COLORADO COURT OF APPEALS **2012 COA 143**

Court of Appeals No. 11CA1351
Douglas County District Court No. 10CV3215
Honorable Vincent R. White, Judge

Andrew Hanson,

Petitioner-Appellant,

v.

Colorado Department of Revenue, Motor Vehicle Division,

Respondent-Appellee.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE BOORAS
Terry, J., concurs
Fox, J., dissents

Announced August 30, 2012

Foster Graham Milstein & Calisher, LLP, Daniel S. Foster, Christopher P. Carrington, Chip G. Schoneberger, Denver, Colorado, for Petitioner-Appellant

John W. Suthers, Attorney General, Laurie Rottersman, Assistant Attorney General, Grant T. Sullivan, Assistant Attorney General, Denver, Colorado, for Respondent-Appellee

¶1 Petitioner, Andrew Hanson, appeals the district court's judgment affirming the administrative order entered by respondent, the Colorado Department of Revenue (Department), revoking Hanson's driver's license for one year. We affirm the district court's judgment.

I. Background

¶2 A private citizen saw a vehicle strike a highway sign after being driven erratically and at excessive speed. The citizen contacted law enforcement and followed the vehicle to a private residence.

¶3 Deputy Ashby was the first officer to arrive at the residence. According to his report, he looked through a garage window and saw a damaged vehicle matching the description of the reported vehicle. Deputy Ashby's report further indicated that the front door of the residence was open and that he "pushed open the door and made announcements."

¶4 According to his report, Deputy Ashby then made contact with a female who said that her boyfriend had come home and was acting strangely. When the female subsequently brought Hanson downstairs, he exhibited indicia of alcohol intoxication and

admitted he had consumed alcohol.

¶5 Hanson was transported to a hospital where he continued to show indicia of alcohol intoxication. He was eventually placed under arrest by a different officer and was advised of his options under the express consent statute. Based on Hanson's refusal to cooperate, the officer deemed him to have refused testing and issued a notice of revocation.

¶6 Hanson timely requested a hearing. He also sought and obtained an administrative subpoena from the Department requiring Deputy Ashby's appearance.

¶7 When Deputy Ashby failed to appear at the hearing, Hanson's counsel sought dismissal, arguing, based on Deputy Ashby's report, that the initial entry into the residence appeared to be illegal, and that he needed to question Deputy Ashby about the details surrounding the entry to determine whether it was constitutionally permissible.

¶8 The hearing officer accepted that Deputy Ashby had been properly served with the subpoena. However, he denied Hanson's request for dismissal and, in effect, quashed the subpoena,

concluding that dismissal was too drastic a remedy and that Deputy Ashby's appearance was "not necessary" because he had "limited contact" with Hanson and had "little to do with the case in chief."

¶9 Then, relying largely on the contents of Deputy Ashby's written report, the hearing officer concluded that Deputy Ashby was justified in entering the house based on a reasonable belief the driver of the vehicle might be injured. The hearing officer further concluded that once Deputy Ashby was inside the residence, the subsequent contact with Hanson was consensual. Based on these conclusions and other findings, the hearing officer sustained the revocation.

¶10 On review in the district court, Hanson argued, as pertinent here, that the hearing officer violated his due process rights including, specifically, his right to cross-examination, by declining to dismiss the action or impose any remedy based on Deputy Ashby's failure to appear at the hearing.

¶11 In affirming the revocation, the district court "discern[ed] no error in the hearing officer's finding that Deputy Ashby's testimony was not required" and concluded that "the hearing officer did not

err in proceeding in Deputy Ashby's absence."

II. Analysis

¶12 Hanson contends that we should reverse the revocation order because the hearing officer erroneously denied him the opportunity to cross-examine Deputy Ashby about the circumstances surrounding his entry into the residence. We disagree.

