IN THE SUPREME COURT OF FLORIDA

JOSEPH WIGGINS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Case No.: SC14-2195
L.T. Case No(s).: 1D13-2471
2011-CA-9988

ON DISCRETIONARY REVIEW FROM THE FIRST 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 Wiggins. Respondent shall be referred to as "Respondent" or Department. Reference to the appropriate pages of the Petitioner's Appendix shall be made by A. followed by the page number.

STATEMENT OF THE CASE AND FACTS

Petitioner, Wiggins, was arrested on August 19, 2011, and charged with the offense of driving under the influence of alcohol, (hereinafter "DUI"). The Petitioner was subsequently requested to submit to a breath test, as authorized pursuant to s. 316.1932, Florida Statutes (2011)(Florida's implied consent statute). S. 316.1932 authorizes a law enforcement officer to request a breath, blood or urine test under certain conditions after a driver is lawfully arrested. The Petitioner refused to submit to the test. The law enforcement officer suspended his driver's license on behalf of the Department and the Petitioner requested a formal review of this administrative suspension with the Bureau of Administrative Review pursuant to s. 322.2615, Florida Statutes (2011). (A. 1-3). S. 322.2615 provides for a review of the administrative suspensions resulting from either an unlawful breath test result or a refusal to submit to a breath, urine, or blood test.

The law enforcement officers involved in the Petitioner's arrest testified at the formal review hearing,. In addition, a DVD recording of the incident was reviewed and placed into the record. This recording contained the driving pattern and stop of the Petitioner as well as the all the contact between the law enforcement officers and the Petitioner leading up to the arrest. (A. 1-3). At the conclusion of the hearing, the hearing officer sustained the suspension. (A. 1-3).

The Petitioner sought review in the circuit court as provided in s. 322.2615(13). The circuit court reviewed the evidence in the record including the DVD. In its analysis, the circuit court relied on the decision rendered in *Julian v. Julian*, 188 So. 2d 896 (Fla. 2d DCA 1966), wherein the Second District Court of Appeal addressed how a reviewing court should consider objective evidence which places the court in the same position as the fact finder in the initial tribunal. The circuit reviewed the evidence in the record, including the DVD recording, and found that the arrest and booking report and testimony of the deputy were "flatly contradicted" by the objective videotape. As a result, the circuit court found that the evidence in the record was not competent substantial evidence upon which the hearing officer could rely to find that the Petitioner was lawfully arrested. In reaching that decision, the circuit court found the arrest and booking report and the testimony did not meet the definition of competent substantial evidence set out by this Court in *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The circuit

court further found that "[i]t was unreasonable as a matter of law for the hearing officer to accept Deputy Saunders report and testimony after this evidence was shown to be erroneous and flatly contradicted by the objective images of the videotape." (A. 1-3). The Department filed a petition for certiorari review in the First District Court of Appeal. (A. 1-3).

In its review of this case, the majority opinion of the First District Court of Appeal found that the circuit court had applied the incorrect law when it applied the decision rendered in *Julian* to this case. The majority further found that under this Court's decision in *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So.2d 1270 (Fla.2001), the circuit court failed to exercise its proper standard of review when it relied on the DVD. Specifically the majority interpreted *Dusseau* to require "culling through the record for whatever bits and pieces of evidence that support an administrative order's factual findings. Here, that meant separating out those portions of the officer's testimony, his report and the video itself that are supportive of the hearing officer's findings, leaving contrary or inconsistent evidence on the cutting room floor." *Dep't of Highway Safety & Motor Vehicles v. Wiggins*, No. 1D13-2471, 2014 WL 4358472, at *8 (Fla. Dist. Ct. App. Sept. 4, 2014) *review granted sub nom. Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles,* No. SC14-2195, 2014 WL 7251666 (Fla. Dec.

17, 2014). The district court then certified the following question as a matter of great public importance:

> WHETHER A CIRCUIT COURT FAILS TO APPLY THE CORRECT LAW BY REJECTING AS NON-CREDIBLE THE ENTIRETY OF AN ARRESTING OFFICER'S TESTIMONY AND REPORT CONCERNING A TRAFFIC STOP, UPON WHICH THE HEARING OFFICER'S FACTUAL FINDINGS RELIED, BASED SOLELY ON THE CIRCUIT COURT'S OWN INDEPENDENT REVIEW AND ASSESSMENT OF EVENTS ON THE VIDEO OF A TRAFFIC STOP? (A. 14).

