IN THE
SUPREME COURT OF FLORIDA

CASE NUMBER: 71,631

THE STATE OF FLORIDA,
Petitioner,

vs.

PAUL CLIVE JOHNSON,
Respondent,

****
ON CERTIFIED QUESTION FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT
****

BRIEF OF AMICUS *CURIAE* IN *SUPPORT* OF RESPONDENT

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STATEMENT OF THE CASE AND THE FACTS

This case comes to this Court upon a certified question, which was certified to this Court in State v. Johnson, 516 So.2d 1015 (Fla. 5th DCA 1987). In Johnson, the trial court suppressed drugs seized by a police officer, based upon its conclusion that the particular facts, which the officer possessed at the time of that stop, in their totality did not satisfy the legal standard for the stop of an automobile. The State of Florida appealed that ruling to the lower appellate court, which court affirmed the trial court's ruling. Based on its concern as to the proper use of drug courier profiles in analyzing the validity of automobile stops, that lower appellate court certified that issue to this Court.

This is an amicus curiae brief, the sole concern of which is that the appropriate legal analysis be used when deciding the validity of investigative stops of motor vehicles for violation of drug laws, where the sole basis for the stop is a profile of a narcotics violator. For this purpose, this brief adopts the facts stated in the lower appellate court's decision, State v. Johnson, supra.

SUMMARY OF ARGUMENT

United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981), established the legal standard to be used to determine the validity of investigative stops of moving vehicles. That case formulated to elements to be used in making the ultimate legal determination. The first element includes the use of a law enforcement officer's knowledge of the modes or patterns of operation of certain kinds of lawbreakers. Because a "profile" technique used by law enforcement seeks to develope characteristics common to a particular type of criminal by looking at the modus operandi of a sample of criminals, who commit that particular type of crime, those characteristics become part of the total picture used to satisfy the first element of the Cortez-Terry legal standard. A court must then determine as a matter of law, the second element of the Cortez-Terry test, i.e. whether, based upon that whole picture, experienced police officers could reasonably conclude that the particular vehicle they stopped was engaged in criminal activity.

On the facts of this case, a reasonable experienced police officer could not conclude that there was a substantial possibility that the particular vehicle in question was engaging in any kind of wrongdoing -- let alone, committing a drug crime. Consequently, this particular stop was invalid under the Fourth Amendment.

ARGUMENT

AN INVESTIGATORY STOP OF A MOVING AUTOMOBILE IS VALID ONLY WHEN THE OBJECTIVE FACTS IN POSSESSION OF THE POLICE OFFICER, AND REASONABLE INFERENCES THEREFROM, WHEN TAKEN IN THEIR TOTALITY, ESTABLISH, AS A MATTER OF LAW, WHAT A REASONABLE TRAINED LAW ENFORCEMENT OFFICER WOULD FIND TO BE A SUBSTANTIAL POSSIBILITY THAT THE PARTICULAR INDIVIDUAL BEING STOPPED IS ENGAGED IN CRIMINAL ACTIVITY, REGARDLESS OF WHETHER THOSE FACTS ARE BASED IN WHOLE OR IN PART UPON A SO-CALLED DRUG COURIER PROFILE.

A. The Legal Standard For An Investigatory Stop Of A Moving Automobile Has Been Established By The Supreme Court And Is Binding On The Courts Of This State.

Article I, Section 12 of the Florida Constitution requires this Court to construe the right against unreasonable searches and seizures in conformity with the construction of the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Consequently, this Court must first examine relevant United States Supreme Court decisions, regarding the Fourth Amendment. The United States Supreme Court has definitively stated the legal standards to be utilized in resolving the factual situation before this Court in this case.