A. Standard of Review

¶13 Judicial review of driver's license revocation orders is governed by section 42-2-126(9)(b), C.R.S. 2011. That statute provides that a reviewing court may reverse the Department's determination if it (1) exceeded its constitutional or statutory authority, (2) erroneously interpreted the law, (3) acted in an arbitrary and capricious manner, or (4) made a determination that is unsupported by the evidence in the record. *See Baldwin v. Huber*, 223 P.3d 150, 152 (Colo. App. 2009). Additionally, a court may reverse a revocation order if a statutory violation by the Department prejudices the substantial rights of a licensee. *Erbe v. Colo. Dep't of Revenue*, 51 P.3d 1096, 1098 (Colo. App. 2002); *Nye v. Motor Vehicle Div.*, 902 P.2d 959, 961 (Colo. App. 1995).

¶14 The credibility of witnesses, the weight to be given to the evidence, and the resolution of conflicting evidence are factual matters solely within the province of the hearing officer as trier of fact. *See Baldwin*, 223 P.3d at 152. However, we review de novo agency determinations regarding questions of law. *See Meyer v. State*, 143 P.3d 1181, 1187 (Colo. App. 2006). We are in the same position as the district court in reviewing the Department's action in the revocation proceedings under the administrative record. *Baldwin*, 223 P.3d at 152.

B. Illegality of Initial Police Contact as a Defense

¶15 Hanson argues that Deputy Ashby's entry into his residence violated his rights under the Fourth Amendment unless the entry was supported by exigent circumstances.[1] Hanson's counsel conceded at oral argument that if the Fourth Amendment exclusionary rule does not apply, Hanson's Fourth Amendment claim fails. We agree with the division in *Francen v. Colorado Department of Revenue, Division of Motor Vehicles*, 2012 COA 110,

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[1] Although the dissent discusses the lack of record support for the hearing officer's conclusion that exigent circumstances supported the entry, the exigent circumstances finding is simply irrelevant if

that it does not. *Francen*, ¶ 36; *see also Nevers v. State*, 123 P.3d 958, 961-66 (Alaska 2005); *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 54 P.3d 355, 363-65 (Ariz. Ct. App. 2002); *Fishbein v. Kozlowski*, 743 A.2d 1110, 1118-19 (Conn. 1999); *Martin v. Kansas Dep't of Revenue*, 176 P.3d 938, 949-53 (Kan. 2008); *Powell v. Sec'y of State*, 614 A.2d 1303, 1306-07 (Me. 1992); *Riche v. Dir. of Revenue*, 987 S.W.2d 331, 333-36 (Mo. 1999); *Chase v. Neth*, 697 N.W.2d 675, 682-85 (Neb. 2005); *Lopez v. Dir., N.H. Div. of Motor Vehicles*, 761 A.2d 448, 450-51 (N.H. 2000); *Holte v. State Hwy. Comm'r*, 436 N.W.2d 250, 252 (N.D. 1989); *State v. Brabson*, 976 S.W.2d 182, 184-86 (Tex. Crim. App. 1998); *Beller v. Rolfe*, 194 P.3d 949, 951-55 (Utah 2008).

1. Requirements of the Fourth Amendment

¶16 The Fourth Amendment has "drawn a firm line" at the entrance to a person's home. *Payton v. New York*, 445 U.S. 573, 590 (1980). The warrantless entry into a person's home to conduct a search is presumptively unreasonable unless a well-established exception to the warrant requirement applies, such as when both

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the exclusionary rule does not apply.

probable cause and exigent circumstances exist. *People v. Mendoza-Balderama*, 981 P.2d 150, 156 (Colo. 1999). Violations of the Fourth Amendment are remedied by the judicially created "exclusionary rule," which is intended to deter illegal police contact by requiring suppression of evidence obtained following the initial unlawful contact. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974); *Ahart v. Colo. Dep't of Corr.*, 964 P.2d 517, 520 (Colo. 1998).[2]

¶17 The exclusionary rule applies routinely in criminal cases, but not so in civil cases. Francen, ¶ 37; Ahart, 964 P.2d at 520. "In determining whether the exclusionary rule should apply in a civil case, a court must balance the likely deterrent effect against the societal cost of excluding relevant evidence: only when the former outweighs the latter should the rule apply." Francen, ¶ 38. To assess the likely deterrent effect, the court must consider "(1) whether the illegal agency conduct is 'inter-sovereign' or 'intra-sovereign'; and (2) whether the proceedings may be characterized as 'quasi-criminal.'" *Id.* at ¶ 39 (quoting *Ahart*, 964 P.2d at 520). Neither consideration is dispositive. *Ahart*, 964 P.2d at 521; *see*

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[2] A police officer's unconstitutional entry into a home may also

I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1042-45 (1984) (exclusionary rule did not apply in deportation proceeding even though agency conduct was intra-sovereign).

