

FILED
SID J. WHITE
JUN 12 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 77,394

THIRD DCA CASE NUMBER 85-2863

FRATERNAL ORDER OF POLICE, MIAMI LODGE 20,
PETITIONER

VS .

CITY OF MIAMI,
RESPONDENT

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL
CERTIFIED AS A QUESTION OF GREAT PUBLIC IMPORTANCE

AMICUS CURIAE BRIEF ON BEHALF OF:

FLORIDA SHERIFF'S ASSOCIATION

FLORIDA POLICE CHIEF'S
ASSOCIATION

DADE COUNTY ASSOCIATION OF
CHIEFS OF POLICE

FLORIDA ASSOCIATION OF
POLICE ATTORNEYS

BY: GEORGE N. AYLESWORTH, Esquire

THOMAS GUILFOYLE, Esquire
Metro-Dade Police Department
Police Legal Bureau
71 West Flagler Street
Room 1601
Miami, Florida 33130
Telephone: (305) 375-5740

TABLE OF CONTENTS

	<u>Page</u>
Citations	ii
Preface	1
Summary of Argument	2
Argument	3
Conclusion	19
Certificate of Service	20

CITATIONS

	<u>Page</u>
<u>CASES</u>	
<u>Berry v. Bailey</u> , 726 F.2d 670 (11th Cir. 1984).....	16
<u>Brandon v. Holt</u> , 469 U.S. 464 (1985).....	15
<u>City of Palm Bay v. Bauman</u> , 475 So.2d 1322 (Fla. 5th DCA 1985).....	7,9,10,12
<u>Connick v. Meyers</u> , 461 U.S. 138 (1983).....	16
<u>Cupp v. Murphy</u> , 412 U.S. 291 (1973).....	17
<u>Fowler v. Unemployment Appeals Comm.</u> , 537 So.2d 162 (Fla. 5th DCA 1989).....	10,17
<u>Monell v. Department of Social Services</u> , 436 U.S. 658 (1978).....	14
<u>Royer v. State</u> , 389 So.2d 1007 (Fla. 3d DCA 1980) <u>a'ffd</u> , 460 U.S. 491 (1983).....	18
<u>Schmerber v. California</u> , 384 U.S. 757 (1966).....	15
<u>United States v. De La Vega, Betancourt, Aleman, Carballo and Coello</u> , 913 F.2d 861 (11th Cir. 1990).....	4,5,13
<u>United States v. Mendenhall</u> , 446 U.S. 544 (1980).....	5
<u>STATUTES:</u>	
§ 112.011, Fla. Stat. (1989).....	9
§ 121.0515, Fla. Stat. (1989).....	9
§ 316.072(3), Fla. Stat. (1989).....	13
§ 843.01, Fla. Stat. (1989).....	13
§ 843.02, Fla. Stat. (1989).....	13
§ 943.085, Fla. Stat. (1989).....	9
§ 943.13, Fla. Stat. (1989).....	9
§ 943.13(4), Fla. Stat. (1989).....	9

