IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

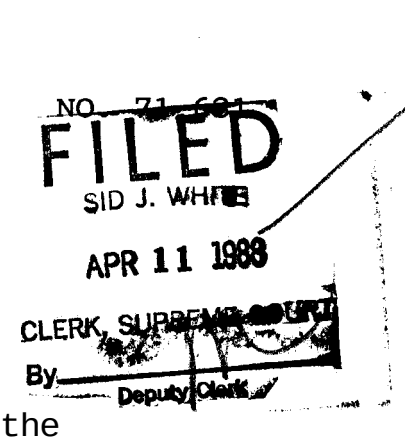
Petitioner,

-vs-

PAUL CLIVE JOHNSON,

Respondent.

NO. 71,601



On Appeal from the
District Court of Appeal, Fifth District

BRIEF OF AMICUS CURIAE
IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers, including representatives from every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organizaton's objective, and of the criminal justice system, is the constitutional protection of an individual's fourth amendment rights. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The issue certified to this court by the Fifth District Court of Appeal; i.e., the validity of the use of drug courier profiles by law enforcement officers to stop vehicles not known to be committing any traffic violation or criminal offense, is one of national importance and one with serious fourth amendment ramifications.

The *Amicus* *Curiae* Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that NACDL should offer its assistance to the court.

STATEMENT OF THE CASE

Amicus National Association of Criminal Defense Lawyers (NACDL) adopts the respondent's statement of the case and adds that on March 10, 1988, this court granted the motion of NACDL to file a brief as *amicus curiae.*

This court also granted an extension of time for the filing of this brief until April 5, 1988.

STATEMENT OF FACTS

Amicus NACDL adopts the respondent's statement of facts.

SUMMARY OF ARGUMENT

The fourth amendment protects each individual's right to privacy. That protection extends to drivers and passengers in vehicles driving on the public highways throughout this country. Every person has a right to refuse contact with the police unless the police have reasonable suspicion to believe that the particular person stopped is engaged in specific criminal activity. Stopping a vehicle always constitutes a seizure within the meaning of the fourth amendment even when the detention is very brief. Yet, the state is asking this court to permit the police to stop vehicles on the Florida highways without requiring that the police have reasonable suspicion to believe the individuals in the vehicles are involved in criminal activity.

The drug courier profile upon which the state seeks to rely is not a valid and reliable test of reasonable suspicion. It is nothing more than a constantly fluctuating series of innocent characteristics of highway travelers. No matter how many profile factors the officer can list, unless a particular factor demonstrates suspicion of a specific crime, the factors cannot add up to reasonable suspicion.

Drug courier profiles have been applied at airports and on the highways. They vary from city to city and state to state and are often contradictory. Even this officer's profile is not consistent. Sometimes his profile includes one person in the car and sometimes it includes two people in the car. Sometimes he considers it suspicious when the cars have Florida rental

plates and sometimes he considers it suspicious when the cars have out-of-state plates. In the instant case, Officer Vogel considered it suspicious first that the defendant refused to look at him as he passed him in the median, and then that the defendant continuously looked at him in the rear view mirror.

The problem with all of these factors is that whether considered alone or in some combination, they do not provide any evidence of ongoing criminal activity.

The effect of a decision reversing the lower court in this case would be to give police officers unrestrained discretion to stop virtually everyone on the highways. The very essence of the fourth amendment is the protection it provides against arbitrary invasions of privacy based on unfettered police discretion in the field. If the court is to accept the policeman's version of reasonable suspicion merely because the policeman states that he used a drug courier profile, the police will be determining what conduct does and what conduct does not violate the fourth amendment. The courts cannot turn this decision over to the police.

Finally, the State argues that the government interest in preventing drug trafficking must be balanced against the invasion of individual privacy created by the seizure. Indeed, this is correct. However, that balancing may not be used as an excuse to completely ignore the fourth amendment's requirement that seizures be based upon reasonable suspicion. If the balance can be tipped all the way in favor of the government interest, there will no longer be any balance and the fourth amendment will have been read out of the Constitution.

ISSUE

May a profile of similarities of drug couriers, which is developed by a law enforcement officer and which, in light of his experience, suggests the likelihood of drug trafficking, be relied upon by him to form an articulable or founded suspicion which will justify a brief investigatory traffic stop on highways known to the officer to be frequently used for the transport of drugs?

