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IN THE SUPREME COURT OF THE STATE OF FLORIDA

KURT KLINKER,

Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OR DRIVER IMPROVEMENT,

Respondent.
_____/

Supreme Court Case No.: SC13-____

5th DCA Case No.: 5D12-3896

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On June 18, 2010, Petitioner was stopped and arrested for driving under the influence of alcohol. After a breath test was administered to him which allegedly showed readings that exceeded .08 grams per 210 liters, Petitioner requested a Formal Review Hearing, pursuant to Section 322.2615, Florida Statutes (2010). The hearing officer sustained the suspension of Petitioner's driver's license.

After Petitioner filed a Petition for Writ of Certiorari with the Circuit Court, the Circuit Court subsequently denied the Petition thereby sustaining the suspension of Petitioner's driver's license. Petitioner thereafter filed a Petition for Writ of Certiorari to the Fifth District Court of Appeal. The Fifth District Court of Appeal subsequently denied the Petition for Writ of Certiorari in Klinker v. Department of Highway Safety and Motor Vehicles, __ So.3d __, 2013 WL 2359104 (Fla. 5th DCA, May 31, 2013), reh. den. July 5, 2013. (App. A)

In that proceeding Petitioner challenged on procedural due process grounds, the hearing officer's refusal to issue subpoenas for FDLE employees Roger Skipper, Jennifer Keegan and Laura Barfield. Petitioner also contended his breath test results were generated by an Intoxilyzer 8000 machine that had not been properly approved for evidentiary use in the State of Florida by FDLE. Petitioner also challenged the failure of the record before the hearing officer to contain, pursuant to FDLE Rule 11D-8.004, a copy of the most recent FDLE Department

Inspection (FDLE/ATP Form 41) for the Intoxilyzer 8000 used to test him. The Fifth District found that an FDLE Inspection Report is a yearly inspection of a given Intoxilyzer machine conducted by a FDLE inspector that is required to validate the instrument's approval for evidentiary use. It found, however, that only the "results" of the breath test had to be admitted at the hearing under Section 322.2615, Florida Statutes (2010).

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal below finding that the approval requirements of Section 316.1932, Florida Statutes and FDLE Rule 11D-8.003 as well as compliance with FDLE Rule 11D-8.004 for breath test admissibility did not apply in a Section 322.2615 proceeding was in express and direct conflict with this Court's decision in Florida Department of Highway Safety and Motor Vehicles v. Hernandez, 74 So.3d 1070 (Fla. 2011). (Fla. Stat. 322.2615 must be read in pari materia with Fla. Stat. 316.1932.) Its decision that only the "results" of a breath test were admissible in a Section 322.2615 proceeding without regard to any proof that the breath test results came from an approved breath testing machine or were in compliance with promulgated FDLE rules as required by Section 316.1932 to ensure its scientific reliability, was also in express and direct conflict with this Court's decisions in State v. Donaldson, 579 So.2d 728 (Fla. 1991), State v. Bender, 382 So.2d 697 (Fla. 1980), Robertson v. State, 604

So.2d 783 (Fla. 1992), Mehl v. State, 632 So.2d 593 (Fla. 1993), State v. Miles, 775 So.2d 950 (Fla. 2000) and the Third District Court of Appeal decision in Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007).

Finally, the decision of the Fifth District Court of Appeal not allowing the issuance of subpoenas to Roger Skipper, Laura Barfield and Jennifer Keegan expressly and directly conflicted with Lee v. Department of Highway Safety and Motor Vehicles, 4 So.3d 754, 758 (Fla. 1st DCA 2009), Pascual v. Dozier, 771 So.2d 552 (Fla. 3d DCA 2000) (the right to call witnesses is one of the most important due process rights) and Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389 (Fla. 1st DCA 1971).

ARGUMENT

THE RULING OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHERS AS TO THE ADMISSIBILITY OF BREATH TEST RESULTS IN PROCEEDINGS UNDER SECTION 322.2615, FLORIDA STATUTES (2010) AND IN ADDITION THE RIGHT TO CALL WITNESSES.