United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981) addressed the central issue presented in this case, i.e. whether a moving vehicle could be stopped temporarily for the purpose of investigation of a crime on facts

constituting less than probable cause, when objective facts and circumstantial evidence suggested that the particular vehicle in question was involved in criminal activity. Simply stated, Cortez held that a Terry stop to investigate a suspicion of criminal activity was acceptable under the Fourth Amendment, even though that suspicion did not rise to the level of probable cause.[1] Cortez established the basic legal standards to be used when a court determines the validity of an investigative stop of a moving vehicle. "Based upon [the] whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Cortez, 449 U.S. at 417-418, 101 S.Ct. at 695. Cortez amplified this standard as consisting of two separate elements, "each of which must be present before a stop is permissible." Those two elements are decisive of the issue before this Court. The first element consists of an analysis which "proceeds with various objective observations, information from police

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[1] The brief of Petitioner, the State of Florida, spends time trying to establish the reasonableness of an investgative stop of a moving vehicle, based on suspicion that a drug crime was being committed. Cortez establishes that proposition. See also Florida v. Rover, 460 U.S. 491 at 498-500, 103 S.Ct. 1319 at 1324-1326 (1983)(opinion of White, J.) and Forida v. Rodriguez, 469 U.S. 1 at 5, 105 S.Ct. 308 at 310 (1984). The State's issue is a straw man, which, as a general proposition, is no longer subject to dispute. The real issue is where and how a "drug courier profile" fits in the legal analysis of investigatory stops of moving vehicles. That latter issue is also no longer subject to dispute, as the following legal discussion establishes.

reports,..., and consideration of the modes or patterns of operation of certain kinds of lawbreakers" from which common sense conclusions can be drawn and which conclusions are to be seen and weighed as understood by those versed in the field of law enforcement. The process of analysis does not ~~end~~ here. The second element consists of the requirement that the end product of that initial analysis ##must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." Cortez, 449 U.S. at 418, 105 S.Ct. at 695. "[T]he question is whether, based upon the whole picture, ... experienced ... officers could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." Cortez, 449 U.S. at 421-422, 105 S.Ct. at 697.

United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675 (1985), amplifying Cortez, established two additional propositions. First, investigatory stops of moving vehicles can be based on reasonable suspicion that the occupant of a moving vehicle was involved in a completed crime. Second, if the basis of the articulable facts supporting the stop consists of reliance on a police flyer or bulletin from another police agency, the stop in the objective reliance upon it is invalid if the police, who issued that flyer or bulletin, lacked facts which meet the requisite standard of reasonable suspicion justifying the stop.[2]

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[2] The most recent and last case to address investigatory stops of moving vehicles was United States v. Sharpe, 470

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The leading treatise on the Fourth Amendment has made the following restatement of the articulable suspicion test, i.e. the legal standard of brief stops for investigation. An investigative stop is based on a standard less than probable cause. Consequently, the more-probable-than-not standard is not the measure of this type of seizure. "Rather, it will suffice that there exists a substantial possibility that criminal conduct has occured, is occurring, or is about to occur." LaFave, Search and Seizure, 2nd Ed. §9.3(b) at 431-432. That treatise amplifies this concept, as it relates to innocent behavior, in the following manner:

> *** In short, the possibility of criminal conduct [must be] strong enough that, upon an objective appraisal of the situation, we would be critical of the officers had they let the event pass without investigation. By contrast, were officers merely to observe a man loading a pickup truck at a residence during daylight hours with boxes of unknown contents, especially if this observation was made in an area where pickup trucks are common because of the amount of truck farming engaged in, then a stopping for investigation would not be justified. This is not simply because the observed

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U.S. 675, 105 S.Ct. 1568 (1985). Sharpe did not establish any additional legal principle regarding the validity of the initial stop. Rather, in this regard, Sharpe merely applied the established standards to the facts of that particular case. Sharpe, 470 U.S at 682, 105 S.Ct at 1573. Sharpe also added an additional factor to the validity of investigative stops of moving vehicles; namely, the reasonableness of the length of the temporary detention. That latter matter is not the central issue before this Court. Indeed, the central issue is when the initial stop can be made.