SUMMARY OF ARGUMENT

S. 316.1932, Florida's implied consent law, sets out under what conditions a driver may be required to submit to a breath, blood, or urine test. As previously held by this Court, this section must be read *in pari materia* with s. 322.2615, which provides for the summary suspension of a driver's license either for an unlawful breath or blood alcohol level, or for a refusal to submit to a lawfully requested breath, urine or blood test. *See Dep't of Highway Safety and Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011). S. 322.2615 further provides for the right to a review of the summary suspension.

The review provided for under s. 322.2615, is a review by "a hearing officer designated by the department." At the hearing, the Department bears the burden to prove by a preponderance of the evidence that the suspension was lawful. S. 322.2615(7). There is no presumption of correctness that attaches to the initial summary suspension. Currently, and at the time of the hearing in this case, these

hearing officers are employees of the Department. They are not lawyers and answer only to the Department for the decisions that they make[1].

The only form of checks and balances provided to a driver in this state is the statutory right to appeal the decision of the hearing officer by a petition for writ of certiorari to the circuit court under s. 322.2715(13). Although this review is by writ of certiorari, the statute provides for a review as of right, different in kind from common law certiorari. The standard of review before the circuit court is three pronged. The review includes 1) whether the order of suspension is supported by competent substantial evidence in the record; 2) whether the hearing officer departed from the essential requirements of law; and 3) whether the driver's right to due process was violated. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982).

The position taken by the Department and furthered by the majority opinion of the First District Court of Appeal, interprets the circuit court's authority to consider whether there is competent substantial evidence in the record too narrowly. The circuit court's consideration of the DVD as objective evidence rendering the account of an eye witness to not be competent is not tantamount to

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[1] An example of their obligation to justify any action they take to invalidate a suspension is a memo that was sent to a hearing officer in 2004. (A. 21). From that memo it is clear that the hearing officer only had to answer for her actions if she invalidated a suspension, but was free to uphold a suspension without justification to her superiors in the Department.

the policy making decisions found improper in *Dusseau.* To find that the circuit court must sit idly by even where an objective piece of evidence such as a DVD recording of the events clearly contradicts an officer's statement would render any right to a review illusory. Absent a meaningful review of the hearing officer's factual findings there would be no protections for the drivers of this state from arbitrary actions by the Department through its hearing officers. In essence, the decision of the First District Court of Appeal has eliminated the first prong of a circuit court's review.

STANDARD OF REVIEW

The determination of the correct standard of review is a question of law. *Broward Cnty. v. G.B.V. Int'l, Ltd.,* 787 So. 2d 838, 845 (Fla. 2001). 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)

ISSUE PRESENTED

WHETHER A CIRCUIT COURT FAILS TO APPLY THE CORRECT LAW BY REJECTING AS NON-CREDIBLE THE ENTIRETY OF AN ARRESTING OFFICER'S TESTIMONY AND REPORT CONCERNING A TRAFFIC STOP, UPON WHICH THE HEARING OFFICER'S FACTUAL FINDINGS RELIED, BASED SOLELY ON THE CIRCUIT COURT'S OWN INDEPENDENT REVIEW AND ASSESSMENT OF EVENTS ON THE VIDEO OF A TRAFFIC STOP?

Pursuant to s. 316.1932, Florida Statutes, a driver is deemed to have consented to a breath, blood, or urine test under the specific conditions outlined in

that statute. The refusal to submit to a lawfully requested breath, blood, or urine test subjects a driver to the summary suspension of their driver's license. As set out in that section, the prerequisite to any request to submit to a breath, blood, or urine test is that a driver is lawfully arrested.

S. 322.2615, Florida Statutes affords a driver the means to challenge that summary suspension. A means to challenge the summary suspension is constitutionally required under basic principles of due process. *Hernandez* at 1077. Under s. 322.2615, a driver is afforded the choice between an informal review of the documentary basis for the suspension and a formal review, which is a live hearing at which the driver may appear in person or by counsel, and live testimony can be elicited. In either case, the review is conducted by a hearing officer designated by the Department.

