that the Petitioner's administrative DUI driver's license suspension may have expired, this does not make his underlying driver's license suspension moot and review of the suspension meaningless. Even after his commercial driver's license suspension or disqualification expires, the suspension remains on the Petitioner's Florida driving record for seventy-five (75) years. Thus, the question of whether he should serve the suspension period may be moot, but whether the suspension should remain on his driving record is still at issue. Recently in *Gordon v. Dep't of Highway Safety*

and Motor Vehicles, 2015 WL 3609103 (Fla. 4th DCA June 10, 2015), the Fourth District addressed the same argument made by the Petitioner and held that:

> We disagree with the Second District that the validity of the license suspension is moot once the term of the suspension expires. As the Department notes, the license suspension has other consequences. A license suspension remains on a driving record for many years into the future. A future DUI or a refusal to take a breath test would call for consideration of the prior record, and the driver could face longer administrative penalties.

Id. at *3.

In this case, if the Petitioner's suspension or disqualification remains on his record, his next DUI or refusal to submit to a lawful breath test will be considered his second. Both State and Federal law provides for longer administrative penalties for each additional DUI as well as prohibitions against issuing the driver a restricted driver's license. *See* §§ 322.2615(8)(a) and (b), and 322.271(2)(a), 322.264(7)(b), 322.264(8) Fla. Stat. (2014). In fact, section 322.271(2)(a), states as follows:

> Except as provided in paragraph (c), the privilege of driving on a limited or restricted basis for business or employment use may not be granted to a person whose license is revoked pursuant to s. 322.28 or suspended pursuant to s. 322.2615 and who has been convicted of a violation of s. 316.193 two or more times or whose

> license has been suspended two or more times for refusal to submit to a test pursuant to s. 322.2615 or former s. 322.261.

Furthermore, §§ 322.2615(8)(a) and (b), state as follows:

> based on the determination of the hearing officer pursuant to subsection (7) for both informal hearings under subsection (4) and formal hearings under subsection (6), the department shall:
>
> (a) Sustain the suspension of the person's driving privilege for a period of 1 year for a first refusal, **or for a period of 18 months if the driving privilege of such person has been previously suspended** as a result of a refusal to submit to such tests, if the person refused to submit to a lawful breath, blood, or urine test. The suspension period commences on the date of issuance of the notice of suspension.
>
> (b) Sustain the suspension of the person's driving privilege for a period of 6 months for a blood-alcohol level or breath-alcohol level of 0.08 or higher, **or for a period of 1 year if the driving privilege of such person has been previously suspended** under this section as a result of driving with an unlawful alcohol level. The suspension period commences on the date of issuance of the notice of suspension.
>
> *Id.* (emphasis added).

The Department further submits that since the Petitioner was also driving on a commercial driver's license, under 49 CFR 383.51(b), a **second** DUI in a lifetime disqualifies the driver from ever having a commercial driver's license for life. This

applies to the entire range of DUI-related suspensions including a second *refusal* to give a breath sample. *See* 49 CFR 383.51(b). In fact, section 322.264(7)(b), states the scope of review for the suspension hearing of a commercial driving privilege and states as follows:

> (b) If the person was disqualified from operating a commercial motor vehicle for refusal to submit to a breath, blood, or urine test:
>
> 1. Whether the law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a commercial motor vehicle, or any motor vehicle if the driver holds a commercial driver license, in this state while he or she had any alcohol, chemical substances, or controlled substances in his or her body.
>
> 2. Whether the person refused to submit to the test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person was told that if he or she refused to submit to such test he or she would be disqualified from operating a commercial motor vehicle for a period of 1 year **or, if previously disqualified under this section, permanently.**
>
> *Id.* (emphasis added).

Under § 322.264(8) Fla. Stat., the Department is required to follow the penalties set forth under 49 C.F.R. s. 383.51, and permanently revoke and disqualify the commercial driver's license who refuses a breath test for a second

time. Section 322.264(8), Fla. Stat. states the following:

> (8) Based on the determination of the hearing officer pursuant to subsection (7) for both informal hearings under subsection (4) and formal hearings under subsection (6), the department shall sustain the disqualification for the time period described in 49 C.F.R. s. 383.51. The disqualification period commences on the date of the issuance of the notice of disqualification.
>
> *Id.*

Contrary to the Petitioner' assertions, the State has a strong safety and public policy interest in protecting its citizens and the motoring public from professional commercial drivers who are trusted to drive the largest vehicles on the road, who choose to drive while using intoxicants and then refuse to participate in a lawful breath test as required under law. Both State and Federal law provide harsher administrative penalties for commercial drivers like the Petitioner, who refuse to submit to a lawful breath test. Thus, the Petitioner's refusal to submit to the breath-test is not a moot issue as if it remains on his driving record, it may be used to increase his administrative penalties for any future refusals. The State's strong safety and public policy interests are not served by invalidating an administrative driver's license suspension based on an evidentiary error made by the Department's hearing officer.