> conduct is consistent with innocent activity, but rather because there are "no facts that would make the conduct observed by the officers anything but innocuous." That is, there does not even exist a significant possibility that the person observed is engaged in criminal conduct.
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> LaFave, supra at 433.

The validity of an investigative detention, i.e. whether the police could have reasonably suspected the particular individual of criminal activity on the basis of those observed facts used by that officer in the case at issue, is a question of law for the courts to decide. Reid v. Georsia, 448 U.S. 438, 100 S.Ct. 2752 (1980).

B. The Utilization Of A Profile, As That Concept Is Used By Law Enforcement, Can Do No More Than Satisfy The First Element Of The Legal Standard Set By Cortez.

A "profile", as that term is used by law enforcement, is a multi-part characterization of facts observed by police officers. This investigative tool is not a recent phenomenon and is no more than a method of analysis employed to evaluate observed facts based on the concept of "modus operandi." 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 at 423-427 (1987), hereafter cited as "Becton".

There are two basic types of profiles. The first type is one which seeks to characterize the modus operandi of a particular individual, who is engaged in repeated criminal behavior. The media repeatedly publicizes this type of profile. The police characterizations of the modus operandi of "Jack the Ripper", "The Son-of-Sam" killer, **"The** Ski-Masked Rapist", etc. are examples of this type of profile. United States v. Cortez, supra, exemplifies this type of profile, in that the police attempted to catch a particular repeat offender, whom the police there labelled **"Chevron",** by characterizing the modus operandi of his particular repeated criminal behavior, and logically infering from that profile conclusions as to when, where and how **"Chevron"** would commit his next crime. This method of catching criminals is the method made famous by Sherlock Holmes.

The second type of profile is a characterization that focuses not on the modus operandi of a particular criminal, but rather on the modus operandi of **all** persons involved in committing a particular type of crime. The phrase "drug courier profile" is an example of this second type of profile. Becton, supra.

When one recognizes that the end product of any type of police-generated **"profile"** is a description of a modus operandi, a **"profile"** can be neatly inserted in its proper place within the legal analysis mandated by United States v. Cortez, supra. **A "profile",** using Cortez's terminology, is a "consideration of the modes or patterns of operation of

certain kinds of lawbreakers", that Cortez holds can be used only to establish the first of the two elements needed to satisfy a valid investigative stop.

C. Decisions Of The United States Supreme Court, Which Discuss The Phrase "Drug Courier Profile", Put That Phrase In Its Proper Place For Lower Courts To Correctly Analyze The Validity Of An Investigative Stop Of A Moving Vehicle.

The phrase "drug courier profile" had a very short lifespan in the Fourth Amendment analysis of the Supreme Court of the United States. Nevertheless, one cannot understand the present-day minimal utility of the phrase "drug courier profile" without first studying that animal, as it was used in the Supreme Court.

Now Chief Justice Rehnquist in footnote 6 of his dissenting opinion in Florida v. Rover, 460 U.S. 491 at 525-526, 103 S.Ct. 1319 at 1339 (1983) correctly describes and analyzes the use of the phrase "drug courier profile" as that phrase was used in the Supreme Court of the United States. This footnote states that the "drug courier profile", as then existed, was a single compilation of characteristics, which was developed in 1974. This footnote also states that, at that time, those particular characteristics were "basically things that normal travelers do not do...." Footnote 6 goes on to reenforce the analysis employed earlier in this brief.

> *** In fact, the function of the "profile" has been somewhat overplayed. Certainly, a law enforcement officer can rely on his own experience in detection and prevention of crime. Likewise, in training police officers, instruction focuses on what has been learned through the collective experience of law enforcers. The "drug courier profile" is an example of such instruction. It is not intended to provide a mathematical formula that automatically establishes grounds for a belief that criminal activity is afoot. By the same reasoning, however, simply because these characteristics are accumulated in a "profile," they are not to be given less weight in assessing whether a suspicion is well founded. While each case will ~~turn~~ on ~~—~~ its ~~—~~ own ~~—~~ facts, sheer logic dictates that where certain characteristics repeatedly are found among drug smugglers, the existence of those characteristics in a particular case is to be considered accordingly in determining whether there are grounds to believe that further investigation is appropriate.[citation omitted].
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> Rover, supra.