ARGUMENT:

I. THE FOURTH AMENDMENT PROTECTS AN INDIVIDUAL'S RIGHT TO PRIVACY

Fundamentally, this case is about the right to be left alone, that cherished right to privacy inherent in the fourth amendment. ***United States*** v. ***Martinez-Fuerte,*** **428** U.S. **543, 554 (1976).** The United States Supreme Court has long held that every individual has the right "to the possession and control of his own person free from all restraint or interference of others, unless by clear and unquestionable authority of law." ***Union*** *Pac. R. Co. v. Botsford,* 141 U.S. **250, 251 (1891).** More specifically, the fourth amendment protects "people, not places," ***Katz*** v. ***United States,*** **389 U.S. 347, 351 (1967),** and the places where people are protected include the streets, whether as pedestrians or as passengers in vehicles. ***Delaware*** v. *Prouse,* **440** U.S. **648 (1979);** ***Terry v. Ohio,*** **392** U.S. **1, 9 (1968).**

Any Police Detention Constitutes a Seizure Within the Meaninu of the Fourth Amendment

The fourth amendment does not provide protection for every contact between individuals and the police. In ***Florida*** v. ***Royer,*** **460** U.S. **491 (1983),** Justice White, in a plurality opinion, divided police-citizen encounters into three categories. The first category involves communications between police and citizens without coercion or detention. The second category involves brief seizures that must be supported by reasonable suspicion, and the third category involves full-scale arrests that must be supported by probable cause. ***Id.*** at **497-99.** The Court excluded the first category of police-citizen

encounters from the protective shroud of the fourth amendment on the theory that if a police officer questions a person about whom he has no reasonable suspicion that person always has the option of leaving and declining to answer questions. Id. In excluding this first category of police-citizen contact from fourth amendment protection, an individual retains his right to "possession and control of his own person," ***Terry*** v. Ohio, **392 U.S. 1, 9 (1968),** because he is not penalized if he chooses to decline contact with the police. It is precisely this right to refuse contact with the police that takes this type of encounter out of the realm of fourth amendment protection.

All vehicle stops involve at least the second category of police-citizen encounters because whenever the police stop a vehicle, the police have exerted control over it and its passengers, and have thus "seized" them. Therefore, the fourth amendment's protection always applies to vehicle stops.

> [S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of . . . [the fourth amendment], even though the purpose of the stop is limited and the resulting detention quite brief.

***Delaware v. Prouse,* 440 U.S. 648, 653 (1979).**

The State of Florida cannot expand the first category of police-citizen encounters in ***Royer*** to foreclose all fourth amendment protection to individuals traveling on the public roads who wish to avoid contact with the police. Indeed, "[o]ne of the hallmarks of a free society is the right to be left alone: the right to walk the streets, to drive a car, to ride a

bicycle, or to sit in one's yard, free from the threat of uninvited and unwarranted governmental questioning, observation, or intrusion." Burkhoff, ***Non-Investigatory Police Encounters,*** 13 Harv.C.R.-C.L. L. Rev. **681 (1978).** Yet, what the state really argues here is for a lessening of fourth amendment protection for automobile stops. In addition to clearly being in violation of the United States Supreme Court's ruling in ***Prouse,*** this argument would undermine the entire concept of the fourth amendment's protection of individual liberty.

11. THE DRUG COURIER PROFILE IS TOO AMORPHOUS TO BE A RELIABLE TEST OF REASONABLE SUSPICION

The so-called drug courier profile, upon which the state seeks to rely to establish the reasonable suspicion necessary to meet the United States Supreme Court's requirements for vehicle seizures is a myth. No such profile exists. It is nothing more than an illusion the police use in an attempt to convince the courts that police officers are following the fourth amendment's requirement of finding reasonable suspicion before stopping a vehicle on the highway. Just as the magician, through sleight of hand, convinces an audience that the whole lady is cut into two parts, so the state attempts to convince the court that a permutable series of wholly innocent characteristics of highway travelers adds up to reasonable suspicion of criminal activity. Putting the name "drug courier profile" on a series of characteristics of travelers does not create such a profile.

When analyzing police activity, one must examine the police action ***at its inception. Terry v.*** *Ohio,* 392 U.S. **1 (1968).** Reasonable suspicion requires an officer to suspect

someone of specific criminal activity before he stops him. In other words, in order for suspicion to focus on a particular suspect, that suspect must engage in activity that links him to some *specific* wrongdoing. *Ybarra* v. *Illinois,* 444 U.S. 85 (1979). Any drug courier profile fails in this regard because the profile contains no information specific to a particular individual. Furthermore, the profile fails to identify any specific criminal activity.

