**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC14-2195
DCA Case No. 1D13-2471

**JOSEPH B. WIGGINS,**

Petitioner,

v.

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

Respondent.

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ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

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# ANSWER BRIEF OF RESPONDENT 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." Petitioner, Joseph P. Wiggins, will be referred to as "Petitioner." The Department has attached an appendix hereto pursuant to Rule 9.220, Florida Rules of Appellate Procedure. Petitioner's Appendix exhibits will be referred to as "P.A.___." The Department's Appendix exhibits will be referred to as "R.A.____."

## 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 ON APPEAL

### CERTIFIED QUESTION

**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?**

## STATEMENT OF THE CASE AND FACTS

The Petitioner was arrested for driving under the influence (DUI) on August 19, 2011, and refused the arresting law enforcement officer's request to submit to breath-alcohol testing. (R.A. 1; DDL#1-8 in the Appendix). Pursuant to the legislative mandate in § 322.2615(1), Fla. Stat., the Department placed an administrative refusal suspension on Petitioner's Florida driver's license at that time and notice of the administrative suspension was provided to the Petitioner in the DUI citation that was issued to Petitioner by the arresting officer. (R.A. 1; DDL#1).

Petitioner subsequently requested an administrative formal review hearing and the Department timely scheduled and held the hearing (and the continued hearing). Petitioner requested subpoenas for the fact witnesses named in the documents submitted to the Department to support the administrative suspension[1] and the hearing officer issued the requested subpoenas for the stopping and arresting officer and the breath test operator. The documents that are required to be submitted to the Department by law enforcement to support the administrative refusal suspension[2] were properly submitted to the Department and accepted into the record at the start of the hearing. (R.A. 1; DDL#1-8).

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1. Pursuant to §322.2615(2), Fla. Stat. (2014).
2. Pursuant to § 322.2615(2), Fla. Stat. (2014).

The hearing officer subsequently reviewed the record documents and testimony and based on the record documents and the testimony offered (R.A. 3) in the review hearing, the hearing officer made the following factual findings:

> On August 19, 2011, at approximately 2:10 a.m. Deputy J. C. Saunders of the Clay County Sheriff's Office observed a vehicle swerving within the lane, almost striking the right side curb on several occasions, and then braking erratically for no apparent reason. He also paced the vehicle and determined that it was traveling 30 MPH in a 45-MPH zone. Suspecting that the driver might be impaired, Deputy Saunders conducted a traffic stop.
>
> Deputy Saunders observed the driver, [Petitioner] to have an extremely strong odor of an alcoholic beverage coming from his breath, bloodshot, glassy eyes, a flushed face, and his movements were slow and deliberate. [Petitioner] admitted to consuming a few drinks when asked about his alcohol consumption. [Petitioner] refused to submit to field sobriety exercises and was placed under arrest for DUI. Based on the foregoing, I find that the petitioner was placed under lawful arrest for DUI.
>
> At the Clay County Jail, the implied consent warning was read and [Petitioner] refused to submit to the breath test.

(R.A. 2).

Based on these factual findings, the hearing officer determined that a preponderance of the record evidence supported an order affirming the administrative refusal suspension. (R.A. 2). The hearing officer denied Petitioner's motions to invalidate the administrative suspension. Pursuant to the

requirements in § 322.2615(8)(a), Fla. Stat., the hearing officer affirmed the administrative refusal suspension. The Department informed the Petitioner of its ruling in an Order dated November 1, 2011.

Petitioner then filed an Amended Petition for Writ of Certiorari in the Circuit Court of the Fourth Judicial Circuit. On February 28, 2012, the circuit court entered an order to show cause. On March 15, 2012, the Department timely filed its response. Therein, the Department advised the circuit court that there *was* competent substantial evidence in the record to support the hearing officer's findings and order, and that pursuant to § 322.2615(13), Fla. Stat., and the controlling administrative case law authorities, the circuit court was not permitted to conduct a *de novo* review of the issues from the administrative hearing. (R.A. 1; DDL#1-8).

On February 4, 2013, the circuit court issued an order that granted Petitioner the extraordinary remedy requested in the petition. (P.A. 1-3).

The circuit court determined that:

> ...[N]either the testimony of Deputy Saunders nor the arrest and booking report constitutes competent substantial evidence on which the hearing officer could rely.

The circuit court then held that:

> It 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 video tape.

(P.A. 1-3). The circuit court thus determined that:

> [T]he Department's order departed from the essential requirements of the law and was not supported by competent substantial evidence when the hearing officer found the Petitioner was lawfully arrested.