¶18 Here, as discussed in *Francen*, the conduct at issue is inter-sovereign, and thus application of the exclusionary rule would result in only marginal deterrence. *Francen*, ¶ 40. Also, as discussed in *Francen*, the proceeding is not quasi-criminal because the primary objective of the driver's license revocation statute is to protect public safety. *Francen*, ¶ 41; *see* § 42-2-126(1)(a)-(c), C.R.S. 2011. Although driver's license revocation proceedings play a role in the law enforcement process, the United States Supreme Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials," even to civil proceedings that are closely related to criminal law enforcement. *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998) (the exclusionary rule does not apply in parole revocation proceeding); *Calandra,* 414 U.S. at 347-48 (the exclusionary rule does not apply to grand jury proceedings).

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trigger a claim for damages under 42 U.S.C. § 1983.

¶19 The dissent discusses facts relevant to the constitutionality of Deputy Ashby's entry into Hanson's home and observes that in a related criminal case, the district court concluded that Deputy Ashby's entry into the home violated Hanson's constitutional rights and entered a suppression order. This related criminal proceeding is exactly where the exclusionary rule should be applied; however, it should not be applied in this civil driver's license revocation proceeding. Applying the exclusionary rule in Hanson's related criminal case accomplishes the deterrence of Fourth Amendment violations that was intended by the exclusionary rule. *See Scott*, 524 U.S. at 367-68 (exclusion of evidence from a criminal case will have more deterrent effect on police officers' conduct than exclusion of that evidence from a parole revocation proceeding because the police officers' focus is upon obtaining convictions of those who commit crimes); *United States v. Janis*, 428 U.S. 433, 458 (1976) (where evidence is excluded in the criminal trial with which the searching officer is concerned, excluding the evidence in a civil proceeding "is unlikely to provide significant, much less substantial, additional deterrence").

¶20 In contrast, applying the exclusionary rule in this driver's license revocation proceeding would result in needless societal costs. As discussed in *Francen*, exclusion would thwart the public safety objective of the revocation laws. *Francen*, ¶ 43. Additionally, applying the exclusionary rule in driver's license revocation proceedings would burden the administrative hearing process by requiring suppression hearings in proceedings that were intended to be limited in scope. The revocation statutes "plainly envision a quick determination based on the single issue of whether a driver operated a motor vehicle or vehicle with excessive blood alcohol content or refused a request for chemical testing." *Id.*

¶21 Thus, like the division in *Francen*, we conclude that the Fourth Amendment exclusionary rule does not apply in this case. *Id.* at ¶ 44.

2. Statutory Probable Cause Requirement

¶22 The dissent in this case does not address whether the Fourth Amendment exclusionary rule is applicable to driver's license revocation proceedings. Instead, although Hanson did not make an argument that the revocation statutes provided an independent

basis for challenging the entry into his home, the dissent concludes that Hanson had a general right to challenge the lawfulness of entry into his residence by implication from the statutory use of the phrase "probable cause."

¶23 We reject this conclusion for two reasons: (1) we agree with the Francen majority that the use of the term "probable cause" in the context of driver's license revocation statutory requirements describes only the quantum and quality of evidence known to the officer about whether the driver either had driven in violation of drinking and driving laws or had refused to submit to testing; and (2) assuming that the use of the phrase "probable cause" in the license revocation statutes permits a statutory challenge to initial contact by police based on lack of probable cause, the plain language does not implicate the requirement of exigent

circumstances, which was the Fourth Amendment component at issue in this case.

¶24 Section 42-2-126(5)(a), C.R.S. 2011, provides that "a law enforcement officer ha[ving] probable cause to believe that a person should be subject to license revocation for excess [blood alcohol content] or refusal" to take or complete a chemical test shall submit an affidavit to the Department "containing information relevant to the legal issues and facts that shall be considered by the department to determine whether the person's license should be revoked as provided in subsection (3) of this section." Additionally, section 42-4-1301.1(2)(a)(I), C.R.S. 2011, provides that "a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI, DUI per se, DWAI, habitual user, or UDD" may request that the driver take and complete a chemical test. As discussed in *Francen*, neither statute says anything about the initial contact between the officer and the driver, much less that the circumstances of the initial stop are relevant to the Department's determination of whether a driver's license should be revoked.