The factors of drug courier profiles as originally applied at airports, vary from city to city and state to state,[1] and are often contradictory.[2] The more recent highway stops based on drug courier profiles continue to include contradictory factors. *United States* v. *Boruff,* No. P-85-LR-073 (W.D. Tex. April 4, 1986) (unpublished) (pick-up truck with too much gear); *United States* v. *George,* 567 F.2d 643 (5th Cir. 1978) (pickup

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[1] A detailed list of both primary and secondary factors found in the cases involving airport stops and a discussion of the variances in the characteristics can be found in *United States* v. *Berry,* 670 F.2d 583, 598-99, n.17 (5th Cir. 1982).

[2] *Compare, United States* v. *Jefferson,* 650 F.2d 854 (6th Cir. 1981) (profile includes walking quickly through an airport) with *United States* v. *Robinson,* 625 F.2d 1211 (5th Cir. 1980), appeal after remand, 690 F.2d 869 (11th Cir. 1982) (profile includes walking slowly). *Compare, People* v. *Shandloff,* 215 Cal.Rptr. 916 (Ct. App. 1985) (being the first passenger to deplane) with *People* v. *Steckhan,* 116 Ill.App.3d 173, 452 N.E.2d 122 (Ct. App. 1983) (being the last passenger to deplane). *Compare, United States* v. *Gooding,* 695 F.2d 78 (4th Cir. 1982) (dressed casually on businessman's flight) and *United States* v. *Borys,* 766 F.2d 304 (7th Cir. 1985), *cert. denied,* 474 U.S. 1082 (1986) (dressed casually while traveling first class), with *United States* v. *Poitier,* 818 F.2d 679 (8th Cir. 1987) (arriving at airport while very well dressed) and *State* v. *Thomas,* 343 S.E.2d 588 (N.C. Ct. App. 1986) (arriving on a plane while wearing a three-piece suit that wasn't being worn a day or two earlier).

truck with not enough gear); ***State*** V. ***Anderson,*** 479 So.2d 816 (Fla. 4th Dist. Ct. App. 1985) (too much luggage in the back seat): ***State*** V. ***Cohen*** 103 N.M. 558, 711 P.2d 3 (1985), ***cert. denied,*** 476 U.S. 1158 (1986) (not enough luggage in the back seat). Some courts and commentators have become cognizant of the constant changes of characteristics included in the profiles.

> [T]he flexible and moderately expansive, chameleon-like initial drug courier profile list rapidly . . . [has grown] into an acrodont reptile of gargantuan proportion.

Becton, ***The*** Drug ***Courier Profile: "All Seems Infected That Th' Infected*** Spy, ***As All Looks Yellow To the Jaundic'd Eye",*** 65 N.C.L. Rev. 417, 436 (1987), [hereinafter cited as Becton].

> One problem with determining the propriety of the stop solely on the basis of whether or not the defendant met the profile is that the factors present in the profile seem to vary from case to case. [The] Special Agent . . . himself testified that the profile in a particular case consists of anything that arouses his suspicion.

United States v. Chamblis, 425 F.Supp. 1330, 1333 (E.D. Mich. 1977).

> [T]his Court has heard testimony from the O'Hare narcotics detail in which the deplaning passenger who is first off the plane coming in from Florida is suspect because in a hurry, the deplaning passenger who is among the last to emerge from the runway is suspect because obviously delaying, and the deplaning passenger who is in the middle of the emerging group is suspect because trying to lose himself or herself in the crowd. Much the same is true as to various other aspects of the observed conduct of incoming

> passengers, such as the different paces at which they go from the arrival gate toward the terminal, the extent to which they look around while walking ("furtively" is the usual adverb attached to what, in a totally innocent and inexperienced plane traveler, might be looking around in simple wonderment at the masses of people encountered at O'Hare on a typical day) and the different things they do in the baggage area downstairs (where even the experienced traveler often has difficulty determining at which conveyor the baggage will be unloaded) and once at the baggage conveyor itself. Because the "drug courier profile" thus tends to become very blurred, as though the characteristics are shaped to fit the conduct instead of the other way around, the controlling decisions wisely require a showing of "specific and articulable facts" before the stopping officers are found to have demonstrated the basis for even a temporary stop of the passenger.