Regardless of whether a driver requests a formal or an informal review, the scope of the review and the Department's burden of proof is the same. During that review the Department must establish, among other things, that there was probable cause to believe that a driver was driving or in actual physical control of a motor vehicle while under the influence of an alcoholic beverage or controlled substance and that the driver was lawfully arrested. This must be proven by the preponderance of the evidence. S. 322.2615(7); *Hernandez supra*.

The Department can rely on the documents submitted by law enforcement to uphold the suspension if they submit the documents required by s. 322.2615(2)(a). The documents however must be in the form required by s. 322.2615(2)(a) and the documents must contain competent substantial evidence of all the matters necessary to establish the lawfulness of the suspension. *See Dobrin v. Florida Dept. of Highway Safety & Motor Vehicles*, 874 So. 2d 1171(Fla. 2004). The driver has the right to rebut the evidence presented by the Department once the Department has established a prima facie case through the documentary evidence.

S. 322.2615(6)(b), *Fla. Stat.* (2014) specifically sets out the right of a driver to subpoena the officers and witnesses identified in documents provided under paragraph (2)(a). Under the rules promulgated by the Department for the conduct of the formal review hearing[2], a driver "shall have the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver." As recognized by the First District Court of Appeal in *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754 (Fla. 1st DCA 2009), based on the statutory provisions , the administrative rules, and basic due process protections, a driver must be afforded the opportunity to rebut the evidence relied upon to suspend his driver's license.

[2] S. 322.2615(12) exempts these hearings from the provisions of the Administrative Procedure Act contained in Chapter 120 and authorizes the Department to adopt rules for the reviews conducted under this statute. As a result the Department has promulgated Fla. Admin Code Rule 15A-6.

See also Yankey v. Dep't of Highway Safety & Motor Vehicles, 6 So. 3d 633 (Fla. 2d DCA 2009).

In *Lee*, the issue before the district court was the Petitioner's right to have subpoenas issued for the people who inspected the breath testing machine and upon whose inspection reports the Department relied to establish the breath test result[3]. The Department had narrowly interpreted the statute to limit which people could be subpoenaed by a driver. The district court, however, recognized the significance of a driver's ability to rebut the evidence presented against him stating,

> We, however, agree with petitioner that the clear language of subsection (2) refers not only to the foregoing explicitly named materials but also, by its express terms, to "*any evidence submitted at or prior to the hearing.*" *See* § 322.2615(2)[4] (emphasis added). Undoubtedly, the department relied on this subsection to introduce the inspection reports in evidence, as well as on the further language of subsection (2) that such "materials ... shall be considered self-authenticating and shall be in the record for consideration by the hearing officer." Therefore, for the hearing officer to consider the inspection reports on the department's behalf but deny petitioner the right meaningfully to cross-examine the individuals who prepared those reports not only evinces a misreading of section 322.2615(2), but violates the basic principles of due process to which petitioner was entitled in this proceeding, as clearly reflected in the previously mentioned applicable statutory sections and department rules. *See also*

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[3] Under s. 322.2615(6), subpoenas for the formal review hearing can only be issued by the Department's hearing officers. *Dep't of Highway Safety and Motor Vehicles v. Elias*, 997 So. 2d 1172 (Fla. 3d DCA 2008).

[4] Although this statute has was amended effective July 1, 2013, to delineate between documents that must be in the record and those that may be in the record, the analysis by the district court is still applicable.