§ 943.13(6), Fla. Stat. (1989)	9
42 U.S.C. 1983 (1976).....	14
<u>OTHER AUTHORITIES:</u>	
American Bar Association: <u>Project on Criminal Justice Standards</u> , 1973:144.....	4
Bishop, <u>Worker Drug Tests Resisted</u> , THE NEW YORK TIMES, Nov. 27, 1985.....	7
Boodt, <u>Random Drug Testing of Police Officers: A Proposed Procedure Which Satisfies Fourth Amendment Requirements</u> . 22:3 Ind. L. Rev. 799 (Summer 1989)	8
Castro, <u>Battling Drugs On The Job</u> , TIME, Jan. 27, 1986...	5,6
Dunham, Lewis & Alpert, <u>Law Enforcement: Testing The Police for Drugs</u> , 24 Crim. L. Bull. 155 (1988).....	11,12,13
Fernandez, <u>Crime Fighters In Miami Urge Surprise Screening For Drugs</u> , MIAMI NEWS, Jan. 21, 1986.....	6
Fernandez, <u>Drug Tests Sought At South Florida Firms</u> , MIAMI NEWS, Dec. 5, 1985.....	6
Higginbotham, <u>Urinalysis Drug Testing Programs For Law Enforcement</u> , 55 F.B.I. L. Enforcement Bull. 25 (1986)...	14
<u>Many Employers Testing Workers For Drug Use</u> , <i>The Washington Post</i> , February 2, 1985, at A14.....	8
Marmo, <u>Public Employees: On-the-Job Discipline For Off-the-Job Behavior</u> , 40 Arbitration Journal 3 (June, 1985).....	10
<u>Miami Virtue, Miami Vice</u> , TIME, Nov. 4, 1985.....	6,13
Op. Fla. Comm. Ethics 83-46 (July 28, 1983).....	13
Potter, <u>Companies Go On Offensive Against Employee Drug Use</u> , THE WASHINGTON POST, Nov. 24, 1985.....	5,6
<u>Hid Miami Police of Corruption</u> , MIAMI NEWS, Dec. 28, 1985.....	14
Schachter, <u>Controlling Worker's Substance Abuse</u> , The National Law Journal, Nov. 11, 1985.....	6,7,11
Thanepohn, <u>Police, Drugs and Stress: A Special Report</u> , U.S. Journal, Feb. 1986.....	8

PREFACE

This is an appeal of a Third District Court of Appeal decision, which has been certified as a question of great public importance requiring immediate resolution. The issue is whether involuntary urinalysis testing of police officers, to detect the presence of a controlled substance, is a mandatory subject of bargaining. This amicus curiae brief is submitted because it is believed that drug abuse by police officers is of such great importance to public safety and to the public's perception of law enforcement that there exist compelling policy reasons for permitting drug testing, based upon reasonable suspicion, and that such testing, therefore, is not a mandatory subject of collective bargaining.

SUMMARY OF ARGUMENT

Nationwide, there is a severe problem of drug abuse in the work place, **and** various methods of testing workers have been recommended. In Miami, and throughout Florida, the public is concerned about drug abuse, particularly as it affects **some** police officers. The occupation of a police officer is unique, due to the requirement for integrity, the potential for corruption, the public perception of police, and the duty to apprehend **criminals** and to **maintain** public safety. A constitutionally permissible **means** of detecting **drug** abuse by **police** officers must be available to police department administrators. Urinalysis is a reliable, non-intrusive **method** of determining whether a **person** has, or has **not**, recently used drugs. Public policy should **permit** a police department to be able to order a police officer to submit to involuntary urinalysis testing, to detect the presence of a controlled substance, based upon reasonable suspicion of drug abuse. The ability to implement such a testing procedure should not be a mandatory subject of bargaining. Indeed, it is not even a proper topic of bargaining, because **it** involves the prevention and detection of criminal activity.

ARGUMENT

WHEN A CASE IS OF GREAT PUBLIC IMPORTANCE,
THERE MAY BE COMPELLING POLICY REASONS WHICH SUPPORT
A PARTICULAR HOLDING

A court's holding *is* comprised of two parts, although observers are often unaware of the second. The first component is the ratio decidendi, the grounds or precedent upon which the court bases its decision. The other component of the holding is the policy reason behind the decision. When making its decision, a court will rely heavily on the cases which are cited as precedent. However, a court must also give careful consideration to the policy reasons which support a particular holding. When an appellate decision is rendered, it settles the particular dispute which is before it, however, it also creates a general rule which will cover a whole class of like disputes. The true rule of a case is what it will be made to stand for later, by another court. If the appellate dispute is of great public importance, the court must give great consideration to the policy reasons which may affect its decision. The issue to be decided here is very narrow, because police officers and their use of controlled substances are involved. This issue is of great public interest and importance because it involves public safety and it involves the public's perception of law enforcement, an important element of the criminal justice system. The purpose of this brief *is* to outline some of the compelling policy reasons which

indicate that this Honorable Court should create a narrow rule which holds that involuntary urinalysis testing of police officers, for the presence of a controlled substance, under constitutionally permissible conditions, should not be a mandatory subject of bargaining.