United States v. Garvin, 576 F.Supp. **1110, 1112 n.1 (N.D.** Ill. **1983).**

To justify the defendant's seizure in the instant case, the officer relied on factors that he claimed were part of a drug courier profile he had developed through his experience. However, because every one of these so-called profile factors, either alone or together, apply to "a very large category of presumably innocent travelers" on the interstate highway, *Reid* v. *Georgia*, **448** U.S. **438, 441** (1980), they do not rise to the stringent level of reasonable suspicion required by the fourth amendment to the United States Constitution. Because the officer's profile factors are vague enough to fit large numbers of travelers, the state asks this court to permit officers to stop virtually anyone they want.

Officer Vogel's attempts to justify stops of vehicles based on these and other similar profile factors have been soundly rejected by a Florida court, ***In re Forfeiture of $6,003.00,*** 505 So.2d 668 (Fla. 5th Dist. Ct. App.), ***cert. denied,*** 108 S. Ct. 455 (1987), and by the Eleventh Circuit Court of Appeals, ***United States*** v. ***Miller,*** 821 F.2d 546 (11th Cir. 1987), ***United States*** v. ***Smith,*** 799 F.2d 704 (11th Cir. 1986). And even Officer Vogel is not consistent. He sometimes considers driving alone to be suspicious, as in the instant case, ***State*** v. ***Johnson,*** 516 So.2d 1015, 1018 (Fla. 5th Dist. Ct. App. 1987), and sometimes considers two people traveling together to be suspicious, as in ***United States*** v. ***Smith,*** 799 F.2d 704 (11th Cir. 1986). Officer Vogel also sometimes considers it suspicious when a vehicle has Florida plates, as in ***In re Forfeiture of $6,003.00,*** 505 So.2d 668 (Fla. 5th Dist. Ct. App.), ***cert. denied,*** 108 S. Ct. 455 (1987), and sometimes considers it suspicious, as in the instant case, when the vehicle has out-of-state plates. ***See e.g., United States v. Miller,*** 821 F.2d 546 (11th Cir. 1987).

In the instant case, Officer Vogel considered it particularly significant that the defendant did not look at the officer as he passed him in the median. R. 10-11. Numerous other courts have given this "factor" short shrift. ***See e.g., Nicacio v. INS,*** 797 F.2d 700, 704 (9th Cir. 1986), (alien's refusal to look agents in the eye considered suspicious by officer; court held "lack of eye contact is not an appropriate factor to consider."); ***United States*** v. ***Lamas,*** 608 F.2d 547,

549-50 (5th Cir. 1979), (avoiding eye contact cannot weigh in balance whatsoever); ***United States*** v. ***Munoz,*** 604 F.2d 1160, 1161 (9th Cir. 1979), ("[t]he failure of the occupants to look at the agents adds little to the case in light of the questionable value of the factor generally. . . ."); ***United States v. Escamilla,*** 560 F.2d 1229, 1233 (5th Cir. 1977), (although agents thought it suspicious that appellants never looked at the police car, court held this factor "cannot weigh in the balance in any way whatsoever"); ***United States*** v. ***Lopez,*** 564 F.2d 710, 712 (5th Cir. 1977), ("Reasonable suspicion should not turn on the opthalmological reactions of the appellant."); ***United States*** v. ***Mallides,*** 473 F.2d 859, 861 (9th Cir. 1973), (conduct not suspicious simply because the occupants of an automobile failed to look at passing police car).

Ironically, the police have, in other cases, claimed that looking at them was suspicious. ***United States*** v. ***Berry,*** 670 F.2d 583 (5th Cir. 1982); ***People*** v. ***Chesternut,*** 157 Mich.App. 181, 403 N.W.2d 74 (1986), ***cert. granted,*** 108 S. Ct. 226 (1987); ***In re:*** D.J., 532 A.2d 138 (D.C. Ct. App. 1987); ***Wilson*** v. ***Superior Court of Los Angeles County,*** 34 Cal.3d 777, 670 P.2d 325, 195 Cal.Rptr. 671 (1983), ***cert. denied,*** 466 U.S. 944 (1984). If looking at the police is a factor in the balance of reasonable suspicion in one case and not looking at the police is a factor in another, reasonable suspicion is whatever the police want it to be. Every suspect will be sure to either look at the police or not look at the police. Indeed in the

instant case, the officer first considered the defendant suspicious because he did not look at the officer as he passed him in the median, (R. 10-11), and then considered him suspicious because the defendant did look at the officer in the rear view mirror. ***State*** V. ***Johnson,*** 516 So.2d 1015, 1017 (Fla. 5th Dist. Ct. App. 1987).