> *Dep't of Hwy. Safety & Motor Vehicles v. Pitts,* 815 So.2d 738, 743 (Fla. 1st DCA 2002) (confirming that "the 'suspension of a driver's license for statutorily defined cause implicates a protectable property interest' " and, therefore, due process applies to its denial, quoting *Mackey v. Montrym,* 443 U.S. 1, 10-11, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979)).
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> In its order, the circuit court likewise concluded that the hearing officer did not have the authority pursuant to section 322.2615(6)(b) to issue the requested subpoenas. Our scope of review of that order is limited to determining only " 'whether the [circuit] court (1) afforded due process and (2) observed the essential requirements of law.' " *See Clay County v. Kendale Land Dev., Inc.,* 969 So.2d 1177, 1180 (Fla. 1st DCA 2007) (quoting *Randall v. Fla. Dep't of Law Enforcement,* 791 So.2d 1238, 1240 (Fla. 1st DCA 2001)); *accord Hernandez v. Dep't of Hwy. Safety & Motor Vehicles,* 995 So.2d 1077, 1079 (Fla. 1st DCA 2008) (citing *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523 (Fla.1995)). "A ruling constitutes a departure from 'the essential requirements of law' when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " *Clay County,* 969 So.2d at 1180 (quoting *Combs v. State,* 436 So.2d 93, 96 (Fla.1983)).
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> As noted above, however, by generally referring to "documents" without further specification or limitation, section 322.2615(6)(b) unambiguously contemplates that a hearing officer may issue subpoenas for the officers and witnesses identified not only in the documents actually named in subsection (2), but also in "*any* [documentary] evidence submitted at or prior to the hearing." (Emphasis added.) Any other interpretation would, indeed, constitute a denial of petitioner's due process right to challenge the suspension of his driver's license.

Lee at 757-58.

This recognition of the due process requirements of a meaningful opportunity to rebut the evidence relied on to suspend a driver's license is

consistent with this Court's reasoning in *Hernandez, supra.* In *Hernandez* this Court stated,

> A driver whose license is unlawfully suspended must have a means to challenge that suspension, and the only means by which a driver can challenge the suspension of his or her driver's license for failure to submit to a breath test is through section 322.2615.
> 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).
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> With regard to due process rights, in *N.C. v. Anderson,* 882 So.2d 990, 993 (Fla.2004), this Court stated:
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> The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty or property, without due process of law." This same protection is provided in the Florida Constitution. *See* Art. I, § 9, Fla. Const. "Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." *Department of Law Enforcement v. Real Property,* 588 So.2d 957, 960 (Fla.1991). *Procedural* due process requires both reasonable notice and a meaningful opportunity to be heard. *See id.* The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The

> notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). (Emphasis added.) 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. We have held that "[s]tatutes, as a rule, 'will not be interpreted so as to yield an absurd result.' " *State v. Iacovone,* 660 So.2d 1371, 1373 (Fla.1995) (quoting *Williams v. State,* 492 So.2d 1051, 1054 (Fla.1986)). Further, "[t]his Court has an obligation to give a statute a constitutional construction where such a construction is possible." *Tyne v. Time Warner Entm't Co.,* 901 So.2d 802, 810 (Fla.2005). We conclude that the only reading of the statute that avoids an unreasonable and unconstitutional result is to construe sections 322.2615 and 322.1932 *in pari materia* and allow the hearing officer to review whether the test was administered incident to a lawful arrest.

Hernandez, at 1078-79. It is this due process right to a meaningful review that mandates that there must be a mechanism to ensure that the review afforded a driver is truly meaningful. The mechanism provided by the legislature to ensure that the review provided by the Department is meaningful is by the statutory right to appeal the order of the hearing officer to the circuit court.

S. 322.2615 became law effective October 1, 1990. 1989 Fla. Sess. Law Serv. 89-525 (West). (A. 22). Prior to that time, s. 322.261, Florida Statutes

governed these hearings[5]. (A. 27). Under s. 322.261, review was obtained by petitioning the court having trial jurisdiction over the DUI charge. Therefore although the license was suspended by the Department, the initial review of the suspension was by the courts. Furthermore, review of the decision of the county court was considered a final order for which a driver could obtain appellate review in the circuit court. *See e.g. Perryman v. State*, 242 So. 2d 762 (Fla. 1st DCA 1971); *State v. Johnston*, 553 So. 2d 730 (Fla. 2d DCA 1989); *Solomon v. State*, 538 So. 2d 931 (Fla. 1st DCA 1989); *Dep't of Highway Safety and Motor Vehicles v. Bell*, 505 So. 2d 472 (Fla. 2d DCA 1987). Thus, although the suspension was initiated on behalf of the Department, review of the suspension was afforded in the courts.

