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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. : SC13-9999
5DCA#: 5D12-3896

KURT KLINKER,

Petitioner,

vs.

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

Respondent.

RESPONSE TO BRIEF ON CONFLICT JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In accordance with the legislative mandate contained in s. 322.2615(1), Florida Statutes (2010), Petitioner's Florida driver's license was administratively suspended by the Department on June 18, 2010 based on a DUBAL (acronym for **D**riving with **U**nlawful **B**reath **A**lcohol **L**evel) violation committed by Petitioner. Petitioner was given notice of the administrative suspension and requested a formal administrative review. The hearing officer timely scheduled a hearing and issued the subpoenas Petitioner requested for the fact witnesses identified in the documents submitted to support the suspension pursuant to s. 322.2615(2).

At the administrative hearing, the hearing officer reviewed the documents submitted to the Department pursuant to s. 322.2615(2), considered the record testimony and determined that there was competent substantial evidence to support a finding that it was *more likely than not* that Petitioner was driving while under the influence of alcohol, lawfully arrested, and had a breath alcohol level above the legal limit. *See*, Fla. Stat. s. 322.2615(7)(a); *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011) (holding that in addition to the issues for the hearing officer's consideration pursuant to the statute, the hearing officer must also consider the lawfulness of the stop). Based on this decision the hearing officer affirmed the legislatively mandated administrative DUBAL suspension. *See*, Fla. Stat. s. 322.2615(8).

Petitioner timely sought first-tier certiorari review of the Department's administrative order affirming the DUBAL suspension in the circuit court. In the first-tier petition Petitioner re-argued the exact same arguments that were rejected by the hearing officer in the administrative hearing and sought a *de novo* determination of the same issues. In its Response, the Department argued that the court *could not* conduct a *de novo* review, that Petitioner was afforded administrative due process, and that the hearing officer's order was lawful and supported by competent substantial evidence. Further, that pursuant to the controlling case law and Fla. Stat. s. 322.2615(13), the circuit court should deny and dismiss the petition.

The circuit court considered the petition, response, reply, over a dozen additional pleadings, hundreds of pages of non-record documents and lastly, motions for rehearing filed by both parties. On September 10, 2012, the circuit court entered its Order on Motions for Rehearing and Final Order Denying Petition for Writ of Certiorari, concluding that Petitioner had been afforded due process by the Department, that the Department adhered to the essential requirements of the law by affirming the administrative suspension, and that there was competent substantial evidence in the record to support the administrative suspension.

Petitioner then sought second-tier certiorari review in the Fifth District Court. In the second tier petition, Petitioner argued that the circuit court violated the essential requirements of law by failing to grant his petition based on the "binding precedent" found in the *Breum* opinion, which Petitioner cited as, ***"Department of Highway Safety and Motor Vehicles v. Breum, Case Number: 5D11-3426 (Fla. 5th DCA, March 28, 2012), rehearing denied (May 1, 2012)"***; in which the circuit court granted a suspended motorist (also represented by Petitioner's counsel) a writ of certiorari based on the identical legal arguments made in the *Klinker* petition, *Klinker v. State of Florida, Department of Highway Safety & Motor Vehicles,* --So.3d--, 2013 WL 2359104 (Fla. App. 5 Dist., May 31, 2013. Petitioner argued that the circuit court's *Breum* opinion was controlling legal authority for *all Florida courts.* In the remainder of the petition, Petitioner again argued that the hearing officer *erred* in rejecting his arguments in the review hearing.

In its Response, the Department argued that there was no merit to the *Breum* argument; that the circuit court's *Breum* opinion did not become controlling precedent when the Department sought second tier administrative review in *Breum* and district court refused to intervene in an order that *per curiam* denied **without an opinion** the Department's second-tier petition; that the circuit court did not violate the essential requirements of the law by rejecting the *Breum* argument; and

that Petitioner failed to address the proper issues for the district court's consideration in the remaining arguments in the petition; and as a result the district court should deny and dismiss the petition.