Officer Vogel's other factors are equally ridiculous. The Eleventh Circuit had this to say about one of these factors, traveling during the night time: "[T]hat travelers should choose to journey at night -- perhaps to avoid the heavier daytime traffic, or to squeeze as much time as possible out of a Florida vacation -- does not reasonably provide any more suspicion of criminal activity than do the other factors cited by Trooper Vogel." ***United States*** V. ***Smith,*** 799 F.2d 704, 707 (11th Cir. 1986).[3]

What can one say about the other factors? They are patently absurd. Is driving in a suit and tie not suspicious but casual dress is suspicious?[4] Perhaps the American car

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[3] In ***Smith,*** Vogel testified that he relied on a drug courier profile containing the following characteristics:

1. The car was traveling at 50 mph.
2. The car was occupied by two individuals.
3. The individuals in the car were approximately 30 years of age.
4. The car displayed out-of-state plates.
5. The driver appeared to be overly cautious.
6. The driver did not look at the officer when he passed him.
7. The car was traveling at 3:00 o'clock in the morning. ***United States*** V. ***Smith,*** 799 F.2d 704, 706 (11th Cir. 1986)

[4] One officer considered it suspicious when an airline passenger traveling first class was dressed casually. ***United States*** V. ***Borys, 766*** F.2d 304 (7th Cir. 1985), ***cert. denied,*** 474 U.S. 1082 (1986).

dealers should be invited to intervene in this case to challenge the officer's allegation that driving a large late model car is somehow suspicious. And consider Officer Vogel's profile characteristic of "overly cautious" driving to explain driving at 55 mph. *State* v. Johnson, 516 So.2d 1015, 1018 (Fla. 5th Dist. Ct. App. 1987). Most newer cars are equipped with cruise control, making it extremely easy to maintain a constant lawful speed. Time after time drivers are told not to exceed the speed limit. Speed kills: speeding tickets raise insurance rates, etc. Have we become a nation of law-breakers to the extent that obeying the law is now suspicious? Is obeying the law now frowned upon as being overly cautious? Or is this just another excuse to stop everyone? Every traveler will either speed and be subject to a speeding ticket, drive at the speed limit and be subject to a stop for overly cautious driving or drive below the speed limit and be subject to a stop for impeding traffic.[5] And, finally, perhaps the Florida tourism department would be interested in challenging Officer Vogel's contention that visitors to the state are to be considered suspicious whether driving their own cars with out-of-state plates or renting Florida vehicles.

Considering all of Vogel's factors together, the state is asking this court to find reasonable suspicion of criminal activity whenever someone is driving north in a late model large

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[5] In *State* v. *Mann*, 103 N.M. 660, 712 P.2d 6 (Ct. App. 1985), *cert. denied*, 103 N.M. 740, 713 P.2d 556 (1986) the officer claimed he stopped the car for traveling 45 mph on the highway.

car with out-of-state plates, at night, at the proper speed limit, with his eyes on the road, while dressed in casual clothes, watching a car behind him in his rear view mirror. As one California court held "four times zero, in [this court's] arithmetic, still equals zero." ***People v. Loewin,*** 35 Cal.3d 117, 672 P.2d 436, 444, 196 Cal.Rptr. 846 (1983).

A. Any ***Set of Characteristics Used to Establish Reasonable Suspicion Must Provide Evidence of Ongoing Criminal Activity.***

The basic problem with these factors is that whether considered alone or in some combination, they do not provide any evidence of ongoing criminal activity. As the Ninth Circuit Court of Appeals so aptly stated in ***United States v. Sokolow,*** 831 F.2d 1413, 1419 (9th Cir. 1987), profile elements can include certain aspects of a suspect's behavior that are consistent with an ongoing crime, such as using an alias or eluding the police. These elements of a profile may demonstrate reasonable suspicion of an ongoing crime. A seizure based on such profile elements "is justified not because a requisite number of profile elements have been satisfied, but because some elements of the profile may create a reasonable suspicion of an ongoing criminal enterprise." Id. at 1419-20. "Such behavior cannot be intuited from a hodgepodge assembly of 'factors' about individual character rather than criminal acts. It must demonstrate the ongoing commission of a crime." Id. at 1423. Nothing in Officer Vogel's profile factors contains a shred of suspicion of criminal activity.

