LAW OFFICES OF THE
PUBLIC DEFENDER
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
1320 NORTHWEST 14TH STREET
MIAMI, FLORIDA 33125

BENNETT H. BRUMMER
PUBLIC DEFENDER

APPELLATE DIVISION
(305) 545-1960

September 29, 1995

Hon. Sid J. White
Clerk
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Alphonso Roddy v. State of Florida
S. Ct. Case No. 86,256

Dear Mr. White:

In accordance with the Court's order of September 22, 1995, enclosed are eight (8) copies of the Brief of Respondent on the Merits in State v. Daniel, Case No. 84,486, which has been adopted herein.

If anything else is needed, please do not hesitate to contact me.

Sincerely,

Bruce A. Rosenthal
Assistant Public Defender

BAR/mc
cc: Wanda Raiford, Assistant Attorney General
Encls.

A-1127

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 84,486

ALAN DANIEL, :

Respondent. :

_____/

RESPONDENT'S ANSWER BRIEF

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

ABEL GOMEZ #832545
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS[1]

Alan Daniel, respondent, accepts petitioner's statement of the case and facts. It is a thorough and accurate summary of the relevant facts, with two exceptions.

First, petitioner failed to mention that sergeant Deal searched Daniel's car for weapons and for registration and identification, after Daniel failed to produce identification.

Second, Daniel disagrees with petitioner's characterization of defense arguments in the trial court. IB.8. Specifically, petitioner states that the defense "conceded that an officer would have stopped someone if the windshield had been cracked." IB.8(e.s.). However, the defense's alleged concession is not found in the excerpt petitioner supplies. IB.8. Petitioner failed to mention defense counsel's earlier statement on this point. Defense counsel stated: "If there was a crack on the windshield that might make matters different...." T.38(e.s.). Defense counsel's use of the qualifier "might" shows he was not conceding the point and gives context to his later statement, excerpted by petitioner. Petitioner's characterization does not belong in the statement of the case and facts.

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[1]References to the record on appeal will be as R.(page number). References to the trial and sentencing hearing transcripts will be as T.(page number). References to the initial brief will be as IB.(page number).

SUMMARY OF ARGUMENT

This Court should answer the certified question in the affirmative and approve the district court's opinion. As the district court held: the state has the burden of showing a reasonable officer would stop a citizen where there is no pretext evidence, but the stop is for a minor traffic violation.

Petitioner argues that, in the absence of pretext evidence, the state only needs to show the stop was for a traffic violation, no matter how minor or trivial. IB.15-18. However, such a rule violates the Fourth Amendment's requirement that seizures be reasonable.

It is difficult to operate a vehicle without committing some trivial violation. Petitioner's argument would open the door to unreasonable traffic stops in cases were the alleged violations are minor. Officers would have carte blanche to stop most motorists since technical violations are commonplace. Yet, if no reasonable officer would have stopped a citizen for a minor or trivial violation, it logically follows that the stop is unreasonable under the Fourth Amendment.

Further, giving officers unconstrained discretion to stop motorist for the slightest violation encourages unreasonable stops and violates the Fourth Amendment. Petitioner's argument would create bad public policy since it encourages improper police procedure and enforces only technical, harmless violations.

Following Kehoe v. State, 521 So. 2d 1094 (Fla. 1988), this Court should hold that an officer has probable cause only where a

reasonable officer would stop for a minor violation, and not whenever the officer could stop. Placing the burden on the state of meeting this test ensures traffic detentions for minor violations are reasonable under the Fourth Amendment. Contrary to petitioner's claim, Kehoe does not expressly answer the certified question. Thus, this Court should answer the certified question in the affirmative.

The facts do not directly prove that Sergeant Deal had some ulterior motive, like a drug search, for the stop. Nonetheless, the district court correctly concluded the state had not met its burden of showing a reasonable officer would have stopped Daniel. First, on a clear night no reasonable officer would have stopped Daniel for a stuck wiper. Second, no reasonable officer would have stopped Daniel for having a crack on his windshield where no evidence existed that the crack obstructed his view of the road. Consequently, the district court was correct in reversing the trial court's denial of suppression. This Court should affirm.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE STATE FAILED TO PROVE A REASONABLE OFFICER WOULD HAVE STOPPED DANIEL FOR THE ALLEGED MINOR TRAFFIC VIOLATIONS HE COMMITTED; THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE AND AFFIRM.

The district court reversed the trial court's denial of Daniel's motion to suppress. Daniel v. State, 19 Fla. L. Weekly D1920 (Fla. 1st DCA Sept. 8, 1994), In doing so, it certified the following question:

> DOES THE RULING IN 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.

