IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALAN DANIEL,

Respondent.

CASE NO. 84,486

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Alan Daniel, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

References to the opinion of the First District Court of Appeal, found in the Appendix of this brief, will be noted by its Florida Law Weekly citation.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's motion-hearing and sentencing proceedings; the symbol will be followed by the appropriate page number in parentheses.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State seeks review of the decision of the First District Court of Appeal, Daniel v. State, 19 Fla. L. Weekly D1920 (Fla. 1st DCA September 8, 1994)(attached as Appendix), that reversed the trial court's denial of a Motion to Suppress Physical Evidence.

This case originated with Daniel's arrest on May 10, 1992 (R 1-4). Subsequent to his arrest, he was charged by information in the Circuit Court of the Fourth Judicial Circuit, in and for Duval

County. The information charged him with Possession of Cocaine and Possession of Controlled Substance Paraphernalia. (R 9)

On June 9, 1992, Daniel filed a Motion to Suppress Physical Evidence (R 19), which the trial court, Judge David Wiggins, denied (R 22). The trial court's order denying the motion ultimately became the subject of this appeal. (R 36) Although the order contained no reasoning, the transcript includes substantial testimony, argument, and reasoning. (See T 37-46)

On August 26, 1992, Daniel pled no contest, reserving the right to appeal the denial of his motion to suppress; the parties stipulated that the motion was dispositive. (R 26-27) Pursuant to the plea bargain (R 26-27), Daniel was sentenced to six months in the county jail (R 28-33).

The public defender appealed, claiming that the trial court "erred in denying Defendant's Motion to Suppress." (R 36-39) The appeal resulted in the decision of the First District Court of Appeal (DCA) that is currently before this Court. The motion-to-suppress allegations and facts elicited at the hearing on the motion to suppress, which resulted in the DCA opinion, follow.

Some key points alleged in Daniel's Motion to Suppress Physical Evidence included:

> 2. On May 10, 1992, the Defendant was alleged to be operating a motor vehicle on Davis and Church Streets in downtown Jacksonville, Florida.
>
> 3. That Sgt. B. Deal of the Jacksonville Sheriff's Office allegedly pulled the Defendant's car over for having an obstructed windshield.
>
> 4. That no material violation of the Florida Statutes was occurring at the time the Defendant's car was allegedly pulled over.

(R 19-21)

Sergeant Bobby Lawrence Deal was the State's first witness at the hearing. (T 3) Deal was assigned as a sergeant to the downtown Jacksonville area on May 10, 1992. He was driving a

marked police car, and he was dressed in police uniform. (T 4) His car had no cage in which to put arrestees in the back seat. (T 4, 10)

In late afternoon, (T 4) Sgt. Deal saw Daniel as he drove northbound and Daniel drove his car southbound on the same street. (T 5, 13) Daniel was driving a 1983 or 1988 Bonneville. (T 13-14) They met in an intersection, where Daniel was attempting to make a left turn onto a one-way street without signalling. (T 5, 14) As Daniel was waiting to turn, the sergeant noticed that the driver's side windshield wiper was stuck in the middle of the windshield directly across Daniel's view and that the front windshield was cracked in the center, between the driver and front-seat passenger locations. (T 5-6, 7) The crack "extended from at least over half of the windshield." (T 14-15) Deal was certain that he "saw a crack in the windshield and the [upright] windshield wiper." (T 15)

At that time Sgt. Deal decided to stop Daniel and "motioned for him to go ahead and make his turn since he was stopped waiting to make a turn." (T 6, 14, 19) Daniel turned and "traveled approximately half of that block and he pulled over and stopped." Daniel stopped his car "on his own." Up to this time Deal had not turned on his blue lights. (T 6) Daniel was already exiting his vehicle when Deal pulled behind him. Deal then turned on the blue lights for vehicles approaching to avoid being rear-ended. Deal had no blue lights facing the front of his vehicle. (T 6-7)

At this point, Sgt. Deal exited his car and motioned for Daniel to come over to him in order to give him "a warning on the condition of the windshield" (T 7). As Deal narrated:

> Number one the windshield wiper was -- appeared to be frozen across the driver's side of the vehicle where it was obstructing his view and also he had a cracked windshield and that he needed to go ahead and get it replaced.
>
> My intent was to give him a warning because I don't even carry a ticket book with me.

(T 7) The prosecutor asked, "And you say you are a sergeant so that is that -- really what your men do as far as writing tickets. Are you basically a supervisor?" Deal responded, "I am a supervisor and have a squad of men work for me." (T 7-8) Consequently, Sgt. Deal did not carry traffic citations. (T 13)

Deal noticed no equipment violations other than the windshield and the upright wiper. (T 15) Deal had never seen Daniel before this encounter, and Deal did not previously suspect Daniel of any criminal activity. Deal was not "working in conjunction with any drug deployment or task force." (T 10)

At this point, Sgt. Deal asked to see Daniel's driver's license, but Daniel "had no identification on him whatsoever," including no driver's license. (T 8) The officer asked Daniel for his name and date of birth verbally then "ran" them through N.C.I.C and D.M.V. The computers did not show any drivers license issued to Daniel (T 8-9), and the tag on the car that he was driving was not registered to him (T 9). Because there was no way of verifying Daniel's identity at the time and because Deal had no arrestee cage in his car, he decided to have another unit transport Daniel to the jail under arrest for no driver's license. (T 9-10, 13) It was "accepted practice in the Jacksonville Sheriff's Office that a person who has no driver's license on them and no identification would be arrested and taken to jail." (T 12)