Under s. 322.2615, however, jurisdiction for these reviews of the administrative suspension of a driver's license was vested in the Department. The hearing is now held before a hearing officer employed by the Department. The hearing officer is also vested with the authority to issue subpoenas. These hearings are deemed exempt from the Administrative Procedure Act in Ch. 120, and the Department was granted the sole authority to promulgate rules for the conduct of the hearings. The only provision for judicial review is s. 322.2615(13) which sets out the driver's right to appeal by petition for writ of certiorari to the circuit court.

[5] This section only addressed administrative suspensions for refusal to submit to a breath, blood or urine test.

Consequently, the new statute vested the Department with complete control of the review of the license suspension, the manner in which the hearings were held, and who the driver could subpoena as a witness for the hearing.

Although s. 322.2615 has been upheld as constitutional, questions about the impartiality of the proceedings and concerns regarding the protection of the due process rights of drivers have been acknowledged. In *Dep't of Highway Safety & Motor Vehicles v. Stewart*, 625 So. 2d 123, 124 (Fla. 5th DCA 1993), the Fifth District Court of Appeal noted, "[i]n 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 respondents in these cases suffered no such deprivation." By footnote, the district court referenced the concerns raise by Judge Griffin in a concurring opinion in *Conahan v. Dep't of Highway Safety & Motor Vehicles, Bureau of Driver Imp.,* 619 So. 2d 988, 990 (Fla.5th DCA 1993). In that concurring opinion Judge Griffin stated,

> 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" hearings.

> 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.

This opinion was written less than three (3) years after the jurisdiction and control of the administrative review hearings was vested entirely with the Department.

The Fifth District Court of Appeal again recognized the ongoing concerns with the impartiality of the hearings held under s. 322.2615 in *Dep't of Highway Safety and Motor Vehicles v. Dean*, 662 So. 2d 371, 373 (Fla. 5th DCA 1995) *cause dismissed*, 667 So. 2d 774 (Fla. 1996). In *Dean,* although the documents asserted that the driver had refused a breath test, the driver testified at the hearing that he had timely recanted that refusal. The breath test operator was not present to respond to that claim. The hearing officer apparently did not accept the testimony of the driver and relied on the assertion of refusal in the documents to uphold the suspension. Although the district court held that a finder of fact is not compelled to believe the testimony of any witness even if unrebutted, the court noted,

> The frequency with which conscientious trial judges of this state issue decisions that have the effect of providing more procedural safeguards to licensees in these revocation hearings suggests a continuing concern about the fairness of this statutory procedure. *See, e.g., Department of Highway Safety and Motor Vehicles v. Shonyo,* 659 So.2d 352 (Fla. 2d DCA 1995); *Department of Highway Safety and Motor Vehicles v. Riggen,* 654 So.2d 221 (Fla. 1st DCA 1995), *Anderson v. Department of Highway Safety and Motor Vehicles,* 3 Fla.Supp. 250 (Fla. 7th Cir. June 6, 1995); *Day v. Department of Highway Safety and Motor Vehicles,* 2 Fla.Supp. 279 (Fla. 9th Cir. May 17, 1994). Nevertheless, requiring the presence of the arresting

> officer at any license suspension hearing against the possibility that the licensee might offer recantation testimony still would not solve the underlying concern illustrated by this case-which is whether DMV hearing officers provide licensees with a fair and meaningful hearing or whether they merely provide a rubber stamp.

As recently as December of last year, concerns about the fundamental fairness of the current system of review were raised in *Dep't of Highway Safety and Motor Vehicles v. Clay*, 2014 WL 7201849 (Fla. 5th DCA Dec. 19, 2014). The issue before the district court was the authority of the circuit court when granting a petition for writ of certiorari pursuant to s. 322.2615(13). In that case, the circuit court had refused to remand the matter for further review, instead choosing to order that the suspension be invalidated. The reasoning of the circuit court was that to remand the matter to correct the due process violation in that case was futile and burdensome. As set out in the concurring opinion in *Clay*, the due process violation occurred when the Department's hearing officer, in complete disregard for binding precedent, denied the driver a requested subpoena for a witness to appear at the formal review hearing. In that concurring opinion, Judge Cohen stated,

> 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. In the instant case, the circuit court recognized that remand would in all likelihood constitute a futile act. Not only is the officer involved no longer employed by the police agency, he now resides out of state. However, our precedent provides for the opportunity to correct the order entered in this case, which did not begin to comport with any semblance of due process.