Concluding that a driver may challenge the lawfulness of an initial stop would effectively add language to the revocation statutes. *Francen*, ¶ 24; *see Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994) ("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate.").

¶25 Even assuming, however, that the statutory use of the phrase "probable cause" permits a challenge to initial contact by police based on lack of probable cause, it does not implicate the requirement of exigent circumstances.[3] Probable cause and exigent circumstances are separate components of the "exigent circumstances exception" to warrantless searches. *See Payton*, 445 U.S. at 587-88 (recognizing "long-settled premise that absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating

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[3] The cases cited by the dissent in support of a general right to challenge initial police contact in driver's license revocation proceedings all involve whether there was sufficient probable cause or reasonable suspicion to stop the arrested driver's vehicle. *See* section 42-4-1302, C.R.S. 2011 (providing for a stop on reasonable

evidence will be found within").

¶26 Hanson did not argue in the trial court or on appeal that there was insufficient probable cause to arrest him for DUI or some other offense, such as reckless driving.[4] Instead, Hanson asserts on appeal, as he did in the trial court, that the police entry into his home violated the Fourth Amendment because it was not justified by exigent circumstances. Although the dissent perceives Hanson's attack on the "legality of the home intrusion" as encompassing the sufficiency of probable cause, Hanson's specific allegations were as follows:

> The entry into the home was unconstitutional. Deputy Ashby did not have a warrant and the record is void of any exigent circumstances (there is not a claim of exigency in Deputy Ashby's report). Instead, the DMV's Order found that a police officer's warrantless entry into a home without the consent of the occupants was a consensual encounter because an occupant of the home did not object once the violation had occurred. Such a finding is clearly erroneous.

¶27 Because the exclusionary rule of the Fourth Amendment is

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suspicion that a person has committed a DUI offense).

[4] Colorado permits police officers to arrest for misdemeanors committed outside of their presence upon probable cause. § 16-3-102(1)(c), C.R.S. 2011.

inapplicable here, and because the revocation statutes do not independently address entry into a residence or an exigent circumstances requirement, Hanson had no defense based on illegality of the initial police contact with him.

C. Deputy Ashby's Failure to Appear

¶28 At the hearing in this case, Hanson's counsel advised the hearing officer that he desired to cross-examine Deputy Ashby about "the details surrounding his entry" in order to contest the legality of Ashby's initial entry into the home. Because, as discussed above, Hanson had no right to challenge the entry into his home in this license revocation proceeding, he was not deprived of his right to due process by Ashby's failure to appear for confrontation.

¶29 Section 42-2-126(1)(b), C.R.S. 2011, provides that one express purpose of the driver's license revocation statute is "[t]o guard against the potential for any erroneous deprivation of the driving privilege by providing an opportunity for a full hearing." Consistent with this purpose, licensees facing possible revocation have the statutory right "to conduct such cross-examination as may be

required for a full and true disclosure of the facts." *Nye*, 902 P.2d at 961 (quoting portion of State Administrative Procedure Act, section 24-4-105(7), C.R.S 2011, made applicable to revocation proceedings by section 42-2-126(11), C.R.S. 2011). Licensees may also ask the Department to issue administrative subpoenas to secure attendance of witnesses. *See* §§ 24-4-105(4), 42-2-126(8)(d)(VII), C.R.S. 2011; *Fallon v. Colo. Dep't of Revenue*, 250 P.3d 691, 693-95 (Colo. App. 2010); *Nye*, 902 P.2d at 961; *see also* Dep't of Revenue Rule 5.8, 1 Code Colo. Regs. 211-2.