NATIONWIDE, AND THROUGHOUT FLORIDA, THERE IS GREAT CONCERN OVER DRUG ABUSE IN THE WORKPLACE. URINALYSIS TESTING IS A REASONABLE, CONSTITUTIONALLY PERMISSIVE METHOD OF DETECTING DRUG ABUSE, AND IS AN EFFECTIVE MEANS OF PROMOTING PUBLIC SAFETY

In a project on criminal justice standards, the American Bar Association stated: "Since a principal function of police is the safeguarding of democratic processes, if police fail to conform their conduct to the requirements of the law, they subvert the democratic process and frustrate the achievement of a principal police function." American Bar Association: Project on Criminal Justice Standards, 1973:144.

In Miami, where the case at bar arose, there have been a number of cases where police officers were stealing drugs or drug money, and were also using illegal drugs, principally cocaine. The most notorious of these incidents was the "Miami River Cops Case". "The investigation by Metro-Dade Homicide Detectives of the causes of death of three corpses found floating in the Miami River led to the discovery of a scheme by which several Miami police officers forcibly separated narcotics traffickers from their drugs or ill-gotten gains, then sold or otherwise distributed the illicit products." United States v. De La Vega, Betancourt, Aleman, Carballo and Coello, 913 F.2d 861 (11th Cir. 1990). Although the

officer's convictions were for **racketeering**, narcotics, civil rights **violations**, and tax **laws**, evidence **at trial** established that the convicted officers were using illegal drugs while employed as police officers. **"Not** surprisingly, the serious charges of widespread police wrongdoing, including murder allegations, piqued the attention and concern of the public. Accordingly, the media documented this two year drama with several hundred news reports. ... In addition, these reports were disseminated by the major audio, video, **and** print media sources which collectively reached the entire Dade County metropolitan area." Id at 864. Public interest in drug possession and abuse, particularly **by** police officers, is not limited to **Dade** County, Florida.

There is widespread concern in the nation over the extent to which drug abuse has permeated the fabric of society. See, e.g., United States v. Mendenhall, 446 U.S. 544 (1980). Mr. Justice Powell stated **that** "Few problems affecting the health and welfare of our population... cause greater concern than the escalating use of controlled **substances**." Id., at 561. **This general concern** is heightened when **attention** focuses on **the** effect of drug **usage** in the workplace, and the **attendant** hazards and **losses that** such activities entail. Castro, Battling Drugs On the Job, **TIME**, January 27, 1986 at 43. Drug use is receiving attention as being a **sizeable** factor influencing human losses due to on-duty injuries, and economic losses due to lowered productivity and poor performance, excessive absenteeism, and employee **theft**. Potter, Companies Go On Offensive Against Employee Drug Use, The Washington Post, November 24, 1985. One study indicates that drug abuse costs U.S. industry twenty-five

billion dollars per year in terms of absenteeism, accidents, injuries and lost productivity. Id. In order to deal with the severe problems associated with drug usage by employees, many employers have developed programs to allow them to detect employee drug abuse and to deal with it. Battling Drugs On the Job, supra. Nearly half of all FORTUNE 500 firms are expected to have programs to detect drug abuse in place within a year. Id. Proposed programs include chemical testing, video surveillance, polygraph testing, random searches, use of narcotics detection dogs, and the use of undercover personnel. Schachter, Controlling Worker's Substance Abuse, National Law Journal, November 11, 1985, at 20. In Miami, there is growing concern about drug abuse by employees. See Fernandez, Drug Tests Sought At South Florida Firms, Miami News, December 5, 1985, at A1. A prominent citizen's group, responding to publicity concerning the effect of drug usage in the work environment, has urged employers to use mandatory drug screening procedures for all employees. Fernandez, Crime Fighters in Miami Urge Surprise Screening For Drugs, Miami News, January 21, 1986, at A7. The Greater Miami Chamber of Commerce and The Miami Coalition have established a group called Businesses Against Narcotics and Drugs (B.A.N.D.). Its goal is a drug-free workplace, and employee drug testing is one of the methods it suggests should be used. Of the available drug detection procedures, urinalysis testing is the most reliable, and the least intrusive method.