Officer J.W. Arnold responded to Deal's call for assistance. Deal told Arnold that he had not yet had the opportunity to pat down Daniel to determine if Daniel had any weapons. Deal still did not suspect Daniel of possessing drugs (T 10, 11-12), and Deal did not check to see if Daniel's

wipers actually worked nor did he conduct a full safety inspection of the car. (T 15, 19) Officer Arnold transported Daniel to jail. (T 11)

On cross-examination Sgt. Deal indicated that there was a passenger in Daniel's car, a 15 or 16 year-old black male. (T 15) The passenger was "a lot younger than Mr. Daniel." The passenger in the car "had a nickname" for Daniel, but he did not know Daniel's name. (T 16) Other than Daniel and the juvenile passenger, Deal noticed no one else on the street during the encounter. (T 17) The area where Sgt. Deal encountered Daniel was a "high drug area" "at one time," but crime had declined there as buildings there have been taken down, remodeled, and restored. (T 16-17) At one time, Deal worked in the vice squad, focusing on "prostitution, gambling, moonshine," which included drug arrests because "prostitution and drugs go hand in hand." (T 17)

On cross-examination, Sgt. Deal reiterated and elaborated that he did not suspect Daniel of possessing drugs:

> If I had a suspicio[n] there was drugs in the car I had a lot of alternatives available to me. I could call a drug dog to see if he alerted on the car. I could call additional officers to come over and search the vehicle if I felt I had probable cause to believe there was drugs in it, but the truth of the matter is I never searched Mr. Daniels and that would be the first place you would look for drugs on an individual would be on the person themself.

(T 18)

The cross-examination continued as Deal testified that he did not know if he had previously pulled someone over for "having a windshield wiper across the windshield," but he had previously issued citations for faulty equipment, including non-working wipers when it was raining. It was not raining on the day Daniel was arrested. He testified that he had previously stopped people for a cracked windshield. (T 18-19)

The State called correctional officer Charles Umstead to testify next. (T 20) He testified that on May 10, 1992, at the Pretrial Detention Facility, he was receiving inmates who had been "arrested off the street." Officer Arnold turned Daniel over to him . Umstead, pursuant to standard procedure at the facility, then searched Daniel and found "nine little packages of crack cocaine that was stuffed in the front of his pants." (T 20-22, 23) Also pursuant to normal procedure, he searched and found "a crack pipe inside ... [Daniels'] underwear in the crotch area." (T 24) No one had told Umstead to search Daniel carefully for drugs; instead, he searched Daniel "the same way ... [he] searched every other ... male that comes into the Duval County Jail." (T 22) Officer Umstead mentioned his training in recognizing crack cocaine, and testified that he initiated a call for Officer Arnold to return to the detention facility. Officer Arnold returned to take custody of the cocaine. (T 23)

The defense did not cross-examine Umstead, and the State rested for the purpose of the hearing. (T 24)

The defense called Officer James Arnold as its first witness. (T 25) He testified that on May 10, 1992, Sgt. Bobby Deal was his supervisor and that at the time of the hearing his supervisor was Sgt. Outlaw. (T 25) He indicated that Deal called for assistance because of the stuck windshield wiper and Daniel did not have any driver's license. (T 26) He did not recall Deal "stating anything about a cracked windshield." Arnold wrote up the arrest report. (T 26) Arnold, who had worked for the Jacksonville Sheriff's Office for two years (T 25), had not pulled "somebody over for having a windshield wiper over the windshield." (T 27)

On cross-examination, Arnold testified that the exact words that Sgt. Deal used to explain why he stopped the car was "having a windshield obstructed." (T 27) These were the words that Arnold put in his report. (T 27)

Next, the defense called Mertis Grier as a witness. (T 28) The prosecutor objected to her testifying on the ground that she had not been listed on discovery and that therefore he knew nothing about her anticipated testimony. The trial court overruled the objection. (T 28-29) She testified that she was the owner of a 1983 Bonneville, which she occasionally loaned to Daniel. (T 28) She loaned the car to him on May 10, 1992. She said that the car never had a cracked windshield. (T 30, 33) The car had been in a wreck on June 26, 1992. It was in a salvage yard at the time of the hearing. (T 30) The defense introduced some photographs of the car, which were taken the week of the hearing (the week of July 30, 1992) and which showed the windshield wipers "up on the windshield" and apparently no "crack in the windshield." (T 31-34)

On cross-examination, Grier indicated that she has known Daniel for about eight months, she is his fiance, and she is in love with Daniel. (T 36) The prosecutor elicited cross-examination testimony from Grier that the photograph appeared to show both wipers "stuck on the windshield." (T 34) About January 1992, when the car was burglarized, Grier had started having problems with the windshield wiper mechanism, but she said that the wipers were not up on May 10, 1992. (T 34-35) She said that she was not at the scene when Daniel was arrested, but she picked up the car after he was arrested. (T 35-36)

The defense rested for the purpose of the hearing, and the trial court heard arguments of counsel. (T 37-44) The defense argued, inter alia, that the trial court should not believe Sgt. Deal's testimony that there was a cracked windshield. (T 38) The defense continued that an officer

would "never have stopped somebody for this kind of situation with wipers just being over the windshield." (T 39) The defense then conceded that an officer would have stopped someone if the windshield had been cracked. To be precise, defense counsel argued:

> I could understand if there was a cracked windshield, but I think it's established that the windshield was not cracked. The only justification that was offered by the prosecution in this case for the stop of Mr. Daniel's car was the observation that a minor traffic violation, that being the cracked windshield but there was no cracked windshield.

(T 39) Defense counsel responded to the trial court's question whether he was trying to extend "Kehough" [Kehoe v. State, 521 So. 2d 1094 (Fla. 1988)]:

> Yes, sir. I see your point. What my position is is that no material violation of Florida law had existed so that Mr. Daniel could be pulled over and therefore anything that arose out of that illegal stop should be suppressed.