¶30 While a revocation may be sustained solely through an officer's hearsay statements without violating a licensee's due process rights, a significant consideration in avoiding a due process violation in those circumstances is that the licensee have the opportunity to subpoena, confront, and cross-examine the officer. *See Colo. Dep't of Revenue v. Kirke*, 743 P.2d 16, 21 (Colo. 1987) (noting that licensee had opportunity to confront and cross-examine "any of the officers involved" and had "right to subpoena initial officer and cross-examine him, but failed to do so"); *see also Halter v. Dep't of Revenue*, 857 P.2d 535, 539 (Colo. App. 1993) (rejecting

argument that licensee's due process rights were violated because he could not cross-examine officer who was not present at revocation hearing and whose written report was admitted into evidence; licensee had right to subpoena officer to require his attendance but failed to do so).

¶31 Applicable regulations provide that if a properly served witness (other than the officer who signed the express consent affidavit) fails to appear, the licensee must make an offer of proof regarding the specific nature, content, and relevance of the witness's testimony. *See* Dep't of Revenue Rule 5.10.3.1, 1 Code Colo. Regs. 211-2. The hearing officer may quash the subpoena if the appearance of the witness "would not provide relevant and necessary information, or . . . the evidence would be needlessly cumulative." Dep't of Revenue Rule 5.10.3.2, 1 Code Colo. Regs. 211-2.

¶32 Here, in quashing the validly issued subpoena for Deputy Ashby, the hearing officer stated: "Counsel [for Hanson] argued he wished for Deputy Ashby to be present to clarify whether he entered the residence. The [h]earing [o]fficer concedes he did so. Therefore, Ashby's presence is not necessary." Although Hanson's offer of

proof and argument concerning the reason for subpoenaing Deputy Ashby were broader than simply establishing that Deputy Ashby had entered the residence, the proposed testimony was nevertheless irrelevant because its only purpose was to establish a Fourth Amendment violation. Counsel's expressed motivation was to inquire about "the details surrounding his entry" and, specifically, whether that entry was illegal under the circumstances based on the contents of his written report.

¶33 Because Hanson had no right to challenge the validity of the initial police contact, the hearing officer did not err in concluding that Deputy Ashby's proposed testimony was "not necessary." Thus, Hanson was not deprived of his statutory right to cross-examine Deputy Ashby.

¶34 The judgment is affirmed.

JUDGE TERRY concurs.

JUDGE FOX dissents.

JUDGE FOX dissenting.

¶35 Because I conclude that the revocation order violated Hanson's rights to due process and to a full and fair hearing, and because the majority extends *Francen v. Colorado Department of Revenue*, 2012 COA 110, ¶ 45, beyond a traffic stop without probable cause to a warrantless home entry – without exigent circumstances – resulting in taking the home's resident into custody, I must respectfully dissent. Instead, I would reverse the district court's judgment and remand for further proceedings. Although the majority opinion recites most of the operative facts, because my analysis largely concerns the entry into the home, I recite a few additional relevant facts below.

I. Additional Background

¶36 Deputy Ashby's report documents that he "observed the front door [of Hanson's home] to be open" and that he "pushed open the door and made announcements." He then entered fifteen to twenty feet into the home, without a warrant and without any exigency, and proceeded to question Angela Nylund, the first person he encountered. The deputy commanded that she summon Hanson.

When Hanson appeared, Deputy Ashby began to question him, and after Hanson refused to answer further questions, the deputy placed him "into protective custody" and removed him from the home. The report does not say why Deputy Ashby found it appropriate or necessary to enter the home without being invited in by Hanson or by Ms. Nyland. The report also does not indicate when, or even why, Deputy Hanson decided obtaining a warrant to search the home or to secure Hanson was not necessary or feasible.

¶37 Despite the hearing officer's failure to require Deputy Ashby's presence, despite the deputy's failure to document an exigency in his report, despite the Department's failure to present affirmative evidence to support an exigency, and despite significant gaps in the information about Deputy Ashby's entry into the home, the hearing officer, on his own, concluded that exigent circumstances supported the entry. To justify his exigent circumstance conclusion, the hearing officer speculated, without support in Deputy Ashby's report, that the truck's driver could not respond and needed medical attention. The suspected truck was already in the garage and, to the extent there was any concern the truck could be moved,

the deputy's car could have blocked the truck while a warrant was obtained. The deputy's report does not document blood on or near the truck. No person was documented to be in the truck. The hearing officer's conclusion that any person in the home needed immediate medical attention was unsupported by record evidence.