In *United States* V. *Brignoni-Ponce*, **422 U.S. 873** (1975), the Court permitted roving patrols to stop vehicles to search for illegal aliens on the basis of reasonable suspicion if sufficiently near an international border. The Court required specific evidence of wrongdoing, however, rejecting the government's argument that Mexican appearance was enough. "Mexican appearance [is] a relevant factor, but standing alone it does not justify stopping all Mexican Americans to ask if they are aliens." **422** U.S. at **887.**

What the state really is saying here is that drug couriers look, act and appear like everyone else. They drive the same kinds of cars as innocent travelers; they drive on the same roads; they drive in the same manner. Therefore, in order to catch drug couriers, the police must be allowed to stop everyone. Indeed, allowing the police to search everyone going north on 1-95 would probably result in numerous arrests for possession of drugs and for other crimes. The problem, however, is that it would be illegal.

If this court reverses the lower court, the list, or more accurately lists, of vague and varying characteristics commonly known as a "drug courier profile" will have been elevated to an amorphous standard that reduces the requirement of reasonable suspicion to a mere formality, thus denying to all who enter the state of Florida the protections guaranteed by the fourth amendment.

> Given the plethera of profile characteristics that DEA agents mention in their testimony and that courts explicitly or implicitly find

> significant, a great risk arises: Rather than use the profile as a reliable guideline, agents may selectively modify the profile during the initial stop and thereafter customize it to fit any hapless traveler who had the misfortune to catch the agents' 'trained eye'.

Becton, ***supra,*** p. 14 **at** 438.

Courts may have a tendency to accept "the premise that these otherwise innocent behaviors may indicate criminality because they are part of a formula, [and] the courts' evaluation of the totality of circumstances will inevitably be colored by the tacit assumption that at least some factual basis for suspicion was present." Cloud, ***Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas,*** 65 B.U.L. Rev. 843, 858 (1985) [hereinafter cited as Cloud]. The myth of the profile will have become reality.

B. Adoption of the Officer's Drug Courier Profile as the Reasonable Suspicion Necessary to Seize an Individual Would Give the Police Unrestrained Discretion

The effect of a decision following the state's reasoning in this case would be far-reaching. It would give police officers in Florida unrestrained discretion to stop virtually anyone on the highways. "[A]n individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." ***Brown v. Texas,*** 443 U.S. 47, 51 (1979).

> Any attempt to replace this essential case-by-case judicial review of government conduct with a 'litmus-paper test' designed to resolve primary

> fourth amendment issues is questionable. Such an attempt is most suspect when the formula for constitutional decisionmaking is devised not by the courts, but by the police for use in law enforcement. Judicial approval of such a formula permits law enforcers, the very people whose activities are subject to fourth amendment scrutiny, to define the standards by which their conduct is reviewed.

(footnotes omitted). Cloud, ***supra,*** p. 21 at **844.** Allowing the police to justify fourth amendment seizures based on formulas as inexact and fickle as the multitudinous drug courier profiles, would be to read the fourth amendment out of the Constitution and turn the whole process over to the police with ***carte blanche,*** in advance, from the courts for virtually random vehicle stops.

The words the United States Supreme Court used to frame the threshhold question presented in ***Terry,*** whether there was in fact a seizure, apply equally in this case: "The question is whether in all the circumstances of ***this*** on-the-street encounter, . . . [the respondent's] right to personal security was violated by an unreasonable search and seizure." Id. at 9. (Emphasis added). Officer Vogel's stop of Mr. Johnson was unreasonable because nothing about Mr. Johnson or his car or his manner of driving provided any justification for invading his right to personal security. Individual situations will cease to have any role in the judicial determination of reasonable suspicion if courts merely accept a series of factors that apply to large groups of people. To do so would be to ignore the clear dictates of ***Terry*** and to turn law enforcement

supervision over to the law enforcers.