(T 40-41) Defense counsel then admitted that there was no evidence that Sgt. Deal stopped Daniel on a pretext. (T 41-42) Instead, defense counsel argued that "wipers up in an extended position is not a material violation of Florida law and therefore he should not and could not have stopped him." Defense counsel continued by invoking "Kehough's" reasoning that to "pull over every car for every minor ... traffic violations would run a substantial risk to personal liberties ... ." (T 42) Defense counsel reiterated that the position of the windshield wipers was insufficient to pull over Daniel, and clarified that "[h]ad there been a cracked windshield certainly that's a whole different story ... ." (T 43-44)

The trial court ruled:

> *** in this case you [defense counsel] conceded and after hearing Officer Deal I am satisfied ... that Officer Deal did not ... know this man, never seen him before.

> Officer Deal didn't even have a ticket book. He couldn't even arrest anybody and the stop of Mr. Daniel was certainly not a pretextual stop. In fact he said he was going to give him ... a warning and in this case the Court and even counsel for the defendant are satisfied that it was not a pretextual stop pursuant to the Kehough case ***
>
> *** we have a thousand police officers I think Sheriff McMillan stated, and I submit to you and probably most or every case that if we drew up a set of circumstances some would write a ticket, some wouldn't.
>
> ... this Court is satisfied that this was not a pretextual stop .... You need to get the wipers checked. He had no intention of writing him even a ticket.
>
> He couldn't have written him a ticket and as it turned out the man did not have a license, was driving without any identification, without a license in the State of New York or Florida and that's what led to the subsequent arrest and then the search incidental to the arrest for driving without a license, and this Court finds one officer said he wouldn't have given him a ticket and one did or was going to give him a warning, so I don't think that ... the courts need to determine whether it's a pretextual stop or not as opposed to whether what one officer would do what is good police work and what's not good police work, ...
>
> At this time the Court will deny the defendant's motion to suppress based upon the testimony that was submitted here.

(T 44-46) The trial court's written Order "Denied" Daniel's motion on the same day as its ruling from the bench. (R 22)

Daniel subsequently pled no contest, reserving his right to appeal the denial of his motion to suppress. (T 48-51, R 26-27) This appeal ensued. (See, e.g., Notice of Appeal at R 35)

SUMMARY OF ARGUMENT

The First District Court of Appeal (DCA) "loads" the certified question by assuming that the traffic violation Sergeant Deal observed was "minor." The state contests this characterization at length by pointing out the significance of pertinent statutes to the public welfare of Florida. The State, at the end of the brief, will also contest the DCA's assumption that the State did not establish at the evidentiary hearing that a reasonable officer would have stopped Daniel. This argument is saved until last because this reasonable-officer-would-have-stopped test applies only to cases where there has been evidence of pretext. Pretext is indicated by evidence that the officer attempted to use a traffic violation to justify a stop of a motorist suspected of a non-traffic offense, such as where the officer's purpose for the stop was to gather evidence for a non-traffic offense. There was no evidence of pretext here, as defense counsel properly conceded below. Therefore, the DCA's use of the reasonable-officer-would-have-stopped test was error.

In arguing to the trier of fact, the trial court, that it should not believe the officer's testimony that he observed a cracked windshield, defense counsel, in essence, conceded that the officer's observations of the cracked windshield would be sufficient to justify the stop. Daniel's defense counsel was correct. The cracked windshield, as well as the malfunctioning windshield wiper, were each sufficient to render the stop constitutional. When the State produced evidence of either one of these facts, the burden shifted to Daniel to establish that the stop was pretextual; he properly conceded that it was not pretextual and failed. Therefore, the DCA's use of a pretextual analysis for a non-pretextual situation was error.

The State submits that the DCA's decision reversing the trial court's denial of the motion should be disapproved.

ARGUMENT

ISSUE

DOES THE RULING OF *KEHOE V. STATE*, 521 SO. 2D 1094 (FLA. 1988) REQUIRE SUPPRESSION OF EVIDENCE OBTAINED AS A RESULT OF THE STOP OF A MOTOR VEHICLE FOR A MINOR TRAFFIC VIOLATION WHERE THERE IS NO EVIDENCE THAT THE STOP WAS PRETEXTUAL, BUT THE STATE FAILS TO AFFIRMATIVELY ESTABLISH BY EVIDENCE THAT A REASONABLE POLICE OFFICER WOULD HAVE ROUTINELY STOPPED A MOTOR VEHICLE FOR THE SAME VIOLATION? (Certified Question)

A. Introduction: The certified question is overly conclusive regarding the nature of the traffic violation and evidence concerning a reasonable officer.

The First District Court of Appeal's certified question is "loaded" so that two sub-issues have been summarily resolved. Of course, the State will analyze the thrust of the certified question of whether Kehoe v. State, 521 So. 2d 1094 (Fla. 1988), applies to the situation here, but the State will also analyze the two matters taken for granted by the First District Court of Appeal.

First, the State will argue that Sgt. Deal's observations of Daniel's cracked windshield and upright windshield wiper did not concern a " minor traffic violation," but rather significant traffic violations. The State will present several statutory and appellate case authorities to substantiate the significance of these statutory violations.

And, second, the State, assuming arguendo that a Kehoe-type analysis applies here, will contest the DCA's conclusion that the evidence was insufficient to meet the Kehoe test.