Chemical testing of urine to detect indications of the use of specific drugs is an effective, reasonable method for determining if the person tested has recently used drugs, Miami Virtue, Miami

Vice, TIME, November 4, 1985, at 33. Submission of a urine sample is a routine part of medical examination procedures, and does not involve any bodily intrusion or impose any physical hardship on the person **tested**. The urinalysis procedure is an effective investigative tool that can provide a positive determination of whether a drug is, or is not, present. While the reliability of properly administered urine testing is accepted by the scientific community, other issues have been raised, such as the right to privacy and Fourth Amendment protections. The reasonableness of the testing method, **and of** the procedures by which it is administered, will depend on many factors. Among **these** are: whether the job is in the public or private sector; constitutional issues; the absence of discrimination or randomness in choosing who is to be tested; whether the drug use occurs on-duty or off-duty; and the potential danger to co-workers, the employer, and the public. Generally, the courts have upheld the chemical testing of employees **when** there is reasonable suspicion that the individual has used drugs. Schachter, Controlling Worker's Substance Abuse, **The National Law Journal**, November 11, 1985, at 20. Employee testing based on reasonable suspicion, as in the case at bar, is constitutionally permissible. See City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. 5th DCA 1985). (Police department may order officer **to submit to urinalysis** based upon a reasonable, objective suspicion of drug use).

Testing of employees in the transportation industry, or in other hazardous occupations, has been upheld even in the absence of reasonable suspicion. Public safety is a compelling interest that allows intrusion into Constitutional rights. Bishop, Worker Drug

Tests Resisted, **The New York Times**, November 27, 1985, at D1, D5. In the District of Columbia, where police officers and school bus drivers are subject to **drug** testing, even critics of urinalysis admit that it is **better** suited for employees whose jobs involve public safety. Many Employers Testing Workers For Drug Use, **The Washington Post**, February 2, 1985, at A14. In an article which examined mandatory drug testing of police officers, a representative of the Boston Police Department **spoke** with incredulity regarding an announcement of the National Collegiate Athletic Association's decision to enforce mandatory urinalysis tests for players. "...they play with basketballs.! We play with people's lives - a police **officer** has a **gun!**" Thanepohn, Police, Drugs and Stress: A Special Report, **U.S. Journal**, February, 1986.

Drug use in the public sector is even **more** problematic than drug use in the private sector. The government has an obligation to the community. Drug use among its **employees hinders the satisfaction of this obligation. The duty to the public is particularly critical when the governmental employee is charged with protecting the public's safety. Police are entrusted with the unusual authority to use force. The potential for disastrous results is obvious if policemen are under the influence of drugs.**

Random Drug Testing of Police Officers: A Proposed Procedure Which Satisfies Fourth Amendment Requirements, **Indiana Law Review**, Vol. 22:3 p. 799 (1989). "Mandatory drug testing of police officers can aid the government in implementing the laudable goals of public safety and confidence in the police force and can **enable** the government to better fulfill its responsibilities." Id., at 820.