On May 31, 2013, the district court entered its order that determined that the petition were meritless and dismissed the petition. *Klinker,* p. 1-2. The district court refused to discuss the meritless arguments, but nonetheless wrote to discuss the due process to be afforded by the Department pursuant to the plain language of the administrative suspension review statute in an attempt to clear up the demonstrated confusion existing in the circuit courts. *Klinker*, at 2-11. Petitioner now seeks to invoke this court's conflict jurisdiction based on an allegation that the Fifth DCA's *Klinker* opinion "expressly and directly" conflicts with other decisions from this court and the district courts.

STANDARD OF REVIEW

The standard for conflict under Article V, section 3(b)(3) requires that the petitioning party show that the district court's decision "...*on its face* collides with a prior decision of the Court. . . on the same point of law so as to create an inconsistency or conflict among the precedents." *Kincaid v. World Insurance Co.*, 157 So. 2d 517, 518 (Fla. 1963)(emphasis supplied).

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate express and direct conflict necessary to support a finding that intervention from this court is appropriate. This court should reject Petitioner's latest baseless attempt to obtain Florida Supreme Court intervention in an appellate administrative driver's license suspension case.

ARGUMENT:
THIS COURT LACKS CONFLICT JURISDICTION.

Petitioner has submitted to this Court a misleading jurisdictional brief that creates the impression that Petitioner is challenging a criminal DUI suspension. To this end Petitioner discusses his DUI arrest and argues that *Klinker* expressly and directly conflicts with the rulings from a half-dozen *criminal* case law authorities and wholly fails to disclose to this Honorable Court that it was the Department's *administrative DUBAL suspension* that the Department imposed on Petitioner's license pursuant to the legislative mandate in s. 322.2615(7)(a) that was under attack in the lower proceedings. (Brief, pp. ii-iii, Argument).

Despite the impression created in his jurisdictional brief, Petitioner is seeking this court's review of a district court order conducting second tier *administrative* review, *not* criminal appellate or circuit civil review. The district court had no reason to consider or apply criminal or civil case law to resolve the issues for the district court's consideration on second tier *administrative* review,

and the district court did *not* render an opinion that conflicts with the civil and criminal case law authorities cited in the jurisdictional brief: The issues presented in non-administrative cases, and especially the issues in criminal appellate cases, have absolutely nothing whatsoever to do with the issues considered by a district court conducting *administrative* appellate review.[1]

Further, and wholly contrary to Petitioner's argument, a review of the district court's *Klinker* opinion clearly reveals that the opinion does *not* 'expressly and directly' conflict with *any* opinions. In fact, the opinion mentions only two other administrative appellate cases and cites both cases with approval. See, *id.* at 2 (citing *Dep't of Highway Safety & Motor Vehicles v. Alliston*, 6 So.3d 633, 638 (Fla. 2d DCA 2009); *id.* at 9, footnote 4 (citing *Yankee v. Dep't of Highway Safety & Motor Vehicles*, 813 So.2d 141,145 (Fla. 2d DCA 2002).

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[1] In criminal DUI/Refusal proceedings the suspended motorist's *liberty* is at stake and as a result constitutional considerations require that the finder of fact apply the *most stringent* burden of proof (beyond a reasonable doubt), and permit the reviewing courts to conduct a *de novo* review of the mixed issues of fact and law from the lower tribunal. However, in *administrative* suspension cases, where only the privilege to possess a license is temporarily in jeopardy; the finder of fact applies the most *lenient* burden of proof (preponderance of the evidence), and *the reviewing courts are prohibited from conducting a de novo review of the same issues from the administrative hearing.* See, *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d 1270, 1275-1276 (Fla. 2001); Fla. Stats ss. 322.2615(7); 322.2615(13).

Notwithstanding this inconvenient truth, Petitioner argues that the *Klinker* opinion "expressly and directly" conflicts with the administrative appellate rulings from the district courts in *Lee, Wejebe, Pelham,* and also with this court's ruling in *Hernandez*, supra. Petitioner is mistaken: the *Klinker* case is factually and legally distinguishable from *all* the cited administrative cases: While the courts in the cited cases considered the arguments in the second-tier petitions and ultimately granted the suspended motorists the relief requested in the petitions, in the instant case the district court properly denied as entirely meritless all of the suspended motorist's arguments in the second tier petition and thus had no reason to consider *any* of the cited cases and absolutely no reason to address the issues of law presented therein.