Therefore, if the certified question is re-phrased to incorporate these concerns, it is transformed into the following:

WAS AN OFFICER'S STOP[1] OF A CITIZEN REASONABLE WHERE THERE WAS NO EVIDENCE OF PRETEXT; WHERE THE STOPPING OFFICER OBSERVED[2] A CRACKED WINDSHIELD AND UPRIGHT WINDSHIELD WIPER ON THE MOTORIST'S CAR; AND, WHERE THE OFFICER WAS A SQUAD SUPERVISOR AT THE TIME OF THE STOP WHO HAD PREVIOUSLY STOPPED MOTORISTS FOR SIMILAR EQUIPMENT DEFECTS.

However, before embarking on these analyses, we must first address the appropriate standard of review, as established by this Court, and determine whether Kehoe applies at all.

B. The facts as determined by the appropriate standard of appellate review.

Owen v. State, 560 So. 2d 207 (Fla. 1990), succinctly stated the appellate standard of review:

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[1] One might also contend that there was no "stop" for the purpose of the Fourth Amendment until the officer discovered that Daniel had no valid driver's license. If there was no Fourth Amendment seizure until after the officer had probable cause to arrest for driving without a license, the Fourth Amendment simply did not apply until the time of the arrest, when it is undisputed that the officer had probable cause. Instead, this situation would fall under consensual encounter case law. See Jacobson v. State, 476 So. 2d 1282, 1285 (Fla. 1985); Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382 (1991); Florida v. Royer, 460 U.S. 491, 103 S.Ct 1319, 75 L.Ed.2d 229 (1983); U.S. v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). However, the State did not pose this argument to the First District Court of Appeal, perhaps with good reason since after Daniel stopped on his own, the officer turned on his blue lights — albeit rear-facing — and motioned for Daniel to come over to him.

[2] One might argue that Daniel's failure to use his turn signal constituted an additional ground to stop Daniel because the crucial **facts** are those perceived by the officer; the **reasons** enunciated by an officer to stop or arrest someone are not generally dispositive. See, e.g., McNeil v. State, 512 So. 2d 1062 (Fla. 4th DCA 1987) and authorities cited therein. The State is not stressing this fact, however, because the officer's stated reasons for stopping Daniel's car were more than adequate to justify the stop.

> The ruling of the trial court on a motion to suppress comes to us clothed with a presumption of correctness and we must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling.

Id. at 211.

Viewing the evidence and reasonable inferences and deductions in a light most favorable to the trial court's denial of the motion to suppress, the pertinent facts are as follows:

- Sgt. Deal was assigned as a supervisor to the downtown Jacksonville area on May 10, 1992. (T 4) A squad of officers worked for him in his supervisory capacity. (T 7-8) As a supervisor, his car had no front-facing blue lights (T 6-7).
- During daylight hours, (T 4) while Daniels's car approached the car Deal was driving as oncoming traffic (T 5, 13), they met in an intersection, where Daniel was attempting to make a left turn onto a one-way street without signalling. (T 5, 14) As Daniel was waiting to turn, Deal noticed that the driver's side windshield wiper was stuck in the middle of the windshield directly across Daniel's view and that the front windshield was cracked in the center, between the driver and front-seat passenger locations. (T 5-6) The crack "extended from at least over half of the windshield." (T 14-15) A reasonable officer would have stopped someone if the windshield had been cracked. (See T 39, 43: defense counsel's concessions)
- At that time, Deal decided to stop Daniel to give him "a warning on the condition of the windshield" (T 7), but he did not order Daniel to stop his car. Instead, Deal motioned for Daniel to make his turn. (T 6, 14, 19) Daniel turned and "traveled approximately half of that block and he pulled over and stopped." Daniel stopped his

car "on his own" and on his own initiative got out of his car. Deal turned on his rear-facing blue lights for the first time. (T 6-7)

- Sgt. Deal exited his car and motioned for Daniel to come over to warn him about the condition of the windshield wiper and crack. (T 7)
- Deal did not stop Daniel or intend to warn Daniel as a pretext to any other motive. (T 10, 15, 18)
- Sgt. Deal asked to see Daniel's driver's license, but Daniel "had no identification on him whatsoever," including no driver's license (T 8-9). Pursuant to the normal procedure of the Jacksonville Sheriff's Office, Deal decided to have another unit transport Daniel to the jail under arrest for no driver's license. (T 9-10, 12, 13)
- Sgt. Deal had previously issued citations for faulty equipment, and he had previously stopped people for a cracked windshield. (T 18-19)
- Another police unit transported Daniel to jail, where nine packets of cocaine and a crack pipe were discovered in Daniel's pants through a routine search process. (T 20-22, 23, 24) Up until this crack and pipe were discovered, law enforcement did not suspect Daniel of illegal activity except driving without a valid license and the windshield obstructed (T 27) by the crack and wiper. (See T 10, 15, 18)

These facts constitute "competent, substantial evidence" that support the decision of the trial court, Caso v. State, 524 So. 2d 422, 424 (Fla. 1988). Therefore, the First District Court of Appeal erred by reversing the trial court.

C. Kehoe's analysis does not apply.

The First District Court of Appeal applied a Kehoe analysis to a non-Kehoe situation:

> In *Jackson v. State*, 596 So. 2d 113 (Fla. 1st DCA 1992), this court held, on the authority of *Kehoe* ... that
>
> > [w]hen the prosecution relies solely upon a minor traffic violation as justification for the stop of an automobile, it has the burden of showing that a reasonable officer would have stopped the vehicle under such circumstances.
>
> As was the case in *Jackson*, our review of the record in this case fails to establish a factual basis upon which the lower court could have found that the prosecution sustained its burden.

19 Fla. L. Weekly at D1920 (italics in original). By applying a Kehoe analysis, thereby requiring evidence that "a reasonable officer would have stopped the vehicle under such circumstances," to a non-Kehoe situation, the DCA erred.