A POLICE OFFICER'S OCCUPATION INVOLVES PUBLIC SAFETY, THE POTENTIAL FOR CORRUPTION, THE PUBLIC'S PERCEPTION OF CRIMINAL JUSTICE, AND THE DUTY TO PREVENT CRIME

There are fundamental differences that set the law enforcement occupation apart from other occupations. The standards for selection **and** certification of police officers are significantly more stringent. For example, police officers must complete specialized training. §943.085; 5943.13, Fla. Stat. (1989). Florida law generally prohibits a denial of public employment to convicted felons. §112.011, Fla. Stat. (1989). However, in the case of law enforcement officers, a person who has been found guilty of any felony, notwithstanding a suspension of sentence or withholding of adjudication, is disqualified from being certified by the state to act as a law enforcement officer. §943.13(4), Fla. Stat. (1989). Law enforcement candidates must meet special physical requirements to be certified. §943.13(6), Fla. Stat. (1989). Law enforcement officers generally are classified as "special risk" employees by the state retirement system, **due** to the unique nature of their duties, §121.0515, Fla. Stat. (1989). These provisions clearly highlight the special nature of police work which imposes higher standards of health, training, integrity and reputation **an** its practitioners.

In a recent case, the Fifth District Court of Appeal, which decided City of Palm Bay v. Bauman, supra, stated that: "We stressed the importance of having a competent drug-free cadre of fire fighters and policemen; and noted that the effect of illegal

substance abuse may last hours or **days** following their use or abuse." Fowler v. Unemployment Appeals Commission, 537 So.2d 162 (Fla. 5th DCA 1989) (Refusal of sheriff's dispatcher to submit to urinalysis test, based on reasonable suspicion, constitutes misconduct which warranted denial of unemployment benefits after employee's dismissal) (emphasis added).

There is ample reason to require higher standards for police employees, and particularly, for **sworn** officers. Police officers carry firearms and **are** trained and expected to use them when necessary; they drive **motor** vehicles **and** engage in high speed responses and chases; they make arrests and become involved in numerous contacts with the public, many of which entail a high potential for violence; they perform lifesaving operations; **and** they are generally expected to respond to emergencies and **make** split second decisions. In any of these circumstances, lack of attention or **diminished** capacity to perform, due to on-duty or off-duty drug usage or other factors, can result in loss of life, serious physical injury, and severe property loss or damage, and can, as a consequence thereof, cause substantial **losses** to the officer's employer due to civil liability claims, and loss of **the employee's** services. **Thus**, drug usage by police **employees, whether** on-duty or off-duty, is a matter directly affecting public safety. City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. Sth DCA 1985). **When the** drug use occurs off-duty, there **must** be a balance drawn between the degree of intrusion and the strength of the employer's need, especially with **employees** in **sensitive** positions, such as police officers. Marmo, Public Employees: On-the-Job Discipline For

Off-the-Job Behavior, Arbitration Journal 40, June, 1985, at 3. Arbitrators generally hold that off-duty conduct does not constitute "cause" for discipline unless it is shown to have affected the company's business or reputation; rendered the employee unable to properly perform the duties of the job; or **affected** employee morale, safety, or willingness to work together. Schachter, Controlling Worker's Substance Abuse, The National Law Journal, November 11, 1984, at 21. Drug abuse by police officers, whether on-duty or off-duty, could cause all three of these adverse results.

The police officer's role includes certain characteristics that render him especially susceptible to the abuse of drugs. The opportunity **for use** of **drugs** exists as officers are in constant contact with drug abusers and suppliers. In **the** course of fulfilling their occupational responsibilities, police officers learn how individuals can obtain drugs, how they ingest them, why they abuse drugs, and the rationalizations for use and abuse. Finally, the motivation is present. In the course of their work, police officers experience considerable stress and trauma and drug abuse can become a coping mechanism. It would be an anomaly were drug abuse not a problem among police officers.

Dunham, Lewis, & Alpert, Law Enforcement, Testing the Police For Drugs, 24 Crim. L. Bull. 155 (1988).

Police officers have occasion to seize items such as drugs and currency for evidentiary purposes, or for safekeeping. Because of the nature of the work performed, these seizures, and many aspects of the subsequent handling of the seized items, often take place away from the immediate presence of supervisors. These factors all provide opportunities for corruption.