¶38 Had Deputy Ashby been present pursuant to the valid subpoena, he might have supplied the details necessary to support the hearing officer's conclusions. It is equally likely, of course, that Hanson's counsel could have vigorously cross-examined Deputy Ashby, who never personally observed Hanson driving, and discredited his testimony and his report. Indeed, the record reveals that Deputy Ashby resigned from the Douglas County Sheriff's Office and that, before his resignation, he was involved in an "Internal Affairs investigation and made statements determined to be false and misleading that may bear on [his] credibility as a witness." The record also discloses that while the revocation proceedings were pending, Hanson faced criminal charges arising from the same facts. In the criminal case, the district court entered a suppression order after concluding that Deputy Ashby's entry into

the home violated Hanson's constitutional rights.

¶39 The hearing officer was understandably concerned about dismissing the revocation proceedings, but because Deputy Ashby was properly subpoenaed, the hearing officer could have offered the parties a short continuance to secure his appearance. *See* § 24-4-105(5), C.R.S. 2011 (when a subpoenaed witness fails to appear, an agency may ask a district court to compel the witness to appear and to impose appropriate punishment); Dep't of Revenue Rule 3.7, 1 Code Colo. Regs. 211-2 (permitting a hearing officer to continue a hearing in order to subpoena any witness or document relevant to the proceeding); Dep't of Revenue Rule 5.10.4.1, 1 Code Colo. Regs. 211-2 (authorizing a hearing officer to reschedule a hearing if a properly subpoenaed witness fails to appear).

II. Analysis

¶40 I agree with Hanson's contention that the revocation order should be reversed because the hearing officer erroneously denied him the opportunity to cross-examine Deputy Ashby about the circumstances surrounding the officer's entry into the residence.

¶41 Under the statutory scheme, revocation based on refusal of

alcohol testing is predicated on a request for such testing by a law enforcement officer having "probable cause" for the licensee's DUI arrest, and, by implication, a lawful basis for the initial contact leading to the DUI arrest. *See* §§ 42-2-126(5)(a), 42-4-1301.1(2)(a)(I), C.R.S. 2011; *Peterson v. Tipton*, 833 P.2d 830, 831 (Colo. App. 1992).

¶42 As a threshold matter, and contrary to the majority's conclusion and the Department's contention, I conclude that, in contesting the revocation, Hanson was entitled to challenge the legality of Deputy Ashby's entry into the residence. *See Peterson*, 833 P.2d at 831; *see also Nefzger v. Colorado Dep't of Revenue*, 739 P.2d 224, 229 (Colo. 1987) (concluding that the police had a reasonable suspicion to support an initial traffic stop, and thereby rejecting driver's contention that improper stop invalidated subsequent arrest and license revocation flowing from the stop); *Baldwin v. Huber*, 223 P.3d 150, 152 (Colo. App. 2009) (a licensee may properly raise issues concerning the legality of initial investigatory stop); *Shafron v. Cooke*, 190 P.3d 812, 814 (Colo. App. 2008) (a driver committed a traffic infraction that justified a police

stop of his vehicle). *Contra Francen*, ¶ 45; *Baldwin*, 223 P.3d at 154-56 (Furman, J., specially concurring) (driver in a license revocation proceeding may not challenge the legality of an initial investigatory stop).

¶43 As the majority acknowledges, one express purpose of the driver's license revocation statute is "[t]o guard against the potential for any erroneous deprivation of the driving privilege by providing an opportunity for a full hearing." § 42-2-126(1)(b), C.R.S. 2011. The majority also recognizes that, in circumstances where hearsay statements support a license revocation, the fact that the licensee has the opportunity to subpoena, confront, and cross-examine the officer is a significant consideration in avoiding a due process violation. *See Colorado Dep't of Revenue v. Kirke*, 743 P.2d 16, 21 (Colo. 1987) (noting that the licensee had an opportunity to confront and cross-examine "any of the officers involved" and had the "right to subpoena the initial officer and cross-examine him, but failed to do so"); *see also Halter v. Department of Revenue*, 857 P.2d 535, 539 (Colo. App. 1993) (rejecting the argument that a licensee's due process rights were violated because he could not cross-examine

the officer who was not present at the revocation hearing and whose written report was admitted into evidence; licensee had the right to subpoena the officer to require his attendance but failed to do so). Even so, the majority concludes that, because Hanson lacked the right to challenge the validity of the initial police contact, the hearing officer did not err in concluding that the deputy's testimony was unnecessary.[5]