Id. Should this Court decide to exercise its discretionary jurisdiction and grant review, it should answer the certified question in the affirmative and approve the district court's opinion.

A. Fourth Amendment places burden on the state to meet the Kehoe test where alleged traffic violations are minor.

In Kehoe v. State, 521 So. 2d 1094 (Fla. 1988), this Court considered whether a traffic stop for a minor violation is lawful where the facts suggest the officer has an ulterior motive for the stop. In Kehoe, the officers observed suspicious behavior suggesting drug trafficking. Id. at 1095. This Court refused to justify the traffic stop on the basis of a bent license tag, a minor violation. Id. at 1096. This Court adopted an objective

test: "the appropriate analysis is whether a reasonable officer would have stopped the car absent an additional invalid purpose." Id.

As the district court held, the state has the burden of showing a reasonable officer would stop a citizen, where there is no pretext evidence,[2] but the stop is for a minor or trivial traffic violation. Petitioner argues that, in the absence of pretext evidence, the state only needs to show the stop was for a traffic violation, no matter how minor or trivial. IB.15-18. However, such a rule violates the Fourth Amendment's requirement that seizures be reasonable. Of course, traffic detentions constitute seizures and the state must show they are reasonable. See Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

1. Petitioners argument opens the door to unreasonable traffic detentions.

"[I]t is difficult to operate a vehicle without committing some trivial violation." Kehoe, 521 So. 2d at 1097. Petitioner's argument would open the door to unreasonable traffic stops in cases were the alleged violations are minor. Officers

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[2]Daniel will assume that the facts fail to establish direct evidence of pretext. However, there were several factors which indirectly suggested a pretext. Sergeant Deal pulled Daniel over for a cracked windshield and a stuck wiper, yet he failed to mention the cracked windshield to officer Arnold and he didn't even bother to test the operation of the wiper. Also Deal was a supervising sergeant, not a patrol officer. Would a supervising sergeant trouble himself with such trivial violations in the absence of an invalid purpose?

would have carte blanche to stop most motorists since technical violations are commonplace. Yet, if no reasonable officer would have stopped a citizen for a minor or trivial violation, it logically follows that the stop is unreasonable under the Fourth Amendment. Following Kehoe, this Court should hold that an officer has probable cause only where a reasonable officer would stop for a minor violation, and not whenever the officer could stop.

Sergeant Deal could have decided he was going to enforce the alleged violations because he didn't like Daniel's car, or his looks, or even worse: the color of his skin. These possibilities demonstrate the harm that could come from petitioner's per se rule. If Kehoe is distinguished, unreasonable traffic detentions will no doubt proliferate.

Also, petitioner's rule would allow improper fishing expeditions. Officers could use a minor traffic violation to stop a citizen simply because he looks suspicious, or the officer has a hunch. As well, an officer could decide to arbitrarily enforce minor traffic violations. In such cases, there will obviously be no direct testimony from the officer that the citizen was suspected of other criminal activity. Such detentions are improper under Kehoe; they give officers unconstrained discretion and would be bad public policy.

a) The Fourth Amendment prohibits granting officers unconstrained discretion to detain motorist.

Giving officers unconstrained discretion to stop motorist for the slightest violation encourages unreasonable stops and

violates the Fourth Amendment. The United States Supreme Court has disapproved the practice of granting officers unconstrained discretion to stop motorist since this presents the grave danger of abuse. See Delaware v. Prouse, 440 U.S. 648 (random stops to check driver's license unreasonable under the Fourth Amendment); cf. Florida v. Wells, 495 US 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990)(inventory searches of containers founds in cars violate the Fourth Amendment where law enforcement agency has no policy on which containers to open). Again, since so many motorist commit trivial or minor violations everyday, a stop for such a violation is unreasonable if no reasonable officer would have made the stop.

b) Petitioner's argument creates bad public policy.

Petitioner's argument would create bad public policy since it would encourage improper police procedure and would enforce only technical, harmless violations. If petitioners has its way, the savvy officer would not be deterred by Kehoe and could rest safe in the knowledge that all stops for minor traffic violations--no matter how trivial--would be legal as long as the officer hid any other suspicions he may have had about the citizen. The courts would then be foreclosed from considering the legality of the stop simply because the police officer claimed he did not suspect the citizen of other illegal activity. Ultimately, suppression hearings would become entirely dependent on the testimony of the very police officers who are inclined to improperly use traffic violations to stop citizens.

Unquestionably, as petitioner notes, the state may regulate the operation of motor vehicles. IB.22. The state properly authorizes officers to stop and cite motorist for operating a vehicle with defective equipment. Yet contrary to petitioner's, public policy argument, the public is not served by a rule which allows officers to enforce technical violations where no reasonable officer would do so. Such a rule would gut Kehoe and was surely not the intent of this Court.