See also Pitts at 743-744); *Forth v. Dep't of Highway Safety and Motor Vehicles*, 148 So. 3d 781 (Fla. 2d DCA 2014); *Dep't of Highway Safety and Motor Vehicles v. Futch*, 142 So. 3d 910 (Fla. 5th DCA 2014); *Dep't of Highway Safety and Motor Vehicles v. Griffin*, 909 So. 2d 538 (Fla. 4th DCA 2005).

It is evident based on these district court opinions as well as a plethora of circuit court opinions[6] that although the procedures set out in s. 322.2615 are constitutionally sound, there is a legitimate concern regarding the application of

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[6] Examples of such opinions include *Wilcox v. Dep't of Highway Safety and Motor Vehicles*, 22 Fla. L. Weekly Supp. 8a (Fla. 4th Cir. Ct., July 7, 2014)(A. 30); *Winters v. Dep't of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 994a (Fla. 13th Cir. Ct., May 21, 2014)(A. 33); *Shi v. Dep't of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 620a (Fla. 9th Cir. Ct., March 13, 2014)(A. 35); *Detlefsen v. Dep't of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 1022a (Fla. 4th Cir. Ct., Aug. 1, 2013)(A. 41); *Gibson v. Dep't of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 1034a (Fla. 7th Cir.

Ct., June 10, 2013)(A. 43); *Boney v. Dep't of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 1114b (Fla. 4th Cir. Ct., March 18, 2013)(A. 47); *Thompson v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 917a (Fla. 4th Cir. Ct., July 30, 2012)(A. 49); *Fuller v. Dep't of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 296b (Fla. 7th Cir. Ct., Dec. 17, 2012)(A. 52); *Scarborough v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 918a (Fla. 7th Cir. Ct., July 14, 2011)(A. 56); *Gabriel v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 916a (Fla. 7th Cir. Ct., April 18, 2011)(A. 61); *Perez v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 1085b (Fla. 13th Cir. Ct., July 21, 2010)(A. 66); *Bell v. Dep't of Highway Safety and Motor Vehicles*,13 Fla. L. Weekly Supp. 756a (Fla. 4th Cir. Ct. May 15, 2006)(A. 69), *Victor v. Dep't of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 110a (Fla. 9th Cir. Ct., Aug. 31, 2004)(A. 72); *Millard v. Dep't of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 289a (Fla. 9th Cir. Ct., Aug. 6, 2004)(A. 76); *Lane v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 598a (Fla. 7th Cir. Ct., Nov. 10, 2003)(A. 80); *Brown v. Dep't of Highway Safety and Motor Vehicles,* 10 Fla. L. Weekly Supp. 849a (Fla. 4th Cir. Ct., September 15, 2003)(A. 84); *Dow v. Dep't of Highway Safety and Motor Vehicles,*10 Fla. L. Weekly Supp. 219a (Fla. 4th Cir. Ct., Feb. 27, 2003)(A. 86); *Verner v. Dep't of Highway Safety and Motor Vehicles,* (Fla. 4th Cir. Ct., Feb. 6, 2003)(A. 88); *Kurashev v. Dep't of Highway Safety and Motor Vehicles,* 10 Fla. L. Weekly Supp. 149a (Fla. 4th Cir. Ct., Feb. 6, 2003) (A. 90); *Hill v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 19a (Fla. 11th Cir. Ct., Nov. 19, 2002)(A. 93); *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) (A. 96); *Friesland v. Dep't of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 75b (Fla. 4th Cir. Ct., Dec. 17, 2001)(A. 98); *Gonzalez v. Dep't of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 75a (Fla. 4th Cir. Ct. Nov. 30, 2001)(A. 100); *Blackburn v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 807a (Fla. 4th Cir. Ct., Oct. 23, 2001)(A. 102); *George v. Dep't of Highway Safety and Motor Vehicles* 8 Fla. L. Weekly Supp. 677a (Fla. 4th Cir. Ct., Aug. 29, 2001) (A. 104); *Chapman v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 268a (Fla. 4th Cir. Ct., Feb. 7, 2001)(A. 105); *Corcoran v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 269a (Fla. 4th Cir. Ct., Dec. 7, 2000)(A. 106); *Panken v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct., Sept. 18, 2000)(A. 108).