In addition to the damage that could result from actual instances of corruption, public knowledge of the mere fact that police officers, whose jobs include enforcing the laws concerning illegal drugs, are themselves using those drugs, can cause a serious erosion in public confidence. City of Palm Bay v. Bauman, supra, at 1324.

Police work is an occupation where impaired judgment can have devastating effects on innocent bystanders. The police are entrusted with unusual authority and the right to use force, which can incur high social costs if misused or employed with poor judgment. At a minimum, police officers must be in possession of all their physical and mental faculties. Their own safety and the safety of property, their fellow officers, and the public is at stake. Police officers use weapons, drive vehicles, and make instant judgments involving life and death, and as a result, they are legitimately subject to more regulation than is the ordinary **worker**. In addition, police officers are sworn to enforce the law and must have credibility if public confidence and respect are to be maintained. Known use of illegal substances undermines that confidence.

Law Enforcement, Testing The Police For Drugs, supra, at 155.

Distrust for particular agencies, and for Law enforcement and government in general, can result. Such public perceptions can adversely affect an agency's ability to enforce the law, **and** to recruit and retain competent employees. Drug use by police employees can also affect an agency's standing in the law enforcement community. This effect **goes** far beyond **damage** to an agency's pride or morale. Knowledge of drug **usage** by the employees of a police agency can result in a reluctance on the part of other

agencies to share information or cooperate in investigations with that department. Cf. 1983 Op.Fla.Comm.Ethics 83-46 (July 28, 1983) (Ethics opinion that agency can prohibit police officer from off-duty employment as private investigator, due to potential for conflict of interest). It can also diminish cooperation and information sharing within the agency. Id. The results of such a loss of standing, then, can diminish an agency's ability to effectively enforce the law and deal with the public. It is important to note that, in addition to the indications that drug usage is occurring at an alarming level in the workplace nationally, public attention has been directed specifically at manifestations of drug usage and **drug** related activities among the police. United States v. De La Vega, Betancourt, Aleman, Carballo and Coello, 913 F.2d 861 (11th Cir. 1990), at 864; Miami Virtue, Miami Vice, TIME, November 4, 1985, at 33. While only a tiny percentage of police employees may actually be involved in drug usage or drug related illicit activities, it is the perception that is being created among the citizenry which damages the image of the police and erodes public confidence. The law generally requires persons to submit to an apparently lawful exercise of police authority. §843.01, 5843.02, Fla. Stat. (1989); §316.072(3), Fla. Stat. (1989). In view of these requirements, it is reasonable that the authorities to whom such deference is owed maintain high standards of integrity and trustworthiness. Knowledge that drug abuse and related criminality is occurring among the ranks of these authorities undermines public trust and may reasonably be expected to lead to resistance or disobedience to authority, in spite of the law. Only the public's

knowledge that the police department is utilizing every reasonable method to detect and deal with drug-involved police employees can maintain the public's confidence in the police. Rid Miami Police of Corruption, Miami News, December 28, 1985.

In sum, there are seven areas of concern which support the implementation of urinalysis drug testing for police officers. These are: public safety, public trust, potential for corruption, presentation of credible testimony, morale in the workplace, loss of productivity, and civil liability. Higginbotham, Urinalysis Drug Testing Programs For Law Enforcement, 55 F.B.I. L. Enforcement Bull. 25 (1986).

The potential for governmental liability is but one aspect of the problem, but it can serve to illustrate the nature of the duty of police administrators. A motor vehicle accident involving an employee who is abusing some substance is sufficient to result in liability. However, if it can be established that the employing agency failed to take reasonable steps to detect and deal with the abuse, in spite of notice regarding its existence, the prospect of catastrophic governmental liability for federal civil rights violations arises, based on a "policy" of failing to deal properly with substance abuse. 42 U.S.C. §1983 (1976); See Monell v. Department of Social Services, 436 U.S. 658 (1978). A police administrator's duty concerning problems involving drug usage by police employees is a duty to detect and effectively deal with employee drug usage, in order to secure the public safety, provide efficient service, and reduce or avoid the waste of public funds due to liability claims and loss of the employee's full services.