2. Per se rules violate the Fourth Amendment.

Allowing officers to stop motorist for all minor traffic violations, (petitioner's argument), creates a per se rule for determining probable cause or reasonable suspicion. However, in Fourth Amendment cases courts must analyzes the reasonableness of police conduct under the particular facts of the case before it. Consequently, the United States Supreme Court has rejected per se rules in Fourth Amendment cases. See Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 241, 115 L. Ed. 2d 389. Applying the objective Kehoe test ensures that Fourth Amendment cases are analyzed by their unique facts and not by a per se rule.

3. Placing burden on the state to meet the Kehoe test is reasonable and not unduly burdensome.

The district court placed the burden on the state to meet the Kehoe test, even though no direct pretext evidence existed. The court stated:

> In Jackson v. State, 596 So. 2d 113 (Fla. 1st DCA 1992), this court held, on the authority of Kehoe v. State, 521 So. 2d 1094 (Fla. 1988), that
>
> > when 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.

Daniel, at D1920; see also White v. State, 619 So. 2d 429 (Fla. 1st DCA 1993); accord Davis v. State, 605 So. 2d 561 (Fla. 2d DCA 1992). As argued above, placing the burden on the state ensures traffic detentions for minor violations are reasonable under the Fourth Amendment.

The state has the burden of showing an arrest and search are reasonable and that no warrant was required. E.g., Norman v. State, 379 So. 2d 643, 646 (Fla. 1980). It seems eminently reasonable and in no way burdensome to require the state show a reasonable officer would have stopped a citizen in all cases were the alleged traffic violation is minor or trivial.

Viewed another way: where a traffic violation is minor, the Fourth Amendment creates a presumption that the stop was pretextual. The state may overcome this presumption simply by meeting the Kehoe test. As argued above, such a presumption is necessary to guard against unreasonable traffic detentions.

a) Defense counsel's alleged concession on pretext does not relieve the state of its burden to meet the Kehoe test.

Petitioner makes various references to defense counsel conceding that there existed no pretext for the stop. In response to the trial court's question on whether there was evidence presented of an ulterior motive, defense counsel gave his

personal opinion that the facts failed to establish an ulterior motive. T.41. Therefore the district court concluded that the defense had "conceded below that based upon the evidence presented there was nothing to indicate that the stop was pretextual--that is, based upon some ulterior motive." However, as the district court noted, defense counsel preserved the issue raised here.[3] That is, he argued:

> that the initial stop was improper because no material violation of the law had occurred, and no reasonable police officer would have stopped [Daniel] based merely upon the condition of the windshield and the position of the wipers.

Daniel, at D1920. Petitioner's argument that the burden shifted to Daniel (IB.27-8), in light of his concession, is therefore erroneous. As discussed above, the state has the burden of meeting the Kehoe test.

4. Case law does not expressly reject the district court's application of the Kehoe test to Daniel's facts.

Petitioner argues that Kehoe itself expressly answers the certified question in the negative. IB.16. Petitioner argues that the Kehoe test applies only in cases where there exists ulterior motive evidence, and in its absence, an officer may stop

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[3]The most logical explanation of defense counsel's response was that he did not believe there was any direct testimony that Deal stopped Daniel because he suspected him of other criminal activity. However, as argued above, the trivial nature of the violations certainly suggest an invalid purpose, although it is true Deal did not admit to one.

a citizen for any traffic violation no matter how trivial. This court should reject petitioner's reading of Kehoe.

Contrary to petitioner's claim, Kehoe does not expressly answer the certified question. As discussed above, Kehoe considered a situation where there was direct evidence that the officer's true motivation was to search for drugs. This Court reasoned and adopted an objective test in light of this fact. However, this Court said nothing about whether this test would apply where there existed no direct evidence of an ulterior motive. To the contrary, this Court's reasoning supports application of the objective test to cases were no direct evidence of pretext exists. This Court stated:

> We decline to adopt the [State v.] Ogburn [483 So. 2d 500 (Fla. 3d DCA 1986)] "could arrest" approach. Although it is the easiest test to follow the fourth amendment constraints on intrusive searches and seizures transcend other concerns. Allowing the police to make unlimited stops based upon the faintest suspicion would open the door to serious constitutional violations. It is difficult to operate a vehicle without committing some trivial violation--especially one discovered after the detention.

Kehoe, 521 So. 2d at 1097 (e.o.).