The decision of the Fifth District below allows a breath test compelled by Fla. Stat. 316.1932 to be admissible in a proceeding under Section 322.2615, Florida Statutes (2010) with no showing that it is scientifically reliable or administered in compliance with Section 316.1932, Florida Statutes (2010) or the FDLE rules promulgated under it. The decision expressly and directly conflicts

with nearly thirty years of legal precedent on breath testing from this Court and other District Courts of Appeal. The importance of Section 316.1932 Florida Statutes (2010) and the FDLE rules to admitting a breath test have never before been understated by the precedent of this Court or others as they have now been understated by the Fifth District Court of Appeal. Without requiring a showing of a proper approval or compliance with the promulgated FDLE rules under Section 316.1932, Florida Statutes (2010) as required by this Court's precedent, the holding of the Fifth District Court of Appeal could allow admission by the State of test results obtained by the State from blowing into a rubber chicken into a proceeding under Section 322.2615 Florida Statutes (2010). The decision of the Fifth District below puts a roof on a Section 322.2615 proceeding without requiring any foundation for the roof.

The taking of Petitioner's breath test on the Intoxlyzer 8000 breath testing machine was compelled by Florida's Implied Consent law. See Section 316.1932(1)(a)1.a., Florida Statutes (2010). This statute expressly provides:

> Any person who accepts the privilege extended by the laws of this State of operating a motor vehicle within this State is, by so operating such vehicle, deemed to have given his or her consent to submit to an ***approved*** chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor

> vehicle while under the influence of alcoholic beverages...

(Emphasis added)

Section 316.1932(1)(b)2. further provides:

> An analysis of a person's breath, in order to be considered valid under this section must have been performed substantially according to methods ***approved*** by the Department of Law Enforcement: For this purpose, the Department may approve satisfactory techniques or methods....

(Emphasis added)

Section 316.1932(1)(f)1., Florida Statutes (2010) also provides:

> The tests determining the weight of alcohol in the defendant's blood or breath shall be administered at the request of a law enforcement officer substantially in accordance with rules of the Department of Law Enforcement. Such rules must specify precisely the test or tests that are ***approved*** by the Department of Law Enforcement for reliability of result and ease of administration and must provide an ***approved*** method of administration which ***must be followed*** in all such tests given under this section.

(Emphasis added)

The purpose of the Implied Consent sections which direct law enforcement to use only approved techniques and methods is to ensure reliable scientific evidence for use in future court proceedings and to protect the health of those persons being tested as found by this Court in State v. Bender, 382 So.2d 697 (Fla. 1980) and Robertson v. State, 604 So.2d 783 (Fla. 1992). Scientific tests of

intoxication prior to the Implied Consent law were admissible only if a proper predicate established (a) the test was reliable, (b) the test was performed by a qualified operator with proper equipment and (c) expert testimony was presented concerning the meaning of the test. State v. Bender, 382 So.2d at 699.

This Court in Robertson stated:

> This predicate had to be established in each and every case. If the State failed to do so the evidence was not admissible. Moreover, when the State attempted to establish the necessary predicate, the defense enjoyed an opportunity to rebut all of this evidence...

604 So.2d at 789

In Robertson this Court also found:

> The Implied Consent law altered this state of affairs. Now, once the State shows that the person conducting the test was licensed by HRS and ***substantially complied with the applicable regulations*** a presumption is created that the evidence is admissible.

604 So.2d at 789 (Emphasis added)

The test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by their authority. State v. Bender, 382 So.2d at 699.

In State v. Donaldson, 579 So.2d 728 (Fla. 1991) the State only presented evidence of the qualifications of the operator and the fact that he conducted the test

properly. There was no evidence concerning the testing, inspection, or reliability of the machine. This Court followed Bender and stated:

> "...there must be probative evidence (1) that a breathalyzer test is performed substantially in accordance with methods approved by HRS, and with a type of machine approved by HRS, by a person trained and qualified to conduct it and (2) that the machine itself has been calibrated, tested and inspected in accordance with HRS regulations to ensure its accuracy before the results of a breathalyzer test may be introduced".