In Kehoe, this Court was confronted with a situation in which officers observed non-traffic suspicious circumstances:

> the unusually early hour at the ramp, the long wait for the boat, the lack of registration numbers on the boat, the heavy items in the back of the truck, the suspicious manner in which the boat was loaded onto the trailer and driven away without draining or securing it ... .

521 So. 2d at 1096. Kehoe then held that these facts were sufficient to make it "permissible to stop the truck, look into the boat, and, upon seeing the marijuana, seize it." Id.

After declaring the evidence admissible based upon a standard "founded-suspicion" analysis, Kehoe announced this Court's adoption of the pretextual analysis test[3] that the DCA erroneously

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[3] It appears that to-date the United States Supreme Court has not decided whether any special standard applies to pretextual traffic cases. See, e.g., Cummins v. U.S., 112 S.Ct. 428, 116 L.Ed.2d 448 (1991)(White dissenting from denial of certiorari).

For a summary of how the United States Courts of Appeal have treated this area of the law, ranging from could-stop, to would-stop, to probable-cause tests, see U.S. v. Ferguson, 8 F.3d 385 (6th Cir. 1993)(abandoning the "would" test for the probable-cause test).

applied here. In its introduction to the pretext test, this Court made it clear that **the test is applicable only where there is a pretext, that is, a motive for the stop ulterior to a minor traffic infraction**: "whether the traffic stop was invalid as a pretext stop because the officers' actual motivation for detaining ... [the suspects] was **their suspicions of drug trafficking**, not the bent tag." Id. A fortiori, the Court's next two sentences are dispositive here:

> These two issues are interwoven. When the police realize that they lack a **founded suspicion**, they sometimes attempt to justify a stop on **some obscure traffic violation**.

Id. In other words, Kehoe expressly limited pretext analysis to cases in which (1) the police realize that they lack a founded suspicion for a non-traffic crime and (2) the police attempt to justify the stop "on some obscure traffic violation," Id. There was absolutely no expression or implication that Kehoe's pretext analysis applied to cases in which the police had no non-traffic suspicion. Accordingly, Kehoe concluded:

> This Court ... will not allow officers to get around the fourth amendment's mandate by basing a detention upon **a pure pretextual stop**. The state must show that under the facts and circumstances a reasonable officer would have stopped the vehicle **absent an additional invalid purpose**.

Id.[4]

As Daniel conceded in the trial court more than once, there was "no pure pretextual stop," there was no pretext here whatsoever. There was no "invalid purpose" in addition to the traffic

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[4] State v. Fernandez, 526 So. 2d 192, 193 (Fla. 3d DCA 1988), correctly framed the analysis:

> Thus, there is no ground for the legal conclusion that the stop was a 'pretextual' one. [footnote omitted] Indeed, that issue does not ever arise unless there is a suggested alternative reason for the stop— usually related to the officer's wish to apprehend the driver because of information or belief that he was guilty of some other offense. [citing Kehoe, 521 So. 2d 1094]

stop. The traffic infractions were the sole reason why Sgt. Deal stopped Daniel. Kehoe's pretext analysis did not apply, and, therefore, it was error for the DCA to hold otherwise.

This Court applied Kehoe in Doctor v. State, 596 So. 2d 443 (Fla. 1992), where the stopping officers' "major purpose that night was to interdict drugs and their primary mode of operation was to stop all traffic violators." Id. at 446. Law enforcement there attempted to use the pretext of a "defective taillight" to justify what was an invalid stop for a non-traffic offense. This Court rejected as insufficient the attempted justification that was a pretext for the real reason why law enforcement wished to stop the vehicle, concluding:

> In sum, there can be no question that the stop here was pretextual since police had neither reasonable suspicion of criminal activity **nor a valid basis for a traffic stop**.

Id. at 447. In other words, if there was a valid basis for a traffic stop, the stop was lawful. Doctor's taillights were "in compliance with the law since red taillights were visible on both ends of the vehicle." Id. Here, Daniel's windshield was not in compliance with the law; therefore, although pretextual analysis does not apply here; but, even if it did, it would be satisfied.

If there is any doubt whatsoever that Kehoe's pretextual analysis does not apply to situations in which there is no evidence of non-traffic criminal activity at the time of the traffic stop, Cresswell v. State, 564 So. 2d 480 (Fla. 1990), resolves it. Cresswell was decided after Kehoe. In Cresswell, a trooper stopped Cresswell for "following too closely." Following the traffic stop, law enforcement developed facts constituting a reasonable suspicion of other illegal activity. In Creswell, this Court did not ask whether any reasonable officer would have stopped Cresswell. Instead, the Court held that "[t]he initial stop was valid because a law enforcement officer is clearly entitled to stop every vehicle for a traffic violation." Pretextual analysis simply did not

apply in Cresswell, and it does not apply here. The DCA erred. The sole question then for the DCA was whether there was a traffic violation, and it appears to have concluded that there was a "traffic violation" and "the ... violation" when it stated the certified question, 19 Fla. L. Weekly at D1920. Its conclusion was correct and the "violation" alone justified the stop here. In support of this point, the discussion now turns to Daniel's noncompliance with the law, as observed by Deal.

D. The officer's observation of an obstructed windshield justified the stop, rendering it lawful.

The legislature has recognized the importance and therefore the lawfulness of the police stopping motorists due to police-viewed equipment violations:

> Any police officer may at any time, upon reasonable cause to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of the vehicle to stop and submit the vehicle to an inspection and such test with reference thereto as may be appropriate.

§316.610(1), Fla. Stat. The statute continues by expressly authorizing an officer to require a stopped motorist to properly repair or adjust a defective windshield wiper within 48 hours of the stop. §316.610(2), Fla. Stat. Also, see §316.6105, Fla. Stat. (officer required to issue affidavit-of-compliance form where motor vehicle improperly equipped).