The phrase "drug courier profile" first reared it head in footnote 1 of Justice Stewart's opinion in United States Mendenhall, 446 U.S. 544 at 547, 100 S.Ct. 1870 at 1873 (1980). Ironically, this very same opinion, in which now Chief Justice Rehnquist joined, also created the seed from which came what is now known as a "police-citizen" encounter.

Within one month after Mendenhall was decided, eight members of the Court[3] held in Reid v. Georgia, 448 U.S 438,

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[3] Five justices concurred in the majority opinion. An additional three justices supported the concurring opinion written by Justice Powell. That concurring opinion stated that those three justices "agree on the basis of the fragmentary facts apparently relied upon by the DEA agents in

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100 S.Ct. 2752 (1980) that those particular factors from the so-called "drug courier profile", which were relied on to make an investigative detention in Reid, did not constitute "a reasonable and articulable suspicion that the person seized [was] engaged in criminal activity."

> We conclude that the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see Terry v. Ohio,..., this is not such a case. The agent's belief that the petitioner and his companion were attempting to conceal the fact that they traveling together, a belief that was more an "inchoate and unparticularized suspicion or 'hunch,'"... than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.
> Reid, supra, 448 U.S. at 442, 100 S.Ct. at 2754.

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this case, that there was no justification for a 'seizure.'" Reid v. Georgia, 448 U.S. 438 at 442 n.1, 100 S.Ct. 2752 at 2755 n.1 (1980)(Powell, J., concurring).

Reid has great significance to stops of moving vehicles, based in whole or in part on a profile technique for characterizing drug criminals. Reid was decided before a majority of the Supreme Court adopted the concept of a police-citizen encounter. More importantly, Reid analyzed the factors used in that case under the assumption that the Terry legal standards, i.e. the articulable suspicion test, were to be used.

Two years later, the phrase "drug courier profile" was discussed in both the plurality opinion of Justice White and the previously quoted dissenting opinion of now Chief Justice Rehnquist in Florida v. Rover, 460 U.S. 491 at 493 n.2 and 525-526 n.6, 103 S.Ct. 1319 at 1322 n.2 and 1339-1340 n.6 (1980). Rover ended the mention of a "drug courier profile" in the United States Supreme Court's Fourth Amendment analysis. In Rover, seven members of the Court agreed that the concept of a police-citizen encounter existed and that this concept was outside the reach of the Fourth Amendment.[4] As a consequence, a law enforcement officer could walk up to citizen, based on a "drug courier profile", --as in fact was done in Rover-- without subjecting to any Fourth Amendment analysis the factors, which were employed by

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[4] The four justices who, agreed to the opinion written by Justice White, were joined by the three justices, who supported the dissenting opinion of now Chief Justice Rehnquist, with regard to the existence and legal status of a police-citizen encounter. Rover, 460 U.S. at 523 n.3, 103 S.Ct. 1319 at 1338 n.3 (1983).

him from that profile and which were used to justify the encounter. Because of Rover, future Fourth Amendment issues involving investigative detentions were always predicated on factors of the a drug courier profile, which were involved in the particular case, plus those facts learned as a result of the initial police-citizen encounter. Indeed, Rover, itself, found that "when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers--paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general--were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him ...." Rover, 460 U.S. at 502, 103 S.Ct. at 1326.

Florida v. Rodriauez, 469 U.S. 1, 105 S.Ct. 308 (1984) mentioned facts, which clearly describe a drug courier profile, but no longer used that term of art, itself. In Rodriauez, the profile concept now merely served to focus the investigation upon the defendant.

Several observations may be made from the above cases and other Supreme Court cases, which were previously discussed.