Id. at 729

In Mehl v. State, 632 So.2d 593 (Fla. 1993) this Court even in the area of blood testing found that it was incumbent upon HRS not merely to test particular machines, methods or operators for accuracy, but also to specify the precise blood-alcohol test and the method of administration approved for use in this State. Id. at 595. In State v. Miles, 775 So.2d 950, 956 (Fla. 2000) this Court again found that the State was entitled to the presumption of correctness of blood or breath test results only if it complied with the relevant statutes and rules.

There is simply no precedent to find, as the Fifth District did below, that challenges to approval can only be made in civil or criminal proceedings. There is no express prohibition in Section 322.2615, Florida Statutes (2010) preventing the litigation of this issue. This is especially true where the breath results were compelled by implied consent under Fla. Stat. 316.1932. The Fifth District's decision below would lead to an absurd result. Even if the breath test is found to

be unapproved or scientifically unreliable in a criminal or civil proceeding, it would still be admissible in a Section 322.2615 proceeding because the Fifth District found only the "results" of the test are required in that proceeding.

In Department of Highway Safety and Motor Vehicles v. Hernandez, 74 So.3d 1070 (Fla. 2011), this Court found that the obligation to submit to a breath – alcohol test emanates from Section 316.1932, Florida Statutes (2006), commonly known as the Implied Consent law. Id. at 1075. This Court found in Hernandez, that Section 322.2615 must be read in ***pari materia*** with Section 316.1932, Florida Statutes because the only definition of a lawful breath test under Section 322.2615 is found in Section 316.1932(1)(a). See also Department of Highway Safety and Motor Vehicles v. Pelham, 979 So.2d 304 (Fla. 5th DCA 2008). In Hernandez this Court even quoted language from Pelham, wherein the Fifth District Court of Appeal also found that Sections 322.2615 and 316.1932 could not be construed in isolation because they are interdependent and must be considered in ***pari materia*** with one another. Id. at 1078-1079. The decision of the Fifth District Court of Appeal below looking at Section 322.2615 in isolation is in express and direct conflict with this Court's decision in Hernandez which requires Section 322.2615 to be looked at in ***pari materia*** with the requirements of Section 316.1932, Florida Statutes (2010).

The decision by the Fifth District Court of Appeal below to exempt Section 322.2615 from the requirements that a breath test be shown to be approved pursuant to Florida Statute 316.1932(1)(a)1. and finding that the State is not required to show compliance with FDLE Rule 11D-8.004 as required by Florida Statute 316.1932(1)(a)2. and Florida Statute 316.1932(1)(f)1. is in express and direct conflict with the predicate requirements for the admissibility of breath tests in State v. Donaldson, 579 So.2d 728 (Fla. 1991), other decisions of this Court and the Third District Court of Appeal in Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 1st DCA 2007).

The Fifth District decision also expressly and directly conflicts with Lee v. Department of Highway Safety and Motor Vehicles, 4 So.3d 754 (Fla. 1st DCA 2009) where the First District Court of Appeal held that a hearing officer may issue subpoenas for the officers and witnesses identified not only in the documents named in subsection (2), but also "in any [documentary] evidence ***submitted*** at or prior to the hearing". Id. at 758 (Emphasis added) The decision below improperly limits witness subpoenas to documents submitted only by "law enforcement". See f.n. 6. Lee, however, allows a driver to subpoena witnesses listed in any documentary evidence submitted at or prior to the hearing including documents submitted by the driver. Petitioner submitted documents at the hearing that referenced Roger Skipper and Laura Barfield but was not allowed to subpoena

them. Along with Ms. Keegan they were needed by Petitioner to authenticate documents and testify concerning them.

The decision of the Fifth District Court of Appeal is also in express and direct conflict with Pascual v. Dozier, 771 So.2d 552 (Fla. 3d DCA 2000) (the right to call witnesses is one of the most fundamental procedural due process rights that exist.) Its decision also expressly and directly conflicts with Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389 (Fla. 1st DCA 1971) (all proceedings conducted by a State agency, board, commission or a department for the purpose of adjudicating any parties legal rights, duties, privileges or immunities must be conducted in a quasi judicial manner in which the basic requirements of due process are accorded and preserved.)