Further, the cited cases did not address or consider the same issues that were considered by the Fifth District Court in *Klinker*. In *Klinker,* Petitioner's primary argument to the district court was that the Ninth Judicial Circuit Court's opinion in Breum became controlling legal authority for all Florida courts when the district court denied the Department's second tier petition. The district court properly rejected and refused to even address this argument pursuant to well settled law from this court: a *per curiam* decision issued **without an opinion** is not precedent and "... such a citation has *no relevance for any purpose* and is properly excluded from a brief or oral argument." *Department of Legal Affairs v. 5th District Court*

of Appeals, 5th District, 434 So.2d 310, 312 (Fla. 1983)(emphasis added). Petitioner's *Breum* argument in the circuit and district courts was wholly improper and misleading and Petitioner should *not* have advanced the argument in either court. *Id.*

The district court also properly rejected the remaining arguments in the second-tier petition because Petitioner re-argued the same issues from the administrative review hearing (*and* the first tier petition) instead of focusing on the actions of the circuit court as required when seeking a second tier writ of certiorari on administrative review. See, *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982) ("[T]he district court, upon review of the circuit court's judgment,... determines whether the circuit court [1] afforded procedural due process and [2] applied the correct law."); see also *Florida Power & Light Co. v. City of Dania,* 761 So.2d 1089, 1093 (Fla. 2000)(explaining that district courts are precluded from assessing the record evidence when conducting second-tier administrative review and holding that doing so usurps the jurisdiction of the circuit court and violates the essential requirements of the law).

Having rejected as meritless all of the arguments in the petition, the district court simply had no reason to discuss *Lee, Wejebe,* or *Pelham.* The district court also had no reason to discuss this court's *Hernandez* opinion,

which ruled that the hearing officer had to consider the lawfulness of the stop when conducting administrative review, because it was entirely undisputed that the hearing officer *considered the lawfulness of the stop* in Klinker's administrative review hearing. Petitioner wholly failed to demonstrate any basis for the district court to intervene in his second tier petition and as a result the Fifth District Court adhered to the proper standards applicable to second tier administrative review and dismissed the arguments in the petition without further discussion. See, *Florida Power & Light Co,* supra at 1092, 1093. On these facts, Petitioner has not and *cannot* demonstrate any conflict between *Klinker* and the cited cases.

Lastly, Petitioner has successfully employed his misleading arguments in past jurisdictional briefs seeking this court's intervention in administrative suspension cases. See, *Berne v. Florida Department of Highway Safety & Motor Vehicles*, 84 So.3d 257 (Fla. 2012);*Meinken v. Florida Department of Highway Safety & Motor Vehicles*, 104 So.3d 1085 (Fla. 2012) (Table Citation). It was not until these cases were briefed by all parties and oral argument on the merits concluded in *Berne* that this court determined that there was not, in fact, any conflict jurisdiction to be found and released jurisdiction in both cases. *Id.* Here as in *Berne* and *Meinken*, there is simply no 'express and direct' conflict to be found in the Fifth District Court's *Klinker* order. There is absolutely no merit to

the arguments in Petitioner's jurisdictional brief, and this Honorable Court should not allow the Petitioner to drag the Department and this Court into yet another administrative appellate proceeding where Petitioner's pleadings have failed yet again to demonstrate any actual basis for the court's intervention

As demonstrated herein, the lower tribunals adhered to the essential requirements of the law and applied the correct law through every stage of the administrative driver's license suspension review proceedings--from the administrative suspension review hearing through the Fifth District Court's second tier certiorari review. There is no merit whatsoever to the arguments in the jurisdictional brief: this court does not have conflict jurisdiction sufficient to support this Honorable Court's intervention in this administrative case.

CONCLUSION

While Respondent would welcome an opportunity to discuss the propriety of Petitioner's pleading practices with this court, because Petitioner has failed to demonstrate express and direct conflict in the Fifth District Court's administrative opinion in *Klinker* sufficient to support this Court's intervention in this matter, the Department must respectfully requests that this Honorable Court enter an order denying conflict jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via email to Stuart I. Hyman, Esquire at shymanlaw@aol.com; and by mail to the Clerk of Court, 5th DCA, 300 S. Beach St., Daytona Beach, FL 32114this **30th** day of July, 2013.

CERTIFICATE OF FONT

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

/S/ Kimberly A. Gibbs
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