(P.A. 1-3). Based on this determination, the circuit court quashed the Department's final order that sustained the administrative refusal suspension.

The Department appealed the circuit court's decision by petition for writ of certiorari to the First District Court of Appeal. The First District Court of Appeal reversed the circuit court's decision on September 4, 2014, and found that the circuit court applied the wrong law when it reviewed the record *de novo* and rejected and excluded evidence including the arresting officer's entire sworn arrest affidavit and his entire sworn testimony. (P.A. 4-20). Petitioner now contests the decision of the First District Court of Appeal, which certified the following question 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.

*Dep't of Highway Safety and Motor Vehicles v. Wiggins*, 2014 WL 4358472 *1, *13. (Fla. 1st DCA 2014). (P.A. 4-20).

## SUMMARY OF ARGUMENT

Upon acknowledging that Deputy Saunders' sworn arrest affidavit and sworn testimony "standing alone" supported the findings of the hearing officer, the circuit court then erred by conducting *de novo* review and re-weighing that evidence against the evidence on the videotape. The circuit court's analysis was required to end once it concluded that there was competent substantial evidence supporting the findings of the hearing officer. The circuit court's actions were unlawful and in direct violation of the well-established law from this Court.

## ARGUMENT

**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.**

The First District Court of Appeal was correct when it found that the circuit court applied the wrong law when it conducted a *de novo* review and unlawfully rejected and suppressed arresting officer Deputy Saunders' sworn arrest affidavit and sworn testimony that were presented to and considered by the Department's hearing officer who presided over the Petitioner's administrative formal review hearing. Although the circuit court's order acknowledged that Deputy Saunders' sworn arrest affidavit and sworn testimony "standing alone" supported the findings of the hearing officer, the circuit court then conducted *de novo* review and re-weighed that evidence against the evidence on the videotape. (R.A. 4). However, with the acknowledgement that Deputy Saunders' sworn arrest affidavit and sworn testimony "standing alone" supported the findings of the hearing officer, the circuit court's analysis was required to end there, and the circuit court

should have denied any relief. The circuit court's actions were unlawful and in direct violation of the well-established law from this Court.

In *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 846, n.25, (Fla. 2001), this Court held that on first-tier certiorari review, the circuit court's task is to review the record for evidence that *supports* the agency's decision, not that *rebuts* it - for the court cannot reweigh the evidence. In *G.B.V. Intern., Ltd.*, 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.* at 845.

Here, as in *G.B.V. Intern., Ltd*, the circuit court also embarked on an independent review and "combed the record" and extracted its own factual finding. In *G.B.V. Intern., Ltd.*, this Court remanded the case back to the circuit court and directed the circuit court "to apply the three-pronged standard of review set forth in *Vaillant*" and to "determine simply whether the Commission's decision is

*supported* by competent substantial evidence." *Id.* at 846. (italicized in the original).

In the instant case, the First District Court of Appeal further correctly held as follows:

> Appellate litigants are not entitled to duplicative plenary review of factual findings as the appellate ladder is traversed. Instead, litigants get one opportunity to make an evidentiary record and to persuade the fact-finder to one of their competing views of the evidence; they cannot appeal to a circuit court and obtain such detailed review again. In this regard, it is noteworthy that the circuit court conducted—in large part—essentially the same type of review done by the hearing officer (with several important limitations discussed below). By comparing the video to the officer's report, and making judgments about whether they were sufficiently in lockstep with each other, the circuit court repeated almost the exact same exercise that the hearing officer had already performed in the hearing room. But circuit courts are not to do so; doing so would impermissibly provide the "second bite at the apple" that first tier certiorari review precludes.

*Wiggins*, 2014 WL 4358472, at *7 (Fla.1st DCA 2014).

In this case, the First District Court of Appeal correctly followed this Court's decisions in *G.B.V. Intern., Ltd.* and in *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270 (Fla. 2001), and held that a circuit court was only permitted to determine whether the agency's decision was *supported* by competent substantial evidence. "Competent substantial

evidence is tantamount to *legally sufficient evidence.*" *Id.* at 1274. (emphasis supplied). Evidence which *does not* support the hearing officer's ruling is beyond this court's scope of review. *Id.*

The First District concluded here that "[t]he circuit court failed to follow *Dusseau,* which requires 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." *Wiggins,* 2014 WL 4358472, at *8. As discussed below, the circuit court order did the exact opposite of what was mandated by this Court in *Dusseau* and culled through the record for whatever bits and pieces of evidence were *contrary* to the administrative order's factual findings.