As for the Petitioner's reliance on the mootness language in *McLaughlin v. Dep't of Highway Safety and Motor Vehicles*, 128 So. 3d 815 (Fla. 2d DCA 2012), the Department submits this language is non-binding dicta which is contravened by applicable decisions from this Court and the numerous other district court cases cited above. First, *McLaughlin* never said that a court is required to grant a petition for writ of certiorari if the underlying suspension has expired prior to its ruling. Second, *McLaughlin* only denies drivers, like the Petitioner, their right to due process as it would instead require all circuit courts to deny and dismiss their pending appeals if their administrative suspension had already expired, as well as prevent the Department from removing a suspension from their record if the court quashes the Department's final order of suspension. *See, Broward County,* 787 So. 2d at 844 (when order is quashed it leaves the controversy pending before the administrative tribunal as if no order were entered and the parties stand upon the pleadings and proof that existed when the order was made with rights to proceed further"). Here, the Petitioner has failed to show that he is entitled to any other relief in this case. Otherwise, his DUI suspension remains on his Florida driving record.

III. THE DEPARTMENT'S ORDER IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

Next, although the Fifth District never addressed the lawfulness of the Petitioner's underlying stop and arrest in the *Futch* opinion, the Petitioner contends that it was made in error because "there is a lack of competent, substantial evidence in the record to establish the warrantless stop was lawful." The Department submits that apart from the evidentiary error below (which will be corrected on remand), it could hardly be argued by the Petitioner that the written record including all arrest reports, lack competent and substantial evidence that he was lawfully stopped and arrested for DUI and that he unlawfully refused a lawful breath test. Those arrest reports cannot be rejected by the appellate court. *See Dep't of Highway Safety and Motor Vehicles v. Wiggins*, 151 So. 3d 457 (Fla. 1st DCA 2014), *review granted*, 2014 WL 725166 (Fla. Dec, 17, 2014) (granting the Department a second-tier writ of certiorari and quashing the Fourth Judicial Circuit Court order that granted a suspended motorist a writ of certiorari after the circuit court conducted a *de novo* review and reconsidered the lawfulness of the stop, explaining that when the circuit courts conduct administrative review they must 'put aside their correctness meters' and simply determine whether there is evidence in the record to *support* the factual findings in the administrative order).

The Petitioner all but concedes that he exited the Roadside Tavern's parking lot and entered onto Nova Road without stopping. Thus, it could hardly be argued by the Petitioner that he did not violate sections 316.193 and 316.125(2), Fla. Stat.

Section 316.125(2), Fla. Stat. plainly states that,

> 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 added).

According to the plain language of the statute, the Petitioner violated the law by not stopping prior to entering Nova Road when he emerged from a business. However, the Petitioner argues that the Roadside Tavern is not in a "business district," thus his actions were not in violation of this statute. The Petitioner is mistaken. The statute does not specifically state that the violation must be located in a "business district," only from a "business" or a "residence district."

Contrary to Petitioner's argument, the written record before the hearing officer, including Officer Davila's charging affidavit and Uniform Traffic Citation contained competent and substantial evidence for the hearing officer to conclude

that Petitioner was lawfully stopped for a traffic violation. An officer who observes a traffic violation has probable cause to initiate a traffic stop. *Whren v. U.S.*, 517 U.S. 806, 135 L.Ed. 2d 89, 116 S.Ct. 1769 (1996); *Holland v. State*, 696 So. 2d 757 (Fla. 1997). An officer's decision to stop an automobile is legal where the officer had probable cause to believe a traffic violation occurred. *Scott v. State*, 710 So. 2d 1378 (Fla. 5th DCA 1998). Officer Davila's charging affidavit established that he observed Petitioner fail to stop when he exited the business parking lot of the Roadside Tavern prior to entering Nova Road. That is all that is required to be charged under section 316.125(2), Fla Stat. Based on the foregoing, Officer Davila had the lawful authority to stop Petitioner for a violation of section 316.125, Fla. Stat. for improper entering a highway from a *business*. Petitioner was properly issued a Florida Uniform Traffic Citation for a violation of section 316.125, Fla. Stat.

Furthermore, the hearing officer must only determine whether the preponderance of the evidence established that the officer had a founded suspicion that the Petitioner committed the traffic infraction in order to justify the stop and thus establish a lawful arrest. *See, Dep't of Highway Safety and Motor Vehicles v. DeShong*, 603 So. 2d 1349 (Fla. 2d DCA 1992). The hearing officer does not have to determine whether or not a driver was in fact violating § 316.125, even though the record clearly establishes that he did.

The appellate court may not simply reject the sworn statements made by law enforcement in their sworn documents. In *Broward County*, 787 So. 2d at 845, this Court analyzed a similar fact pattern as in this case, and held:

> Rather than limiting its review of the Commission decision to the three "first-tier" factors set forth in *Vaillant,* the court embarked on an independent review of the plat application and made its own factual finding based on the cold record (i.e., the court determined that G.B.V. had misrepresented its position on flex). In other words, instead of simply reviewing the record to determine *inter alia* whether the Commission's decision was supported by competent substantial evidence, the court combed the record and extracted its own factual finding. The court thus exceeded the scope of its authority under *Vaillant.*

Id.

Here, there was no error committed by the Fifth District. The Petitioner's appeal was correctly remanded for a new administrative formal review hearing. The district court's decision is lawful and does not conflict with any other ruling from this Court or any other district court in this State. Accordingly, the Department respectfully requests that this Court deny the Petitioner's appeal.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Honorable Court deny Petitioner's appeal and affirm the Fifth District Court of

Appeal's Order quashing the circuit court's Order Granting Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to **Eric Latinsky, Esquire** at elatinsky@communitylawfirm.com and krosin@communitylawfirm.com, on this 21st day of July, 2015.

JASON HELFANT
Senior Assistant General Counsel