The concept of police-citizen encounters does not apply to the investigatory stop of moving vehicles. See United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568 (1985)(post-Rover stop of moving vehicle); United States V. Henslev, 469 U.S. 221, 105 S.Ct. 675 (1985)(same). Consequently, unlike

profile encounters with walking citizens, the fruits of a stop of a moving motor vehicle cannot supplement the profile factors used to justify the stop, when determining the validity of that stop under the Cortez-Terry legal standards.

The concept of a "drug courier **profile"** only applies to the first element of the Cortez analysis, as Justice Rehnquist's opinion in Rover so clearly shows.[5]

What was of probative value in **"the** drug courier profile", which now Chief Justice Rehnquist was discussing in his opinion in Royer, was the fact that those profile characteristic identified a type of criminal, who travelled on airplanes but who did things that other travelers **did not**.

The then-single drug courier profile, which the Supreme Court was discussing when it mentioned the phrase "drug

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[5] Chief Justice Rehnquist's dissenting opinion in Royer highlights several flaws in the legal discussion and certified question contained in the lower appellate courts opinion in State v. Johnson, 516 So.2d 1015 (Fla. 5th DCA 1987). Johnson overplays the phrase "drug courier profiles" and uses that phrase, rather than the factors employed in any case, as what it sees to be the decisive issue in stops of moving vehicles. As a consequence, the certified question posed to this Court becomes a rhetorical question. Obviously, law enforcement officers' experience, culminating in a profile, may be relied on to meet the Cortez-Terry test. That certified question ignores the second element of that test, namely does the articulated experience of any police officer demonstrate, as a matter of law, that the particular vehicle being stopped is engaged in criminal activity.

The State has literally gotten the lower court and this Court to do battle on its terms -- "drug courier profile"--, rather than on the concepts contained in the Cortez-Terry legal standard.

courier profile", was developed by someone other than the law enforcement officer, who was actually using it. The latter officer's use of another's profile, as the exclusive basis for an investigatory stop, triggers the concept of United States v. Hensley, supra, that the detention is not valid if the factors used from a profile, which was not developed by the officer who is using it, do not satisfy the required "articulable suspicion" test employed in analysis of all kinds of investigative stops.

Most importantly, Reid leaves no doubt that it is the probative value of the factors, themselves, which factors make up a profile and which particular factors are utilized in a particular stop, that is decisive in any Fourth Amendment analysis -- not the fact that the general concept "drug courier profile" was used.[6] No particular stop is valid, merely because based on a "drug courier profile." As

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[6] In an analogous context, this Court has come to the same conclusion. When addressing the use of the concept of modus operandi to prove identity in the Williams Rule context, this Court looked at the probative value of the similarities, not the number of similarities.

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared fatual situation. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.***
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> Drake v. State, 400 So.2d 1217 at 1219 (Fla. 1981).

Drake could have been discussing the first type of profile exemplified by United States v. Cortez, supra. Its logic system is also transferable to the second type of profile, which was discussed earlier in this brief. The more that a particular profile reaches the level of describing characteristics of a drug trafficker "that normal travelers do not do" --to use the words which an officer used to describe the original DEA drug courier profile developed in 1974 for use at airports, Florida v. Rover, 460 U.S. 491 at 525-526 n.6, 103 S.Ct. 1319 at 1339 n.6 (1983)(Rehnquist, J. dissenting)--the more likely it will be that the use of that profile will also satisfy the second element of the Cortez-Terry test that there is a reasonable suspicion that the particular individual being stopped is engaged in wrongdoing.

now Chief Justice Rehnquist observed in his Rover opinion, the function of the phrase "drug courier profile" has been somewhat overplayed.