CONCLUSION

The decision of the Fifth District Court of Appeal is in express and direct conflict with the decisions of this Court and other District Courts of Appeals.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Kimberly Gibbs at kimgibbs@flhsmv.gov this 16 day of July 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this foregoing brief complies with the font standards required by Fla. R. App. Pr. 9.210(a)(2).

STUART I. HYMAN, ESQUIRE

IN THE SUPREME COURT OF THE STATE OF FLORIDA

KURT KLINKER,

Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OR DRIVER IMPROVEMENT,

Respondent.
_____/

Supreme Court Case No.: SC13-____

5th DCA Case No.: 5D12-3896

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Westlaw

--- So.3d ----, 2013 WL 2359104 (Fla.App. 5 Dist.), 38 Fla. L. Weekly D1195
(Cite as: 2013 WL 2359104 (Fla.App. 5 Dist.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Fifth District.
Kurt **KLINKER**, Petitioner,
v.
DEPARTMENT OF **HIGHWAY SAFETY** AND **MOTOR VEHICLES**, Respondent.

No. 5D12–3896.
May 31, 2013.

Background: Motorist's driver's license was revoked as result of his arrest for driving under the influence. Motorist filed petition for writ of certiorari. The Circuit Court, Orange County, affirmed. Motorist filed petition for writ of certiorari.

Holding: The District Court of Appeal held that report that was completed in motorist's case in connection with his arrest for driving under the influence (DUI) was not a document that a law enforcement officer was required to provide to the Department of Highway Safety and Motor Vehicles (DHSMV) within five days of issuance of notice of suspension of driver's license in connection with motorist's license revocation proceeding.

Petition denied.

West Headnotes

Automobiles 48A ⇐144.2(1)

48A Automobiles
48AIV License and Regulation of Chauffeurs or Operators
48Ak144 Suspension or Revocation of License
48Ak144.2 Procedure
48Ak144.2(1) k. Administrative Procedure in General. Most Cited Cases

Florida Department of Law Enforcement (FDLE) report that was completed in motorist's case in connection with his arrest for driving under the influence (DUI) was not a document that a law enforcement officer was required to provide to the Department of Highway Safety and Motor Vehicles (DHSMV) within five days of issuance of notice of suspension of driver's license in connection with motorist's license revocation proceeding, as statute provided that the results of any breath or blood test or an affidavit stating that such a test was requested by a law enforcement officer and that the person refused to submit, but an FDLE report was more akin to a report related to the maintenance of a breath testing instrument, as opposed to the "results" of a breath testing instrument. West's F.S.A. § 322.2615(2).

Stuart I. Hyman of Stuart I. Hyman, P.A., Orlando, for Petitioner.

Stephen D. Hurm, General Counsel and Kimberly Gibbs, Assistant General Counsel of **Department** of **Highway Safety** and **Motor Vehicles**, Orlando, for Respondent.

PER CURIAM.

* Kurt **Klinker** (" **Klinker** ") seeks a writ of certiorari from this Court quashing a circuit court opinion which affirmed a hearing officer's determination that **Klinker's** driver's license suspension should be sustained. We deny, as meritless, **Klinker's** petition to the extent that it challenges whether there was probable cause for Trooper Ramirez' traffic stop. Likewise, we deny **Klinker's** remaining claims challenging the hearing officer's refusal to issue subpoenas to FDLE employees Roger Skipper, Jennifer Keegan, and Laura Barfield;

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the hearing officer's refusal to set aside **Klinker's** suspension based on his claim that the Intoxilyzer 8000 breath test machine has never been properly approved for evidentiary use in Florida; and his claim that the record before the hearing officer failed to include a copy of the most recent Florida Department of Law Enforcement Department ("FDLE") Inspection Report (FDLE/ATP Form 41) for the Intoxilyzer 8000 machine used to test him.