In this case, the circuit court separated out those portions of Deputy Saunders' sworn written statements that arguably *contradicted* the factual findings and conclusions of Hearing Officer Young. In all, the circuit court specifically found that five quotes made by Deputy Saunders in his arrest affidavit were inconsistent with the videotape and used that alone as the basis to reject and exclude the entire three page sworn document. The circuit court also struck in its entirety Deputy Saunders' sworn live testimony that encompassed 73 pages of the transcript without providing any justification at all. (R.A. 3).

The Department submits that evidence that is legally sufficient or "competent substantial" evidence to support an administrative driver's license refusal suspension is contained in the documents listed in § 322.2615(2), Fla. Stat. (2014), and consist of the suspended motorist's driver's license; the Notice of Suspension issued to the suspended motorist; an affidavit from the arresting officer setting forth the grounds for the officer's belief that the motorist was operating a motor vehicle while under the influence of alcohol; and an affidavit stating that a breath-test was requested from the suspended motorist by a law enforcement/correctional officer and the motorist refused to submit to the requested testing. All of these documents were provided to the Department and were in the record for the hearing officer's consideration. (R.A. 1; DDL 1-8). The circuit court extensively reviewed the record documents and acknowledged that there was competent substantial evidence to support the hearing officer's order when the court stated that: "Standing alone, the arrest and booking report and testimony by Deputy Sanders would support the findings of the hearing officer." With this acknowledgement, the circuit court was required to defer to the decisions of fact made by Hearing Officer Young as she had a "special vantage point" as trier of fact.

In agreeing with this Court's opinions in *G.B.V. Intern., Ltd.* and *Dusseau*, the First District Court of Appeal correctly held that "this evidence, which the

circuit court otherwise deemed competent and substantial, cannot be ignored simply because the circuit court disagreed with portions of testimony and report that it deemed conflicted with the video." *Wiggins*, 2014 WL 4358472, at *8.

Here, as in *G.B.V. Intern., Ltd*, the circuit court also embarked on an independent review and "combed the record" and extracted its own factual finding. The circuit court justified this independent review by referring to *Julian v. Julian*, 188 So. 2d 896 (Fla. 2nd DCA 1966), claiming that where the evidence is objective and there is not a determination of credibility, the reviewing court is in the exact same position as the hearing officer. However, the circuit court did not correctly follow *Julian*, and made a determination regarding Deputy Saunders' credibility and rejected numerous statements he made in his sworn arrest report and his entire sworn testimony. (P.A. 1-3).

The standard of review adopted by the circuit court pursuant to the *Julian* opinion was a misapplication of the *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957) competent substantial evidence standard of proof. In doing so the circuit court usurped the hearing officer's role as finder of fact and applied the wrong law. The circuit court was also required to apply the *Vaillant v. City of Deerfield*, 419 So. 2d 624, 626 (Fla. 1982), competent substantial evidence standard of review when reviewing the order of an administrative agency.

Petitioner's argument, like the circuit court order that adopted it, wholly overlooks the fact that the competent substantial evidence standard discussed by the Florida Supreme Court in *De Groot* is the competent substantial evidence standard of proof that is applied by the finder of fact, and Hearing Officer Young was the finder of fact at Petitioner's the administrative review hearing. *See Dusseau*, 794 So. 2d at 1274-1276; *De Groot* 95 So. 2d at 916. The Petitioner's argument also overlooks the portion of this Court's holding in *De Groot* stating that, "[I]n certiorari the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination...." *Id.* at 916. Further, the hearing officer alone considers the issue of the lawfulness of the stop. *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011) (holding that lawfulness of the stop is an issue for the hearing officer's consideration in the administrative review hearing). *See Dep't of Highway Safety and Motor Vehicles v. Silva*, 806 So. 2d 551, 554 (Fla. 2d DCA 2002) (holding that circuit court improperly rejected trial court's findings and made its own determination that no probable cause existed); *see also Dep't of Highway Safety and Motor Vehicles v. Haskins*, 752 So. 2d 625, 627 (Fla. 2d DCA 1999) (holding that circuit court applied the incorrect law when it "...reviewed the evidence and formed its own opinion, without deference to the findings of the hearing officer").