C. *Balancing the Needs of Society Against the Rights of the Individual Does Not Justify Acceptance of the Drug Courier Profile*

When first carving out the reasonable suspicion exception to the warrant requirement in *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that the governmental interest of effective crime prevention and detection is an interest that must be balanced against the invasion of individual privacy created by the search or seizure. *Id.* at 22. In so balancing it is crucial to remember that "good police work is characterized not only by the prevention and detection of crime but also by the avoidance of intrusions upon personal privacy in violation of the fourth amendment." *People v. Tebedo*, 81 Mich. App. 535, 265 N.W.2d 406, 409 (1978). In the instant case, the state puts heavy emphasis on this balancing, using the drug trafficking crisis as one side of the scale. This required balance also serves to protect individuals from the arbitrary interference of their personal security by police officers. *Terry v. Ohio*, 392 U.S. 1 (1968). Balancing means just that. Both sides stay above ground. Yet, the state here asks the court to tip the scale so far that the side holding the individual right to privacy must scrape harshly against the ground, eroding its very existence.

Perhaps, the police would be more efficient if the fourth amendment did not apply to their actions, but this society has

chosen a course that sets limits on police conduct in the interest of protecting personal security and privacy. As this court recently held in *Riley* v. *State*, 511 So.2d 282 (Fla. 1987), *cert. granted*, 108 S. Ct. 1011 (1988):

> The fourth amendment reflects a choice that our society should be one in which citizens 'dwell in reasonable security and freedom from surveillance.' . . . [T]he fourth amendment prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wish to guard against their privacy.

Id. at 288 (citations omitted).

Justice Scalia recently put it more bluntly when he wrote that "the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona* v. *Hicks*, 107 S. Ct. 1149, 1154 (1987). That privacy, so cherished by this society, is at stake here.

This case thus focuses on an individual's right not to be subjected to arbitrary searches while driving on the public highways; his right to "go on his way," *Florida* v. *Royer*, 460 U.S. 491, 498 (1983), when the police do not have reasonable suspicion that he has been, is engaged in, or is about to be engaged in criminal activity. In his dissent in *Terry* v. *Ohio*, 392 U.S. 1 (1968), Justice Douglas foresaw the coming of a new and frightening era in this country. He was concerned that the "Terry search" would become the rationale for removing extensive police activity from the fourth amendment's warrant

and probable cause protection.[6] His fears are most relevant now.

> To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. . . .
>
> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has never been greater than it is today.
>
> Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

392 U.S. at 38-40. (J. Douglas, dissenting).

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[6] The Terry-type analysis has been used to require merely reasonable suspicion in border searches, ***see e.g., United States v. Montoya de Hernandez,*** 473 U.S. 531 (1985); searches of high school students by school officials, ***see e.g., New Jersey V. TLO,*** 469 U.S. 325 (1985); searches of the insides of cars for weapons incident to investigative stops, ***see e.g., Michigan V. Long,*** 463 U.S. 1032 (1983); searches of luggage at airports, ***see e.g., United States V. Place,*** 462 U.S. 696 (1983); detentions of persons incident to the execution of a search warrant, ***see e.g., Michigan v. Summers,*** 452 U.S. 692 (1981); investigative stops near international borders, ***see e.g., United States v. Cortez,*** 449 U.S. 411 (1981); temporary seizures to investigate potential violations of immigration laws, ***see e.g., United States V. Brignoni-Ponce,*** 422 U.S. 873 (1975); investigative stops based on informants' tips, ***see e.g., Adams V. Williams,*** 407 U.S. 143 (1972); and of course the investigative stop of an automobile, ***see e.g., Delaware V. Prouse,*** 440 U.S. 648 (1979).

The fourth amendment itself grew out of Colonial resistance to British revenue officers using general warrants to search the colonists for smuggled goods. In 1755, the concern over smuggled goods created the perceived necessity for relaxation of the longstanding English law requiring a special writ issued for a specific search. William Pitt, The Elder, Earl of Chatham, addressing the English House of Commons on November 18, 1783, warned:

> Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.

Today, the perceived necessity is the concern over drugs. A necessity to relax constitutional rights will always present itself. It is the responsibility of the courts to look beyond that necessity. No matter how great the need to control the drug traffic, that need can never be greater than the cherished right to privacy the fourth amendment was designed to protect.

CONCLUSION

For the reasons stated herein, *amicus,* National Association of Criminal Defense Lawyers, respectfully requests that this court affirm the decision of the Florida Court of Appeals.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing was mailed to all counsel of record on this 8th day of April, 1988.

RICHARD LUBIN