We conclude, however, that because these latter claims have resulted in conflicting decisions in the circuit courts below, it is incumbent upon us to address the issues presented in order to resolve the confusion that currently exists. *Cf. Department of H'wy Safety & Motor Vehicles v. Alliston,* 813 So.2d 141, 145 (Fla. 2d DCA 2002) ("[W]e conclude that the circuit court's error results in a miscarriage of justice requiring certiorari relief because it has precedential value and the circuit court is applying the same error to numerous other administrative proceedings involving the suspension of driver's licenses.").

On June 18, 2010, **Klinker** was lawfully stopped in his vehicle by Trooper Ramirez after having been observed by the officer to be travelling over the posted speed limit. Trooper Ramirez approached **Klinker's** vehicle and observed **Klinker** to have glassy, blood-shot eyes, a flushed face, slurred speech, and an odor of alcohol. After **Klinker** performed poorly on field sobriety exercises, Trooper Ramirez arrested **Klinker** for DUI and transported him to the Orange County Breath Test Center where **Klinker** would later submit to a breath test utilizing an Intoxilyzer 8000 breath test machine (using software version 8100.27). The results of **Klinker's** two breath tests were readouts of 0.196 and 0.200, considerably above the statutory maximum of .08. Based upon this information, Trooper Ramirez suspended **Klinker's** license for driving under the influence of alcohol.

Klinker would subsequently request that a formal administrative review of his license suspension be conducted by the Florida **Department** of **Highway Safety** and **Motor Vehicles** ("DHSMV"). *See* Fla. Admin. Code R. 15A–6.006. The hearing was scheduled to be held in Orlando, Florida, where the notice of suspension was issued. *See* Fla. Admin. Code R. 15A–6.009.

In preparation for his hearing, Klinker listed 20 separate issues to be resolved and requested that the hearing officer issue subpoenas and/or subpoenas *duces tecum* for three FDLE employees: Roger Skipper, Laura Barfield, and Jennifer Keegan. According to the subpoena requests, both Barfield and Keegan worked at an FDLE office in Tallahassee, and Skipper worked at an FDLE office in Orlando. According to Klinker's prehearing statement, these three FDLE employees would be needed to testify on all the following matters at the formal administrative review hearing:

***2 Roger Skipper:** Testify as to breath test results and improper approval and registration of breath test machines, simulator solutions, including but not limited to Guth Alcohol Countermeasures and other dry gas standards are not properly approved, modification to breath test device. Non-compliance with F.D.L.E. Rules 11D–8.003, 11D–8.0035, 11D–8.004, 11D–8.006 and 11D–8.007.

Laura Barfield: Testify as to simulator solutions including but not limited to Guth Alcohol Countermeasure solutions and other dry gas standards are not properly approved, whether F.D.L.E. agency inspection permits are properly approved, improper approval and registration of breath test machines. Non-compliance with F.D.L.E. Rules 11D–8.003, 11D–8.0035, 11D–8.004, 11D–8.006 and 11D–8.007.

Jennifer Keegan: Testify as to the type of operator's manual, maintenance manuals and schematics in the possession of the F.D.L.E. and used for the approval of breath testing machines, pursuant to all past and present versions of F.D.L.E. Rule 11D–8.003.

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Utilizing this testimony, Klinker sought to demonstrate that his breath test results recorded on June 18, 2010 were invalid and unreliable because they were obtained through the use of a breath testing machine that had not been properly approved pursuant to FDLE Rule 11D–8.003, Florida Administrative Code. The hearing officer denied each of Klinker's written subpoena requests by writing the word "Denied" and "F.S. 322.2615" across the the top of each request.

On July 28, 2010, Klinker's formal administrative review hearing was conducted. At the hearing, the DHSMV admitted into evidence Klinker's driver's license, Trooper Ramirez' arrest affidavit, the breath alcohol test affidavit prepared by Orange County Sheriff's Office employee Jimmy Burke, the Agency Inspection Report for the utilized Intoxilyzer 8000 machine (FDLE/ATP Form 40) prepared by Orange County Sheriff's Office employee Kelly Melville, and an uncertified transcript of Klinker's driving record. In addition, the following three individuals provided live testimony at the hearing: Burke, Melville, and Trooper Ramirez. Klinker was present and represented by his attorney, Stuart Hyman. On August 6, 2010, the hearing officer entered a written order sustaining Klinker's license suspension.