The Department further submits that despite the specific events on the videotape in which the circuit court believed "refuted" Deputy Saunders' sworn testimony and arrest affidavit, there was still no legal reason for the hearing officer to have invalidated the Petitioner's administrative driver's license suspension based on a lack of a reasonable suspicion to stop him. The videotape does not exonerate the Petitioner and clearly supports Deputy Saunders' reasons for the stop. (R.A. 4). It shows a reasonably suspicious driving pattern that is indicative of the commission of DUI. In fact, even if Hearing Officer Young had agreed with the circuit court's own independent factual findings of the case and excluded the specific quotes made by Deputy Saunders in his arrest report including the "vehicle does not drift and weave within its own lane" and the "passenger tires do not cross over the fog line ... nor come close to striking the raised curb," or "the Petitioner did slightly apply the brakes momentarily . . . however, Petitioner did not swerve to the right and almost hit the curb as he was passing through the intersection with Everett Avenue," there was still other competent substantial evidence to support Hearing Officer Young's conclusions that Deputy Saunders had a reasonable suspicion to stop the Petitioner for suspicion of DUI. (P.A. 1-3).

Moreover, the circuit court did not specifically find that the videotape refuted Deputy Saunders' other observations of the Petitioner's vehicle's driving pattern in his sworn arrest report. These observations including the fact that at

2:10 a.m., he paced the Petitioner drive his vehicle 30 mph in a 45 mph zone. Nor did the circuit court disagree with Deputy Saunders' sworn statement that as the Petitioner approached Everette Avenue, the Petitioner's vehicle started tapping the brakes again, even though the light for south bound Blanding Boulevard traffic was green. The circuit court did not disagree with Deputy Saunders' observation that as the Petitioner's "vehicle came ***out*** of the intersection he nearly hit the curb with his passenger side tires," (emphasis added) or the Petitioner's other erratic driving including his vehicle "make a sudden sharp turn into the Walgreens parking lot," or the Petitioner's "wide right turn through the parking lot, then he swung back left in another wide turn into the marked parking spots." The circuit court also did not disagree with the fact that "the [Petitioner] continued through the parking spots and stopped partially blocking the travel lane." (R.A. 1; DDL#1-8). Each of these facts were in Deputy Saunders' sworn arrest report, and were not cited by the circuit court as "refuted" by the videotape evidence, yet were still suppressed and rejected by the circuit court. (P.A. 1-3).

Recently, in *Harrington v. Dep't of Highway Safety and Motor Vehicles,* 136 So. 3d 691 (Fla. 2nd DCA 2014), Judge Altenbernd wrote in a concurring opinion that,

> I do not regard *Crooks* as even persuasive precedent in a case where an officer stops a car late at night because the driver is weaving in a lane and there is no basis to believe that the driver is avoiding other traffic. Even when a vehicle manages to stay within a single lane, there are patterns of driving that an experienced officer may rely upon to establish reasonable suspicion that the driver is impaired. That suspicion allows the officer to conduct a brief traffic stop to determine whether the officer has probable cause to arrest the driver for DUI.

*Id.* at 692.

Here, the unrefuted sworn statements of the Petitioner's other driving patterns made by Deputy Saunders would still constitute as a reasonable suspicion to stop him.

The circuit court also did not specifically find that the videotape "refuted" Deputy Saunders' observation of the Petitioner's indicia of impairment including his extremely strong odor of an alcoholic beverage coming from his breath, his bloodshot and glassy eyes, his flushed face, and his slow and deliberate movements. (R.A. 1; DDL#1-8). Each of these facts were also in Deputy Saunders' sworn arrest report, and were not cited by the circuit court as "refuted" by the videotape evidence, yet were still suppressed and rejected by the circuit court. In *Dep't of Highway Safety and Motor Vehicles v. Possati*, 866 So. 2d 737 (Fla. 3d DCA 2004), the Third District Court of Appeal discussed the elements of probable cause under § 322.2615(7)(b), Fla. Stat., by stating that the sole basis for

probable cause determination in a DUI case is based on the smell of alcohol on Possati's breath, his observably bloodshot and watery eyes, and, most significantly, the uncontested fact that he just crashed into a parked police vehicle. Therefore, Possati's refusal to take a breath test under the plain language of the statutes, justified the suspension of his driver's license. *Id.*

Further, even if Hearing Officer Young agreed with the circuit court's decision and also rejected Deputy Saunders' entire sworn live testimony, this too would not necessarily prevent the Hearing Officer from also finding that Deputy Saunders had a reasonable suspicion to stop the Petitioner for DUI. The Third District Court of Appeal held in *State, Dep't of Highway Safety and Motor Vehicles v. Saxlehner,* 96 So. 3d 1002, 1007 (Fla. 3d DCA 2012), that "pursuant to those provisions, a formal review may be conducted without any witnesses at all, and a hearing officer's decision may be based solely upon the documents submitted by the arresting agency." *Id.* No corroborating testimony or other evidence is necessary in Ch. 322 proceedings. *See Dep't of Highway Safety & Motor Vehicles v. Swegheimer,* 847 So. 2d 545 (Fla. 5th DCA 2003).