¶44 The majority asserts that Hanson has not argued here, and did not argue to the trial court, that there was no probable cause for his arrest. Respectfully, I disagree. Throughout these proceedings, Hanson has vigorously challenged the legality of the home intrusion and the subsequent events. Hanson's argument is that everything which happened after the illegal entry should have been excluded. I need not address the later events, however, because the statutory scheme affords Hanson the right to challenge Deputy Ashby's entry into the home. Given the serious consequences associated with the revocation of a driver's license, it

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[5] Hanson's counsel repeatedly stated he needed to inquire about "the details surrounding [Deputy Ashby's entry]" and specifically whether that entry was illegal under the circumstances based on

makes complete sense that the statutory framework provides full due process and other constitutional protections. *See Francen*, ¶ 52 (Taubman, J., dissenting).

¶45 I also disagree with the majority's assertion that Hanson did not raise the express consent statute's "probable cause" language as a basis for challenging the initial police contact in this case. To the contrary, at the administrative, district court, and appellate court levels, Hanson's challenge to Deputy Ashby's entry into the residence has been based, in part, on the statute's probable cause language and on the *Peterson* decision, which expressly relied on that statutory language.

¶46 The majority effectively concludes that, even if the statute allows challenges to probable cause, the probable cause requirement does not apply here because the issue implicates exigent circumstances.[6] The majority's distinction between

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the contents of the officer's written report.

[6] To the extent the hearing officer, and the trial court's affirmance, relied on "consent," that consent was simply nonexistent. The deputy's report is clear that he entered on his own initiative. The report in no way suggests that he was given permission *before* entering. That Ms. Nylund may not have required the deputy to leave immediately is of no consequence to the initial nonconsensual

concepts of probable cause and exigent circumstances ignores the line of authority that, in my view, allows drivers to more broadly challenge the constitutionality of the initial police contact. *See Peterson*, 833 P.2d at 831; *see also Baldwin*, 223 P.3d at 152. Indeed, although concepts of probable cause and reasonable suspicion are also distinct, these cases nevertheless allow drivers to challenge whether police had reasonable suspicion to support an initial vehicle stop. Moreover, in my view, it would be inconsistent for the statute to allow challenges to improper vehicle stops, but disallow similar challenges to unconstitutional home entries.[7] If anything, a private citizen's rights within the home are greater than the right of a driver to be free from an unreasonable vehicle stop. *See People v. O'Hearn*, 931 P.2d 1168, 1173 (Colo. 1997) (citing *Payton v. New York*, 445 U.S. 573, 585 (1980), for the proposition

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entry.

[7] It is equally inconsistent to have opposing court rulings involving the same incident. The finding in Hanson's criminal case that Deputy Ashby's entry was illegal is clearly inconsistent with the hearing officer's conclusion that exigent circumstances excused the entry. These inconsistent results contradict the *Francen* majority's assumption of a marginal deterrent effect from the exclusion of evidence in revocation proceedings, as opposed to the exclusion of unlawfully obtained evidence in a criminal case brought as a result

that "[u]nreasonable 'physical entry of the home' is the 'chief evil' against which the Fourth Amendment is directed"); *see also People v. Prescott*, 205 P.3d 416, 419 (Colo. App. 2008) (quoting *Payton* and concluding that "[a]bsent the exigent circumstances, [the home's] threshold may not reasonably be crossed without a warrant").

¶47 Having concluded that Hanson had a right to challenge the validity of the initial police contact, I next conclude that Hanson had a statutory right to conduct cross-examination "as may be required for a full and true disclosure of the facts." *Kirke*, 743 P.2d at 20 (quoting § 24-4-105(7), C.R.S. 2011). In my view, the hearing officer erred in concluding that Deputy Ashby's proposed testimony was "not necessary." To the contrary, I conclude that the proposed questioning of Deputy Ashby regarding the circumstances of his entry into the residence was relevant, necessary, and not "needlessly cumulative." *See* Dep't of Revenue Rule 5.10.3.2, 1 Code Colo. Regs. 211-2.