the procedures set out in s. 322.2615 and the fairness of the process. The lack of any judicial oversight would eliminate any of the checks and balances long recognized as imperative to the protection of the rights of citizens. As recognized by this Court in *Burley v. State*, 59 So. 2d 744, 745 (Fla. 1952), "[t]he makers of the Constitution were realists. Their knowledge of mankind was drawn from experience and the democracy promulgated by them was the product of persistent reason and logic. They knew man's proneness to abuse power, hence the limitations they imposed on those designated to govern the governed. To them our system of checks and balances, the doctrine of the separation of powers and the constitutional guarantees were absolutes." It is within this context that this Court must consider the certified issue in this case.

As set out above, the type of review afforded a driver after having received an order upholding a driver's license suspension is set out in s. 322.2615(13). By establishing this statutory right to review, the legislature attempted to afford drivers of this state an opportunity for a full review of the actions of the Department. Under s. 322.2615(13), a driver has the right to a review of the order by a writ of certiorari directed to the circuit court. Although called a petition for writ of certiorari, this Court has recognized that such proceeding is more akin to a plenary appeal. This Court has held, "...certiorari in circuit court to review local administrative action under Florida Rule of Appellate Procedure 9.030(c)(3) is not

truly discretionary common-law certiorari, because the review is of right. *Vaillant,* 419 So.2d at 625-26; *see also EDC,* 541 So.2d at 108. In other words, in such review the circuit court functions as an appellate court. *See EDC,* 541 So.2d at 108." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). *See also Netz v. Jacksonville Sheriff's Office, City of Jacksonville,* 688 So. 2d 235 (Fla. 1st DCA 1996). Because of the nature of this review, a circuit court must have the ability to review the record and find that factual findings based on objectively erroneous evidence do not meet the standard of competent substantial evidence.

In order to answer the question certified, this Court must necessarily consider the question of what type of review is afforded in the circuit court under s. 322.2615(13). Although this Court has deemed statutory certiorari review different in kind from common law certiorari review, this Court has not fully clarified the role of the circuit court in its review. The Department and the majority opinion rendered by the First District Court of Appeal have interpreted this Court's decision in *Dusseau,* as directing that a circuit court must uphold the order of the hearing officer if there is any statement whatsoever in the record that would support the finding. The Petitioner would respectfully suggest that this interpretation is too narrow. As noted by Judge Van Nortwick in his dissenting opinion in *Wiggins*,

> *Dusseau* did not put forth a new understanding of the competent substantial evidence standard of review. That is, in describing first-tier

> review, the *Dusseau* court does not require, as the majority states, that reviewing the record in support of the findings of fact involves "culling through the record for whatever bits and pieces of evidence that support an administrative order's factual findings" while "separating out those portions [of a matter of record] that are supportive of the hearing officer's findings, leaving contrary or inconsistent evidence on the cutting room floor." Majority op. at ——— ———. Instead, an item of evidence can be rejected as a whole by the circuit court on first-tier review because it is not legally competent evidence, even though a sentence or phrase within that item might support a finding of fact. Courts employing a competent substantial evidence standard of review, as this court routinely does, are not obliged to disassemble or deconstruct matters submitted into evidence. To so construe the competent substantial evidence standard would essentially render it a meaningless standard, for certainly there is almost always some passing phrase or minor reference in the record evidence which could be seen as support for a finding of fact, even when an item of evidence, when viewed in context as a whole, plainly does not support a finding of fact.

The position put forth by the Department and accepted by the majority below would result in absurd results. Under the reasoning put forth, if an officer states he stopped the driver in a red car based on a BOLO for a person in a red car, but the video clearly shows the driver in a green car, is the circuit court powerless to intervene? Similarly, if an officer writes in a report that a driver was stopped because he was speeding, but then admits at the hearing that he could not really say that the driver was speeding, must a circuit court let the order upholding the suspension stand. If an officer states that a driver refused to submit to a breath test but the video shows that once the driver requested an attorney no such request to submit was ever made, is the driver doomed to suffer the consequences of a refusal

because the officer wrote down that he refused? The majority opinion rendered below would permit such results. Clearly this was not the meaning of this Court's finding in *Dusseau* when this Court stated that a circuit court must defer to an agency's technical expertise and cannot act as a roving "super-agency" as to policy-based decisions. *Id.* at 1275, 1276.