Therefore, here, Sgt. Deal's observation of the windshield wiper in the upright position alone would have justified the stop. But here, we have more than reasonable cause to believe that the

wiper was defective or out of adjustment. Sgt. Deal also saw a cracked windshield,[5] leading to the officer's reasonable conclusion that the driver's view out of the front windshield was obstructed.

The legislature has prohibited driving a motor vehicle with an obstructed front windshield. See §316.2004, Fla. Stat. Also, see §316.252, Fla. Stat. (splash and spray suppressant devices on trucks to minimize throwing of materials on the windshields of following vehicles); §316.2952, Fla. Stat. (limitations on materials attached to windshield); §316.2956, Fla. Stat. (violations of §§316.2951-316.2954 as infractions, installation of those materials as a misdemeanor); §401.31, Fla. Stat. (inspection of windshield and wipers of medical transportation); §627.7288, Fla. Stat. (damage to windshield exempted from motor vehicle insurance deductible).

Therefore, given the legislative preoccupation with unobstructed windshields, it is understandable that Daniels' counsel, in essence, conceded that a cracked windshield alone would have been sufficient to justify the stop. (See T 39:" I could understand if there was a cracked windshield"; T 43: "Had there been a cracked windshield certainly that's a whole different story")

Of course, the State recognizes that ultimately the lawfulness of Sgt. Deal's stop of Daniel is a matter of constitutional jurisprudence to be decided now by this Court in light of its past decisions, as well as those of the United States Supreme Court. We have already discussed Kehoe and Doctor and argued that, if anything, they indicate that the trial court should have been affirmed. Additional cases are instructive and dispositive.

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[5] As discussed supra, the State is entitled to this fact in the face of evidence that Daniel adduced to the contrary. Indeed, Daniel's evidence that the windshield was not cracked consisted of the testimony of his fiancee and photographs taken of the car over two months after the stop.

In Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), an Orlando police officer saw Hansbrough "make an illegal turn and observed that his car had a broken windshield." The officer stopped him for the "traffic infractions." This Court upheld the stop and reasoned in a mode that portended Kehoe:

> ... stopping a person suspected of further criminal activity for a minor traffic infraction for which any citizen could be stopped is not an unlawful pretext stop.

509 So. 2d at 1084. The Court then held that an illegal turn and a broken windshield

> are infractions for which any citizen could have been stopped notwithstanding the officer's knowledge that Hansbrough was a possible suspect in a crime. *** Because the stop and initial arrest [for a driver's license offense] were valid, we hold that the trial court did not err in failing to suppress the evidence flowing from that stop and arrest.

Id. Moreover, this reasoning was explicitly approved in Kehoe, which distinguished a bent tag from Hansbrough's facts, and Cresswell cited Hansbrough for the proposition that an officer "is clearly entitled to stop a motor vehicle for a traffic violation," 564 So. 2d at 481. Cresswell's citation to Hansbrough was unqualified; it did not ask whether a reasonable officer would have stopped the suspect.

In Hansbrough, therefore, a broken windshield was one of two infractions "for which any citizen could have been stopped." Similarly, here a broken windshield and a broken wiper were two infractions "for which any citizen could have been stopped." Because of their substantive nature, these infractions would have been enough to justify the stop even if there were evidence of law enforcement initially suspecting Daniel of another offense. Of course, there was no such evidence. In any event, the infractions Deal observed were sufficient to justify the stop. Contrary

to the DCA's reasoning, the State need not have elicited testimony that a reasonable officer would have stopped Daniel.

In sum, Cresswell and Kehoe recognized that Hansbrough was correctly decided, and Cresswell did not impose the burden for pretextual cases, where the State must establish that a reasonable officer would have stopped the suspect for the given traffic defect, on non-pretextual cases, like here. This position is consistent with pertinent United States Supreme Court cases.

For example, in condemning as unconstitutional "roving patrol" stops, Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), compared them to the effectiveness of lawful stops where an officer has probable cause or a reasonable suspicion that "a driver is violating any one of the multitude of applicable traffic and equipment regulations," 440 U.S. at 661. See 440 U.S. at 663 ("articulable and reasonable suspicion" regarding a particular motorist generally required). Similarly, Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d (1977), addressed the constitutionality of a traffic stop for an expired tag without digressing into any requirement that a reasonable officer would have stopped Mimms: "we need presently deal only with the narrow question of whether the order to get out of the car, issued after **the driver was lawfully detained**, was reasonable and thus permissible under the Fourth Amendment." 434 U.S. at 109.

Although Prouse and Mimms assist our analysis, N.Y. v. Class, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986), perhaps is even more on point. There, like here, the officer "had no reason to suspect that ... [Class's] car was stolen, that it contained contraband, or that ... [Class] had committed an offense other than traffic violations." 475 U.S. at 108. There, like here, the traffic violations included a cracked windshield and another violation under state law, there, speeding.

Id. at 107-108. Class reasoned that a motorist's reasonable expectation of privacy is diminished in automobiles, especially as to the VIN [vehicle identification number] and especially "in the case of a driver who has committed a traffic violation." [citing and quoting Prouse] Class held the officer's inspection of a VIN [vehicle identification number] was constitutional, "like a demand to see license and registration papers ... is within the scope of police authority pursuant to a traffic violation stop." Id. at 115. In other words, a major premise for the court's analysis of the VIN inspection was the lawfulness of the original stop. No proof of whether a reasonable officer would have stopped a motorist for a cracked windshield was conducted or necessary.

Thus, according to this Court's and the United State's Supreme Court's case law, the DCA erred in imposing the reasonable-officer-would-have-stopped burden here.