¶48 Although the Department argues that the hearing officer properly admitted and considered Deputy Ashby's written report, it

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of the driver's conduct. *Francen*, ¶¶ 39-42.

was not the admission or consideration of the report that violated Hanson's due process rights. Rather, it was the hearing officer's consideration and ultimate reliance on the report *without* providing Hanson any opportunity to cross-examine Deputy Ashby about the report's contents or the deputy's other observations surrounding the entry into the residence.

¶49 The Department further asserts that the hearing officer acknowledged Deputy Ashby entered the residence without a warrant and without exigent circumstances, and that Hanson was not prejudiced because these were the very facts he claims he was prevented from establishing through cross-examination. However, this assertion does not accurately characterize the hearing officer's decision. The hearing officer ultimately concluded that Deputy Ashby's entry was legal under the emergency doctrine, which, while technically distinct, is an example or subcategory of an exigent circumstance. *See People v. Thompson*, 770 P.2d 1282, 1285 (Colo. 1989) (emergency doctrine exception to warrant requirement is but a specific example of exigent circumstances doctrine); *see also People v. Chavez*, 240 P.3d 448, 451 (Colo. App. 2010).

¶50 Again, Hanson was denied an opportunity to question Deputy Ashby regarding the content of his report, his observations, and the circumstances leading to the initial entry, all of which were relevant in determining whether the emergency doctrine even applied. Moreover, Hanson's challenge to the entry at the hearing was broad enough to cover the emergency doctrine, as his counsel asserted that there was "no valid basis" to enter the house and said that he wanted to inquire about "the details surrounding [the] entry." Hanson's attorney further argued:

> Once you open the door without consent, unless you've got a warrant or some type of probable cause with exigency which is certainly not articulated anywhere in this report, that is an illegal entry to the house and from there the poisonous fruit. So I subpoenaed [Deputy Ashby] so we could ask him about these issues.

¶51 In sum, I conclude that the hearing officer violated Hanson's rights to due process and to a fair hearing by determining, based largely on the contents of Deputy Ashby's written report, that Deputy Ashby legally entered the residence, while simultaneously quashing the properly issued subpoena for Deputy Ashby and thereby denying Hanson any opportunity to cross-examine him regarding his report, his observations, and the circumstances

surrounding the entry. *See Gilbert v. Julian*, 230 P.3d 1218, 1222 (Colo. App. 2009) (by failing to issue a requested subpoena for documents concerning the functioning of an intoxilyzer, the Department acted inconsistently with its statutory obligations to provide a meaningful opportunity for a fair hearing); *cf. Kirke*, 743 P.2d at 21; *Halter*, 857 P.2d at 539.

¶52 Because the hearing officer's ruling prejudiced Hanson's right to cross-examination and substantially impaired his right to present a defense, I would reverse the revocation and remand for a new hearing in which Hanson is afforded an opportunity to cross-examine Deputy Ashby.[8] *See Gilbert*, 230 P.3d at 1222-23 (remanding for a new hearing with directions requiring the Department to issue the requested subpoenas); *Erbe v. Colorado Dep't of Revenue*, 51 P.3d 1096, 1099 (Colo. App. 2002) (reversing a revocation order and remanding for a new hearing where the Department effectively denied a driver her statutory right to

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[8] I would also conclude that, under these circumstances, the statutory sixty-day period to hold the hearing would begin to run anew when the Department reacquires jurisdiction. *See* § 42-2-126(8)(a), C.R.S. 2011; *Gilbert*, 230 P.3d at 1223.

counsel); *see also Barnes v. Department of Revenue*, 23 P.3d 1235, 1236-37 (Colo. App. 2000) (the Department's failure to follow the statutory requirement that arresting officer be present at the hearing upon driver's written request entitled driver to reversal of the revocation order and to a new revocation hearing); *Mameda v. Colorado Dep't of Revenue*, 698 P.2d 277, 279 (Colo. App. 1985) (reversing revocation and remanding for a new hearing based on the hearing officer's erroneous evidentiary ruling that denied the driver an opportunity to produce rebuttal evidence).