The single drug courier profile, which was developed for airport stops in 1974, is an extinct animal. The label "drug courier profile" now applies to totally different sets of factors and differs from place to place, which situation has led to the labeling of this term of art as "chameleon-like." United States v. Sokolow, 831 F.2d 1413 at 1418 (9th Cir. 1987). Indeed, this very case exemplifies this present-day reality. The Highway Patrol has its own profile and Officer Vogel developed his own. Moreover, these profiles involve automobiles, not persons traveling by airplane. Only the methodology employed to derive any "drug courier profile" is the same, i.e. attempting to find similar characteristics from a sample of drug smugglers. The end product varies in content as the number of people, with whom the officer comes in contact, increases. Because the modus operandi of the entire class of drug criminals changes day by day and from place to place, there never again will be that single drug courier profile, with which the Supreme Court once concerned itself. The profile concept was a good idea that now has gone wild like an uncontrolled nuclear reaction.

Finally, one must recognize that the methodology used to form a drug courier profile yields a composite of classifiable traits, based a sample of a large number of

people. Consequently, this abstract is a characterization of an imaginery man.

D. As A Matter Of Law, The Profile Factors Used By The Police Officer Involved In This Case, When Making The Stop Of This Car Were Not Sufficient To Establish A Substantial Possibility That The Driver Of This Particular Car Was Engaged In Commission Of A Drug Crime.

In this case, a police officer made a stop of a moving vehicle on the following articulated facts: An approximately thirty-year-old lone male, dressed in casual clothes on a summer night, was driving within the speed limit at exactly **55** miles per hour on a major Florida thoroughfare, **1-95,** at **4:15** a.m. in a large luxury car, which car had out-of-state license plates. When this police officer was driving within the visibility of that driver, the driver began glancing continuously in his rearview mirror. At no time did the driver commit a traffic violation. Based solev on these facts, that officer conducted a vehicle stop to investigate whether the driver was engaged in trafficking in marajuana. That officer deemed these facts to be common to those possessed by other drivers, whom that officer had arrested for committing drug crimes, and, consequently, these facts fit his **"profile"** of a drug criminal. "After the stop, the trooper observed facts giving rise to a reasonable suspicion that the defendant was a drug courier." State v. Johnson, **516** So.2d **1015** at **1016** (Fla. 5th DCA **1987).**

The legal question posed is whether these particular facts, seen through the eyes of a reasonable trained law enforcement officer, create a substantial possibility that this particular driver was engaging in a drug crime? In this tourist state, the answer is **"No"!** Although these facts fit that officers **"profile",** there is nothing about these facts, which make them unique to drug criminals. These facts do not show anything that other early-morning drivers on Florida's section of 1-95 do **not** do. **As** a consequence, these facts, when viewed in their totality, do not satisfy the second element of the test established in United States v. Cortez, supra, that this particular driver was engaged in wrong doing at the time his car was stopped, giving all due regard to that officer's personal experience with drug traffickers who had transported marijuana in their cars.

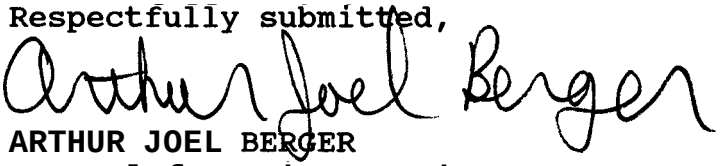
It may very well be true that drug traffickers, who seek to transport one or more bales of marijuana from Florida to another state, have learned that they should drive like other totally innocent tourists for the very purpose of not being stopped. In reality, this was the conclusion that the officer in this case came to. Nevertheless, the more liberal standard for present-day investigative stops of moving vehicles does not permit those criminals to be stopped, if that is all that a policeman sees them do.

CONCLUSION

Based upon prevailing law established by the United States Supreme Court for investigative stops of moving vehicles and applying that Court's method for evaluating any "drug courier profile" case in the context of an investigative detention, this Court should reformulate the question certified to it in State v. Johnson, 516 So.2d 1015 (Fla. 5th DCA 1987).

In resolving the particular factual situation before it, this Court should affirm the lower appellate court's legal conclusion, as well as the trial court's legal conclusion, that the motor vehicle stop in this case was not a valid investigatory stop under prevailing Fourth Amendment legal standards.

Respectfully submitted,



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