Klinker next sought to challenge the hearing officer's decision to sustain his driver's license suspension by filing a first-tier petition for writ of certiorari in the Orange County circuit court. *See* § 322.2615(13), Fla. Stat. (2010). In that proceeding, Klinker challenged, on procedural due process grounds, the hearing officer's refusal to issue the subpoenas for FDLE employees Skipper, Keegan, and Barfield. In addition, Klinker contended that his license suspension should have been set aside by the hearing officer because his breath test results were generated by an Intoxilyzer 8000 machine that had not been properly approved for evidentiary use in the State of Florida by the FDLE. Klinker also challenged the failure of the DHSMV to ensure that the record before the hearing officer contained a copy of the most recent FDLE Department Inspection (FDLE/ATP Form 41) for the Intoxilyzer 8000 used to test him. Finally, Klinker argued that Trooper Ramirez' traffic stop was not supported by probable cause. The circuit court ultimately issued an opinion, on rehearing, rejecting each of Klinker's arguments.

***3** Klinker now seeks second-tier certiorari review raising essentially the same issues that were asserted before the circuit court. For the reasons which follow, we deny the instant petition.

The Division of Driver Licenses of the DHSMV is tasked with the responsibility of conducting formal administrative review hearings, when requested by a driver, in order to determine whether the DHSMV's decision to suspend a driver's license should be sustained, amended, or invalidated. *See* Fla. Admin. Code Rs. 15A–6.013(1); 15A–6.002(3). The formal review process is initiated when a law enforcement officer, on behalf of the DHSMV, issues an administrative suspension to a driver for driving with an unlawful breath alcohol level. *See* § 322.2615(1)(a), Fla. Stat. (2010). Once this occurs, the officer is provided five days within which he or she must provide certain documentation to the DHSMV, including "the results of any breath or blood test," which support the officer's determination. § 322.2615(2), Fla. Stat. (2010).[FN1] Historically, the DHSMV will rely heavily upon this documentation in attempting to establish that a driver's license suspension should be sustained.

At a formal review hearing, the proceedings are presided over by a hearing officer who is a division employee and who is tasked with the responsibility of determining "whether the suspension ... is supported by a preponderance of the evidence." Fla. Admin. Code R. 15A–6.013(7). *See also* Fla. Admin. Code R. 15A–6.002(2).[FN2]

Because Klinker submitted breath test samples on the Intoxilyzer 8000 machine in the instant case, the scope of the hearing officer's review was limited to the following questions:

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1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in the state while under the influence of alcoholic beverages or chemical or controlled substances, and;

2. ***Whether the person whose license was suspended had an unlawful ... breath-alcohol level of 0.08 or higher as provided in s. 316.193.***

§ 322.2615(7), Fla. Stat. (2010) (Emphasis added).

Notably, the hearing officer is empowered by statute and rule to issue subpoenas to individuals whose attendance is requested by the driver at the formal administrative hearing. However the scope of the hearing officer's subpoena-issuing power in this regard is strictly limited to "the officers and witnesses identified in documents in subsection (2) ...." § 322.2615(6)(b); Fla. Stat. (2010); Fla. Admin. Code R. 15A–6.012(1).[FN3] *See also* § 322.2615(11), Fla. Stat. (2010) ("The formal review hearing may be conducted upon a review of the reports of a law enforcement officer ..., including documents relating to the administration of a breath test.... However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath ... test.").