The State's discussion thus far has been primarily concerned with a legal analysis of Kehoe, Cresswell, Hansbrough, and pertinent statutes. The discussion now turns to policy supporting Cresswell and Hansbrough and their application here; as applied in the instant case, they are sound cases because they support sound public policy.

E. Sound public policy supports Sgt. Deal's stop of Daniel.

The governmental regulation of the operation of a motor vehicle and motor vehicle equipment has long been upheld by this Court. See, e.g., Jones v. Kirkman, 138 So. 2d 513, 515 (Fla. 1962)("any reasonable restriction upon or condition attached to the continued employment of the [driving] privilege will be upheld in the interest of public safety"); Duval Lumber Co. v. Slade, 2 So. 2d 371, 372 (Fla. 1941)("regulation of traffic on public streets or highways is in the exercise of the sovereign police power"). Also, see, e.g., Dean v. Rouillier, 597 So. 2d 961, 962

(Fla. 5th DCA 1992)("Traffic control is strictly within the police power of the governmental entity"); LaFave and Israel, 1 Criminal Procedure §3.9(g) at 330 (1984)("States have a vital interest in ensuring that ... vehicles are fit for safe operation"). Accord, Class, 475 U.S. at 112-13 (State's vital interests "in highway safety," automobiles "justifiably the subject of pervasive regulation by the State" including regulations concerning safety equipment).

This broad ability to regulate motor vehicles is grounded on the realization that they constitute a dangerous instrumentality when mishandled or used with faulty equipment, especially equipment that may compromise the ability to see or react to potential hazards. As this Court reasoned in the early years of motoring:

> It is idle to say that the Legislature imposed all these restraints, regulations, and restrictions upon the use of automobiles [registration, adequate brakes, signaling devices, lights, speed limits, ...] if they were not dangerous agencies which the Legislature felt it was its duty to regulate and restrain for the protection of the public.
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> * * *
>
> The courts seem to be unanimous on the proposition that, for the purpose of the exercise of the state's police power, the automobile in operation is a dangerous agency that requires stringent regulatory legislation in the interests of the public safety.

Southern Cotton Oil Co. v. Anderson, 86 So. 629, 634, 635 (Fla. 1920)(dangerous instrumentality doctrine).[6]

Even as early as 1920, this Court had the foresight to recognize the growing magnitude of the dangers motor vehicles presented:

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[6] The dangerous instrumentality doctrine dictates that, subject to some exceptions, "the owner of the vehicle is vicariously liable for the negligent operation of the vehicle no matter who is driving," Devlin v. Florida Rent-A-Car, Inc., 454 So. 2d 787 (Fla. 5th DCA 1984). See Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993); Edwards v. ABC Transportation Co., 616 So. 2d 142 (Fla. 5th DCA 1993).

> We say that the automobile has become the most deadly machine in America, because the mortality report of the Census Bureau and statistics being received daily by the National Safety Council indicate that during recent years automobile accidents have resulted in approximately one-half the number of deaths caused by industrial accidents of all sorts.

This Court concluded:

> Even more alarming than these statistics is the fact that in almost every case a comparison, year by year, of the number of automobile deaths and the number of automobiles in use indicates that the deaths are increasing in almost exact mathematical ratio with the increase in number of automobiles.

Southern Cotton Oil Co., 86 So. at 633 (numerous statistics from the Census Bureau and the National Safety Council cited).

One only has to peruse any of a plethora of government publications to appreciate the foresight of Southern Cotton Oil Co. For example, Delaware v. Prouse, 440 U.S. 648, 658, 658 n. 14, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), cited to 1977 statistics showing 47,671 dead motorists while reasoning that "we are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and prudent driver may encounter."

When used improperly, an automobile even constitutes such a dangerous instrumentality that it is a deadly weapon for purposes of Aggravated Assault, Williamson v. State, 111 So. 124 (Fla. 1926).

Therefore, the State regulation of motor vehicles is warranted due to their extreme danger to human life when not equipped or operated properly. This regulation includes maximizing the driver's ability to view his/her surroundings through the front windshield to fully enable anticipating other motorists and other potential sources of collisions. See statutes cited supra. A moment of hesitation due to sight of a hazard blocked or distorted by a crack or frozen wiper can

deprive the driver of sufficient reaction time just as a higher rate of speed. As a child darts in front of a car, a momentarily blocked view can be just as important as "speed kills" or the loss of reaction time due to alcohol.[7]

Consequently, the enforcement of statutes concerning obstructed windshields of motor vehicles is extremely important to the social welfare. Enforcement of these statutes, in contrast to a bent tag, See Kehoe, or a cracked but operating taillight, See Doctor, should be encouraged rather than discouraged. Another hurdle for law enforcement to overcome should not be added in order to sustain the lawfulness of a traffic stop concerning windshield visibility. The prosecution should not be required, when there is no evidence of pretext, to prove that a reasonable officer would have stopped Daniel. The needs of the people of Florida should weigh heavily in reaching a decision in accordance with a long line of its cases supporting the type of stop in this case. Sgt. Deal was enforcing a vital area of Florida law under circumstances that would justify a reasonable person to believe that there was a violation. The stop was lawful.

In addition to these public needs for the enforcement of safety-related equipment, it is well-settled that the privacy interests of a motorist are lower than privacy interests in other situations. See e.g., N.Y. v. Class, 475 U.S. at 112-15; Cady v. Dombrowski, 413 US. 433, 441-42, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

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[7] The practical effect of the DCA's holding is that it deters an energetic officer who wishes to enforce traffic laws more than other officers. One can only imagine the consternation of the public or the parent of a child killed by a motorist, when law enforcement must explain to them that safety-related traffic laws would have been enforced but-for the DCA's decision in the Daniel case. The sole litmus in non-pretextual traffic stop cases should be whether the officer had probable cause or a reasonable suspicion that a traffic law was being violated.