The First District Court of Appeal relied on *Wiggins* to grant a petition for writ of certiorari on behalf of the Department in *Dep't of Highway Safety and Motor Vehicles v. Lanning*, 2015 WL 47034 (Fla. 1st DCA Jan. 2, 2015). In *Lanning* the district court held that the circuit court had improperly reweighed the evidence when it found that the Department had not proven substantial compliance with the requirements of the administrative rule governing breath testing. The rule at issue requires that a person be observed for twenty (20) minutes prior to conducting the test to ensure that they have not taken anything by mouth or regurgitated, which could impact the breath test result. The circuit court, after having reviewed the record of the hearing noted that during the twenty (20) minute period, the officer "observing" the driver actually left the room on several occasions. It was based on this that the circuit court found that there was not competent substantial evidence of compliance. (A. 110). A finding that the circuit court must leave standing an order of suspension based on a finding by the hearing officer that an officer has observed a driver, notwithstanding the fact that the

officer is not even in the same room is the type of absurd result that would occur if this Court answers the certified question in the affirmative.

The underlying question before this Court is the definition of "competent substantial evidence." In *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla.1957), the term competent substantial evidence was defined. This Court stated, "[s]ubstantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'" This Court further defined "competent substantial evidence" as evidence that is reliable. *Fla. Rate Conference v. Fla. R.R. & Pub. Utils. Comm'n,* 108 So.2d 601, 607 (Fla.1959)(wherein this Court found that the use of unreliable evidence fails to meet the competent substantial evidence standard.). *See also Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981).

Although the legislature has chosen to place the initial review of a driver's license suspension under s. 322.2615, the legislature also recognized the need for some form of judicial review. The Petitioner does not suggest that this review must be *de novo* or that the circuit court can reweigh the evidence. The Petitioner would suggest that basic principles of due process require that the Department's hearing officer impartially review all the evidence presented and hold the Department to its burden of proof. The only way to ensure the Department is held to its burden is to allow a review in the full context of the record. In the event the evidence relied on is shown to be blatantly false, it cannot and does not meet the definition of competent substantial evidence. Judicial review, even by statutory certiorari, cannot be so limited as to require "culling through the record for whatever bits and pieces of evidence that support an administrative order's factual findings," and ignoring a video recording that contradicts those "bits and pieces" of evidence. Such judicial review would be tantamount to no judicial review at all.

As this Court has found, in order to suspend a person's privilege to drive, there must be a means for a full fair review of that suspension. The only way to ensure that this occurs when there is one government agency that has total control of the entire process is to provide for meaningful judicial review. To be meaningful, this review must be interpreted to include the ability of the court to recognize innately incredible evidence as failing to constitute competent

substantial evidence. *See e.g. Dep't of Highway Safety and Motor Vehicles v. Colling*, 2014 WL 2532406 (Fla. 5th DCA June 6, 2014). Accordingly, the circuit court's review for competent substantial evidence in the record must include the ability to review a recording of events to determine if the assertions relied on by the hearing officer are blatantly incredible and therefore not competent.

CONCLUSION

The First District Court of Appeal incorrectly decided that under the circuit court's standard of review of an administrative order upholding a driver's license suspension under s. 322.2615, a court is prohibited from reviewing a recording of the events and determining that because it clearly contradicts the statements of the law enforcement officer, there is a lack of competent substantial evidence to support the order. This Court therefore should reverse the decision of the First District Court of Appeal and answer the certified question in the negative.

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 to the Office General Counsel, Department of Highway Safety and Motor Vehicles, 2900 Apalachee Parkway, Room A-432, Tallahassee, Florida 32399, by electronic service at OGCFiling@flhsmv.gov and mariannealen@flhsmv.gov, on the 12th day of January, 2015.

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