***4** As noted above, in the present case the record demonstrates that the only documents submitted by Trooper Ramirez to the DHSMV pursuant to his section 322.2615(2) responsibilities were Klinker's driver's license, Trooper Ramirez' arrest affidavit, the breath alcohol test affidavit prepared by Orange County Sheriff's Office employee Jimmy Burke, the Agency Inspection Report for the utilized Intoxilyzer 8000 machine (FDLE/ATP Form 40) prepared by Orange County Sheriff's Office employee Kelly Melville, and an uncertified transcript of Klinker's driving record. Accordingly, on the face of the record it is clear that the only individuals for whom Klinker would have the right to seek subpoenas would be Burke, Melville, and Trooper Ramirez, as these were the only "officers and witnesses identified in documents in subsection (2)." *See* § 322.2615(6)(b), Fla. Stat. (2010). In fact, Klinker did seek to subpoena these witnesses and, in each case, the subpoenas were issued and the witnesses appeared.

However, Klinker also seeks to challenge the proceedings below on the ground that the record of his formal administrative review hearing did not include a copy of the most recent FDLE Inspection Report (FDLE/ATP Form 41) for the Intoxilyzer 8000 machine used to test him. An FDLE Inspection Report is a yearly inspection of a given Intoxilyzer machine conducted by an FDLE inspector in order to "validate[ ] the instrument's approval for evidentiary use." Fla. Admin. Code R. 11D–8.004(2). The specific responsibilities of such an FDLE Inspector include "register[ing] evidentiary breath test instruments, ... conduct[ing] inspections and maintenance of breath test instruments and related equipment and facilities, [and] to conduct and monitor training classes, and to otherwise ensure compliance with Chapter 11D–8, F.A.C." Fla. Admin. Code R. 11D–8.004(4). This Court takes judicial notice of the fact that historically, these FDLE inspections in Orange County have been conducted by Roger Skipper and that Mr. Skipper has affixed his signature to numerous FDLE Inspection Reports (FDLE/ATP Form 41) as the certifying official.

Thus, a key question presented in the instant case is whether an FDLE Inspection Report would qualify as a document that law enforcement must submit to the DHSMV pursuant to section 322.2615(2). If it is determined to be such a document, then it would necessarily follow that Klinker would have a statutory right to subpoena the author of that document (presumably Roger Skipper) pursuant to the express language of section 322.2615(6)(b).

We conclude, however, that an FDLE Inspection Report (FDLE/ATP Form 41) is not a docu-

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ment which is contemplated in the language of section 322.2615(2). [FN4] First, a review of the language of section 322.2615(2) reveals that an FDLE Department Inspection Report could only qualify under the language of that section if it was determined to constitute "the ***results*** of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit." (Emphasis added). In our view, when read in its totality, this language in subsection (2) clearly refers to documentation, such as the breath alcohol test affidavit, which is designed to provide the "results" of a driver's breath alcohol level as determined on the date that the driver actually took the breath alcohol test.

***5** Furthermore, as has previously been discussed, an FDLE Department Inspection Report is designed to "validate[ ] the instrument's approval for evidentiary use." Fla. Admin. Code R. 11D–8.004(2). In achieving this goal, an FDLE inspector performs an annual inspection and maintenance of each Intoxilyzer 8000 machine in the State of Florida in order to determine that each machine is functioning properly. *See* Fla. Admin. Code R. 11D–8.004(4).

Given this purpose of an FDLE Inspection Report, it is our view that such a report is more akin to a report related to the *maintenance* of a breath testing instrument, as opposed to the *results* of a breath testing instrument. While it is true that a report related to "the maintenance of a breath testing instrument" is a document that the Florida Administrative Code expressly states that a hearing officer "may" consider, *see* Fla. Admin. Code R. 15A–6.013(2) [FN5], we find that such maintenance reports do not fall within the language of section 322.2615(2), such that a law enforcement officer must provide it to the DHSMV within five days of the issuance of a notice of suspension. Moreover, since we conclude that FDLE Inspection Reports do not fall within the purview of section 322.2615(2), it follows that a driver has no right to request that a subpoena be issued for any individuals identified in such a report. *See* § 322.2615(6)(b), Fla. Stat. (2010). Thus, in the context of the instant case, we find that the hearing officer correctly refused to issue a subpoena for FDLE employee, Roger Skipper.[FN6]