Here, the privacy interests of the Daniel paled in comparison with the public safety need and Daniel's lowered expectation of privacy in the car. For discussions of balancing privacy interests against the State's interests in regulating automobiles, see Class, 475 U.S. at 116-18; Prouse, 440 U.S. at 656-61. Cf. Mimms, 434 U.S. at 109-110 (safety of officer at traffic stops weighed against the incremental intrusion of requiring suspect to exit car).The DCA erred by concluding that the stop was invalid and erred in deciding that the nine packages of cocaine must be suppressed on remand. In light of balancing relevant interests, the stop was reasonable.

F. Conclusion: The sole litmus in non-pretextual traffic stop cases should be whether the officer had probable cause or a reasonable suspicion that a traffic law was being violated.

Pretext analysis does not apply here nor should it apply here. The lawfulness of a traffic stop, absent evidence of pretext,[8] should be based solely upon whether the officer had probable cause or a reasonable suspicion that a traffic law was being violated. This has been the general law of arrest and the general law of temporary detentions for "eons" in this country for sound policy reasons.

G. "Postscript" and "Sur-Conclusion": Kehoe's test was met here, and Daniel failed to meet his burden of proof.

The State has entitled this section as a "postscript," because the State's primary argument attempts to convince this Court to clarify Florida law for the First District Court of Appeal by disapproving its decision. It submits that Kehoe's reasonable-officer-would-have-stopped test is

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[8] The State is not necessarily conceding that it agrees with Kehoe's reasonable-officer-would-have-stopped test where there is evidence of pretext, but, for the purpose of this case, it has accepted this test as a reality, albeit not applicable here.

not applicable here. If, however, this Court is inclined to apply the Kehoe pretext test here, the State contends that it was met in this case. It was met for two reasons. First, the significance of the pertinent traffic laws, as discussed at length above, prima facie establish that a reasonable officer would have (indeed, should have) stopped a motorist with a cracked windshield and a malfunctioning windshield wiper. Second, Sgt. Deal testified, as a squad supervisor, that he had previously stopped people for a cracked windshield. Each of these two reasons was sufficient evidence to shift the burden to Daniel to prove that a reasonable officer would not have stopped a motorist with not only a cracked windshield but also a malfunctioning wiper. See U.S. v. Bates, 840 F.2d 858, 860 (11th Cir. 1988)(officer's "practice to stop cars for following too closely" sufficient to establish stop as non-pretextual). And, here, although Daniel did produce some contrary evidence regarding the wiper, the trial court, as the trier of fact, was entitled to disregard his evidence, and he produced no evidence contrary to Deal's testimony about his practice of stopping people for a cracked windshield.[9]

In conclusion, the burden of proof also pertains to the State's major argument that the DCA erred in requiring it to prove that a reasonable officer would have stopped Daniel. Daniel failed to establish any pretext. In fact, in the trial court, he conceded that there was none. Daniel failed to establish the "trigger" that activates a Kehoe pretext analysis. Therefore, once the State proved that Sgt. Deal's observations established at least a reasonable suspicion, the State had met its burden; it was not required to prove anything else. Here, the Eleventh Circuit, which enunciated

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[9] His evidence concerning the windshield disputed whether it was cracked rather than contended that a reasonable officer would not have stopped Daniel. As argued supra, the state is entitled to, as a fact favorable to the trial court's ruling, the fact of the cracked windshield.

the test this Court adopted in Kehoe,[10] assists the burden-of-proof analysis. In Courson v. McMillian, 939 F.2d 1479 (11th Cir. 1991), like here, there was probable cause that a stopped motorist committed a traffic violation. In Courson, like here, the probable cause demonstrated that the officer "was acting within the purview of his discretionary authority when he stopped the vehicle," Id. at 1488-89. "The burden thereafter shifts to ... [the defendant] to show that ... [the officer's] conduct violated clearly established constitutional law." Id. at 1489. See U.S. v. Valdez, 931 F.2d 1448, 1450 (11th Cir. 1991)("When a defendant raises a claim of pretextuality, 'the proper inquiry is whether a reasonable officer *would* have made the seizure in the absence of illegitimate motivation,'" italics in original). Daniel conceded that there was no pretext. In fact, Sgt. Deal had no pretext. Daniel failed to meet his burden. The DCA should have ended its analysis there. The DCA erred.

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[10] This Court adopted the test enunciated in U.S. v. Smith, 799 F.2d 704 (11th Cir. 1986), when there is evidence of a pretext.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court answer the certified question in the negative, disapprove the decision of the First District Court of Appeal, and direct that the trial court's denial of the motion to suppress be affirmed.

Respectfully submitted,

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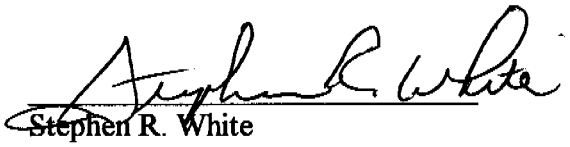
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS and its Appendix, have been furnished by U.S. Mail to Mr. Abel Gomez, Assistant Public Defender, Leon County Courthouse, Suite 401, North, 301 South Monroe Street, Tallahassee, Florida 32301; Mr. John R. Dixon, Esq., Public Defender's Office, Leon County Courthouse, Suite 401, North, 301 South Monroe Street, Tallahassee, Florida 32301; and, Mr. Peter Stoumbelis and Mr. Enoch J. Whitney, Legal Division, Dept. of Highway Safety and Motor Vehicles, Tallahassee, Florida 32399-0504, this 23rd day of November, 1994.



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