Fulfilling **the** requirements of that duty compels a police administrator to **do** more than merely deal with problems after they manifest themselves; there is also a **duty** to take affirmative action to detect behavior that may foreshadow serious derelictions. See Brandon v. Holt, 469 U.S. 464 (1985). Police administrators also have a duty to prevent crime when possible, **and** to apprehend those who commit crime, particularly **when** police personnel are involved. Whether the sanction for committing an offense is meted out in court, or in a disciplinary action, the proof of the offense is based on physical evidence. Depending on the circumstances, evidence may **be** obtained in a variety of constitutionally **permissible ways**. See Schmerber v. California, 384 U.S. 757 (1966). As long **as** the manner of obtaining such evidence does not violate due process of law, society and law recognize a duty to obtain such evidence. In these unique law enforcement situations, mandatory drug testing for police officers, based on reasonable suspicion, may be the only method of obtaining the evidence. The duty to prevent or detect crime, and to obtain appropriate evidence, is not something that can be bargained away at the negotiating table. **As** long as the methods of fulfilling these duties **are** constitutionally permissible, and can withstand subsequent review in a criminal or disciplinary action, they should not be a mandatory subject of bargaining.

SINCE SOME DRUGS DISSIPATE QUICKLY IN THE BODY,
A DELAY IN TESTING MAY RESULT IN A NEGATIVE
FINDING. WHEN A POLICE OFFICER IS GIVEN **AN**
ORDER, **BASED UPON REASONABLE** SUSPICION, TO
SUBMIT TO **URINALYSIS** TESTING, DISMISSAL IS
AN APPROPRIATE SANCTION FOR FAILURE TO OBEY.

Even though urinalysis is an effective, reliable means of detecting drugs, a delay in administering the test may negate the results. Depending on the physiology of the individual, and the amount and type of drug used, the drug may be dissipated in the individual's system. Therefore, a delay in testing could thwart the purpose behind the test. For this reason, and also because police work involves public safety, when the circumstances indicate that an officer is abusing drugs, there must be a procedure for compelling that officer to submit to testing immediately.

Police departments are paramilitary organizations. Due to the nature of many aspects of police work, quick compliance with orders from supervisors is necessary. With the exception of orders that direct the police employee to commit a crime or wrongful act, or which expose the subordinate to an unreasonable physical risk, defiance of an order with which the employee disagrees, or which is thought to be unfair, erodes necessary discipline and reduces the ability of the agency to provide effective police service. Aside from the direct damage that may flow from non-compliance with an order, damage to the organization from the erosion of discipline results directly from the act of defiance, regardless of the conduct the order was intended to elicit. Berry v. Bailey, 726 F.2d 670 (11th Cir. 1984); See also Connick v. Meyers, 461 U.S. 138 (1983). The fact that an order, not clearly illegal or unreasonably dangerous, is found to be invalid upon subsequent examination, does not alter or reduce the damage done by the defiance of the order. On the other hand, a challenge mounted against an order after compliance does not necessarily cause the same effect on the

organization. This is true even if the employee's position is vindicated and the order challenged is invalidated. Therefore, when an employee defies such an order, rather than challenging it after compliance, dismissal of the **employee** should be upheld, regardless of the subsequent invalidation of the order. When a command level supervisor, based upon reasonable suspicion, orders a police officer to submit to urinalysis testing, **the** officer's defiance of the order should **lead** to dismissal. Fowler v. Unemployment Appeals Commission, 537 So.2d 162 (Fla. 5th DCA 1989). A subsequent challenge to such an order, after obedience to the order, could examine the reasonableness of the order, and provide the employee with a remedy. However, if the order is not obeyed, and urinalysis does not occur, the proof of drug **usage** will be lost, due to the body's dissipation of the substance. See Cupp v. Murphy, 412 U.S. 291 (1973). There is no remedy for the destruction of the police employer's evidence.