Finally, we reject Klinker's arguments contending that his breath test results were invalid and unreliable due to his claim that they were obtained through the use of an Intoxilyzer machine that had not been properly approved by the FDLE pursuant to Rule 11D–8.003, Florida Administrative Code. We conclude that such challenges to the approval process of the Intoxilyzer machine are simply beyond the scope of a formal driver's license review proceeding. We are buttressed in this conclusion by the restrictive statutory language located in sections 322.2615(2) and 322.2615(6)(b), which require law enforcement officers to produce to the DHSMV documentation related only to the "results" of the actual breath test at issue, and which limits a hearing officer's subpoena powers to only the individuals identified in the documents provided pursuant to section 322.2615(2). Furthermore, we are compelled to this result by the recent amendments to the language of Florida Administrative Code Rule 15A–6.013(2), which now give the hearing officer the discretion to consider certain pieces of documentation, such as reports related to the maintenance of a breath testing instrument, where once such consideration was required.[FN7]

PETITION DENIED.

SAWAYA, JACOBUS and BERGER, JJ., concur.

FN1. The pertinent language of section 322.2615(2), Florida Statutes (2010) is as follows:

> [T]he law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, the driver's license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical

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> control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test, if any; and the notice of suspension. The failure of the officer to submit materials within the 5–day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing. The officer may also submit a copy of the crash report and a copy of a videotape of the field sobriety test or the attempt to administer such test. Materials submitted to the department by a law enforcement agency or correctional agency shall be considered self-authenticating and shall be in the record for consideration by the hearing officer. Notwithstanding s. 316.066(5), the crash report shall be considered by the hearing officer.

FN2. This Court has previously recognized that the utilization of hearing officers who are employed by the DHSMV does not alter the fact that the formal review procedure "is 'prompt,' 'fair' and 'meaningful' enough to meet the requirements of due process and is facially valid." *Dep't of Hwy. Safety & Motor Vehicles v. Stewart,* 625 So.2d 123, 124 (Fla. 5th DCA 1993).

FN3. While these rules only provide a driver the right to obtain subpoenas for those individuals identified in the documents listed in section 322.2615(2), Florida Statutes, it should be noted that the hearing officer is still provided with the discretion to issue subpoenas for other witnesses he or she deems relevant to the proceedings. *See* Fla. Admin. Code R. 15A–6.012(1) ("The hearing officer may issue a subpoena on his or her own initiative without the request of the driver.").

FN4. Like our sister Court in *Yankey v. Department of H'wy Safety & Motor Vehicles,* 6 So.3d 633, 638 (Fla. 2d DCA 2009), we express no view on whether an Agency Inspection Report (FDLE/ATP Form 40) is contemplated in the language of section 322.2615(2). Here, the Agency Inspection Report was entered into evidence by the DHSMV and Klinker was allowed to subpoena the individual who authored that report (Kelly Melville).

FN5. It is significant to note that on March 11, 2007, the language of Rule 15A–6.013(2) was amended in numerous respects. Among the major changes made to Rule 15A–6.013(2) was the replacement of the word "shall" with the word "may", such that the hearing officer was no longer required to consider the former, lengthier list of enumerated documents listed within this subsection, but instead now had the discretion to consider the remaining documents listed therein. *See The Florida Bar v. Trazenfeld,* 833 So.2d 734, 738 (Fla.2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall' ".).

FN6. Likewise, we find that the hearing officer correctly rejected the subpoena requests for Laura Barfield, and Jennifer Keegan. There is simply no reason to believe that either of these two individuals appeared on any of the documents submitted by law enforcement to the DHSMV pursuant to section 322.2615(2).

FN7. We would note, parenthetically, that

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> contrary to Klinker's assertion in the instant petition, the FDLE *has* approved the Intoxilyzer 8000 model for evidentiary use in the State of Florida. *See* Fla. Admin. Code R. 11D–8.003(2). In our view, any challenges directed at deficiencies in this approval process are better addressed in a civil or criminal action.

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