Pursuant to well settled administrative appellate case law, the circuit court was required to presume the hearing officer's rulings on the evidentiary issues for the hearing officer's consideration in the review hearing were lawful and deny and dismiss the petition. *Dusseau,* 794 So. 2d at 1275-1276; *Campbell v. Vetter,* 392

So. 2d 6, 8 (Fla. 4th DCA 1981)("[I]n its review capacity, a circuit court may not re-evaluate evidence to determine whether there is competent substantial evidence to support the decision of the lower tribunal. Such action would amount to an improper granting of *de novo* appeal."). According to *Vaillant*, 419 So. 2d 624, 626 (Fla. 1982), the circuit court's task was simply to review the record for evidence that *supports* the hearing officer factual findings and final order. *See City of Jacksonville Beach v. Car Spa, Inc.*, 772 So. 2d 630, 631 (Fla. 1st DCA 2000)(whether circuit court would have reached a different conclusion from that of the agency had it been sitting as the trier of fact is irrelevant, provided that the record contains competent substantial evidence supporting the decision actually reached by the agency).

Although the Petitioner argues that the position put forth by the Department and accepted by the majority below would result in "absurd results," the Department submits that the position put forth by the Petitioner would only result in making the Legislature's intent behind § 322.2615(13), Fla. Stat., meaningless. Section 322.2615(13), Florida Statutes, clearly mandates that "a person may appeal any decision of the department sustaining the suspension of his or her driver's license by a petition for writ of certiorari to the circuit court ... and specifically states that it "shall not be construed to provide *de novo* appeal." The Petitioner's contention would also result in providing all drivers the proverbial

"second bite at the apple" in allowing the circuit court to conduct impermissible *de novo* review of the record and substitute its own judgment for that of original the fact finder. *See Nader v. Dep't of Highway Safety and Motor Vehicles*, 87 So. 3d 712, 724 (Fla. 2012) ("The statute further provides that a 'person may appeal any decision of the department sustaining a suspension of his or her driver's license by a petition for writ of certiorari to the circuit court.... This subsection shall not be construed to provide for a de novo appeal.' § 322.2615(13), Fla. Stat. (2007)").

The Petitioner also defends the circuit court's actions by appearing to appeal to this Court's sentiment and asserting that there is an inherent lack of impartiality of the Department's hearing officers presiding over administrative hearings held pursuant to § 322.2615, Fla. Stat., and that this in of itself, requires the circuit courts to review these cases *de novo*. This assertion is unsupported and incorrect. There is no question that the Department's hearing officers shall impartially review all evidence presented at a driver's administrative review hearing and resolve all issues on the basis of a preponderance of the evidence. However, apart from simply disagreeing with the outcome of his own hearing, the Petitioner is unable to explain where in the record Hearing Officer Young actually lacked impartiality. In fact, nowhere in the record or the circuit court's order is there any indication that Hearing Officer Young was partial to law enforcement. Most glaring is the fact that, although he is under no obligation to do so, the Petitioner himself refused

to testify at his own hearing and defend himself under oath and refute the sworn testimony and affidavit of Deputy Saunders.

The Department submits that the mere fact that there are competing views on the evidence and that administrative hearings held pursuant § 322.2615, Fla. Stat. (2014), 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 by the majority and even addressed by this Court in *Dusseau*, 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.

Contrary to the Petitioner's assertions about all Department hearing officer's 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 Court of Appeal held that a hearing officer is not required to believe unrebutted testimony. The court 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 Court of Appeal 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*[3] the hearing officer was free to accept or reject the licensee's testimony." *Id.* at 1217. The hearing officer may

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

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 driver or in this case, his family member. This is the duty and privilege of the hearing officer as fact finder.

In *Dep't of Highway Safety and Motor Vehicles v. Stewart and Henry*, 625 So. 2d 123 (Fla. 5th DCA 1993), 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. *Id. At 124 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).