If the police employee submitted to the order, and the urinalysis test was negative, the employee would be vindicated. If the urinalysis test was positive, dismissal need not result. Depending on the circumstances, a variety of actions would be available, including attendance at a **drug** program. Again, the employee's appeal of any action taken **would** examine the reasonableness of the testing procedure, **and** of the sanction. Surely, the method of urinalysis testing to detect drug **abuse** by police officers, under circumstances that require **prompt** action, must **be** available for immediate use by any police administrator.

The Third District Court of Appeal has recognized the effect that drug abuse has had on our community. "Indeed, any fair-minded person must surely conclude, in view of the overwhelming evidence available, that South Florida is being inundated with a multi-million dollar narcotic drug traffic... That, traffic by any standard is corrupting this society..." Royer v. State, 389 So.2d 1007, 1023 (Fla. 3d DCA 1980) a'ffid, 460 U.S. 491 (1983). Drug abuse by police officers is a type of corruption which is intolerable.

During the pendency of the case at bar, The Miami River Cops were stealing and selling drugs, and were also using illegal drugs, while they were employed by the Miami Police Department. It is impossible to determine whether drug testing of those officers, based upon reasonable suspicion, would have revealed their drug use and prevented some of their activities. However, this Honorable Court now has the opportunity to establish guidelines which could prevent or detect drug abuse by police officers throughout the State of Florida.

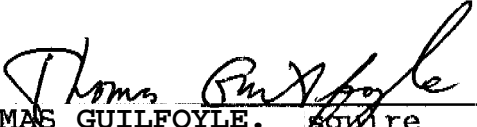
CONCLUSION

It is an indisputable fact that drug abuse has seriously damaged the quality of our society. Drug abuse by police officers has the potential to cause serious damage to the safety of our society, and to the perception and function of the criminal justice system. It is admitted that we may never have a drug-free society, however, it is submitted that we must have drug-free police officers. The en banc decision of the Third District Court of Appeal is supported by both case law and public policy, and it should be affirmed. The proper, narrow rule should be this: involuntary urinalysis testing of police officers, to detect the presence of a controlled substance, may be ordered by the police department based upon reasonable suspicion of drug abuse. The Florida Sheriff's Association, Florida Police Chief's Association, Dade County Association of Chiefs of Police, and Florida Association of Police Attorneys, as amicus curiae, respectfully submit that this Honorable Court has the duty to create a rule which will allow the use of this reasonable, constitutionally permissible method of detecting drug abuse by police officers.

Respectfully submitted,

GEORGE N. AYLESWORTH, Esquire

and


THOMAS GUILFOYLE, Esquire
Florida Bar No. 396060
Metro-Dade Police Department
73 West. Flagler Street
Room 1601
Miami, Florida 33130
Telephone: (305) 375-5740

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: PETER J. HURTGEN, Esquire, Morgan, Lewis & Bockius, 5300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; LEE COHEN, Esquire, General Counsel, and PHILLIP QUASCHNICK, General Counsel, Florida Public Employees Relations Commission, 2586 Seagate Drive, Suite 100, Tallahassee, Florida 32301; GENE "HAL" JOHNSON, Florida Police Benevolent Association, Inc., P.O. Box 11239, Tallahassee, Florida 32302; LORENE C. POWELL, 118 North Monroe Street, Tallahassee, Florida 32399-1700; TERENCE G. CONNOR, Esquire, Attorney for Florida Public Employer Labor Relations Association, Inc., 5300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2339; ROBERT D. KLAUSNER, Esquire, Atkinson, Jenne, Diner, Stone and Cohen, Attorneys for Appellee FOP, P. O. Drawer 2088, P.O. Box 1757, Hollywood, Florida 33011-2088 and JAN C. HAYMAN, Esquire, Deputy General Counsel for Florida League of Cities, Inc., P.O. Box 1757, Tallahassee, Florida 32302, this 11th day of JUNE, 1991.



THOMAS GUILFOYLE, Esquire