Further, the Fifth District Court of Appeal also held in *Gurry v. Dep't of Highway Safety and Motor Vehicles*, 902 So. 2d 881 (Fla. 5th DCA 2005) that "[w]e also agree with the circuit court that Gurry's final argument that the 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.* at 885. The Fourth District Court of Appeal further held in *State, Dep't of Highway Safety and Motor Vehicles v. Tidey*, 946 So. 2d 1223, 1227-1228 (Fla. 4th DCA 2007) that § 322.2615(6)(b), Fla. Stat., 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*, 909 So. 2d 538 (Fla. 4th DCA 2005), the Fourth District held that the department's use of non-lawyer employees as hearing officers passes constitutional muster. *Id.* at 541.[4]

Although the Petitioner also proposes numerous hypotheticals concerning contradictory evidence presented to a hearing officer, for the circuit court to resolve any of the hypothetical conflicts described in the Petitioner's Initial Brief would require the circuit court to unlawfully compare each piece of evidence to one another and give greater weight to one or the other, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make new findings of fact. Furthermore, none of the hypotheticals proposed by the Petitioner actually took place in this case. This case does not involve a "BOLO," nor was there a

4. In *Griffin*, 909 So. 2d at 541, the Fourth District specifically declared "that the procedural scheme employed by the Department of using non-lawyer hearing

mistake in the color description of the Petitioner's car. Nor did the Petitioner "request an attorney" before he unlawfully refused a breath test."

In fact, the Department submits that upon viewing the videotape of the Petitioner's DUI arrest, it is clear that the circuit court misapprehended the Petitioner's driving pattern in which Deputy Saunders observed live before his own eyes. Even under *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002), there is not any evidence that was "hopelessly in conflict" and in this case no "discrepancies on the critical facts went unexplained." *Id.* at 1085. The videotape does not vindicate the Petitioner and instead shows the Petitioner's vehicle drive in a pattern consistent with Deputy Saunders' sworn statements. (R.A. 4). The Department further submits that even under *Dep't of Highway Safety & Motor Vehicles v. Colling*, 2014 WL 2512406 (Fla. 5th DCA 2014), there was no "flip of a coin" by Deputy Saunders as to determining whether there was reasonable suspicion to stop the Petitioner for suspicion of DUI or probable cause to arrest him.

Contrary to the holdings in *Trimble* and *Colling,* Hearing Officer Young, alone, was privileged to determine the weight and credibility of the evidence. *City of Deland v. Benline Process Color Company*, 493 So. 2d 26, 28 (Fla. 5th DCA

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officers does not run afoul of the state or federal constitutions or the due process

1986); *Heifitz v. Dep't of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Cenac v. Florida State Board of Accountancy*, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1991). Hearing Officer Young, as the trier of fact was in the best position to evaluate the evidence. *Dep't of Highway Safety & Motor Vehicles v. Favino*, 667 So. 2d at 309; *Dep't of Highway Safety and Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994). *Trimble* and *Colling* are also clearly contrary to *Dusseau*, which the district courts did not discuss or apply in its orders.

The circuit court's order as well as the Petitioner's argument is also entirely contrary to the actual holding in *De Groot*, 95 So. 2d 912 (Fla. 1957), and overlooked the portion of the *De Groot* opinion that specifically ruled that the circuit court could not reconsider the evidence from the administrative review hearing when conducting administrative review by stating that, "[t]he appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law." *De Groot*, 95 So. 2d at 916; *Dusseau*, 794 So. 2d at 1275-76.

The process proposed by the Petitioner and conducted by the circuit court below in of itself equates to a *de novo* review. See *Dep't of Highway Safety and*

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rights of the motorists."

*Motor Vehicles v. Allen*, 539 So. 2d 20, 21(Fla. 5th DCA 1989) ("The acting circuit judge improperly reweighed the evidence in the case and came to a different factual conclusion than that of the administrative body. It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings when he undertakes a review of a decision of an administrative forum.") *Dean*, 662 So. 2d at 373; and *Satter*, 643 So. 2d at 695. This Court's opinion in *Dusseau* appears to have been written to specifically prevent the actions taken by the circuit court below.

## CONCLUSION

**WHEREFORE,** based on the record in this case and the authorities cited above, Respondent, Department of Highway Safety and Motor Vehicles, respectfully requests this Court approve the decision of the First District Court of Appeal and deny and dismiss this appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail and E-mail to Susan Cohen, Esq., at eandr@flduidefense.com, and to Jessica@flduidefense.com; 233 E. Bay St., Suite 1125, Jacksonville, FL 32206, on this 30th day of January, 2015.

## CERTIFICATE OF FONT

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

*/S/ Jason Helfant*
Jason Helfant
Senior Assistant General Counsel