As well, petitioner's argument that Cresswell v. State, 564 So. 2d 480 (Fla. 1990), answers the question is unavailing. In Cresswell, a trooper stopped the defendant for "following too closely". Id. at 481. The Court approved the initial stop "because a law enforcement officer is clearly entitled to stop a vehicle for a traffic violation." Id. The Court cited to Hansbrough v. State, 509 So. 2d 1082 (Fla. 1987). Id. This is significant because in Kehoe the Court distinguished Hansbrough. Kehoe, 521 So. 2d at 1097 Hansbrough involved a traffic stop for

making an illegal turn where the officer suspected the driver in a murder investigation. The Kehoe Court distinguished Hansbrough:

> Police officers ordinarily would likely stop somebody for making an illegal turn. For this reason Hansbrough is not controlling in situations where the traffic violation is too minor to warrant detention absent some other motivation.

Kehoe, 521 so. 2d at 1097 (e.o.). Kehoe applied the objective "would" the reasonable officer have stopped test in order to explain the decision in Hansbrough.

Thus, Cresswell's citation to Hansbrough indicates the Court determined the traffic stop is one a police officer ordinarily would make, distinguishing it from Kehoe and the facts here.

Petitioner cites several United State Supreme Court cases in support of its position that an objective test is not required in cases where pretext evidence is lacking. IB.21-22. However, these cases, while involving traffic detentions, do not concern pretextual stops or stops for minor violations. As petitioner itself points out, the United State Supreme Court has yet to decide a pretextual traffic case. IB.15,N.3.

B. The state failed to carry its burden of showing that a reasonable officer would have stop Daniel for the minor traffic violations.

Sergeant Deal stopped Daniel for an allegedly cracked windshield and because his wiper was stuck in the up position. Deal was a patrol supervisor and was not carrying a citation book. He testified that he was merely going to warn Daniel about the equipment violations. But rather than merely warning Daniel

and sending him on his way, he asked Daniel for his driver's license. Unfortunately, Daniel was not able to produce identification. Rather than asking Daniel to search his vehicle for identification or registration, Deal decided to search the car himself, and he admitted searching for weapons.

These facts do not directly prove that Deal had some ulterior motive, like a drug search, for the stop. Nonetheless, the district court correctly concluded the state had not met its burden of showing a reasonable officer would have stopped Daniel.

1. On a clear night, no reasonable officer would have stopped Daniel for a stuck wiper.

Sergeant Deal testified that he had previously stopped others for having a cracked windshield, but not for having a wiper stuck in the up position. T.18-9. Deal testified he had cited people for having had inoperable wipers when it was raining. T.18. However, it was not raining when he stopped Daniel. T.18. Officer Arnold testified he had never stopped someone for having a windshield wiper stuck in the up position. T.27. As Deal candidly testified about stuck windshield wipers: "I don't know if I -- you see that many anyway." T.19. This testimony is not proof that a reasonable officer would have stopped Daniel on a clear night for a stuck wiper.

Further, Deal never checked the wiper to see whether it was truly inoperable. His lack of interest with the wiper suggests pretext.

2. No reasonable officer would have stopped Daniel

for having a crack on his windshield where no evidence existed that the crack obstructed his view of the road.

The state elicited testimony that Deal had previously stopped others for cracked windshields. He stated: "And for cracked windshield I have stopped people." T.18-9. Petitioner characterizes this testimony as Deal testifying to a "practice" of stopping motorist for cracked windshields. IB.27. However, this passing reference hardly qualifies as evidence of a standard practice.

Deal did not testify that the windshield crack obstructed Daniel's view, contrary to petitioner's contention. IB.19. There was no testimony on the nature of the crack, other than to describe that it extended over half the windshield. T.15.

Petitioner lists numerous statutes which indicate the legislature's intent to prohibit motorist from driving with an obstructed front windshield. IB.19. However, it does not reference a statute which prohibits a motorist from driving with an unobstructed cracked windshield.[4] Accordingly, Daniel was not cited for an "obstructed" windshield and officer Arnold testified that Deal never even mentioned the crack to him. T.26.

Further, as the district court stated: "the owner of the vehicle testified that her car did not have a cracked windshield

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[4]Section 316.2952(2), Florida Statutes (1992), prohibits placing any "sign, sunscreening material, product or covering" on the front windshield. This section says nothing about cracked windshields or faulty wipers.

when she loaned her car to appellant, and photographic evidence produced at the hearing showed the subject window intact." Daniel. While it is normally the case that an appellate court should interpret the evidence in a light most favorable to sustaining the trial court's ruling, e.g., Owen v. State, 560 So. 2d 207 (Fla. 1990), the trial court may very well have believed the state failed to prove a cracked windshield. The trial court never made an express factual finding on the allegedly cracked windshield. Instead, the trial court only referenced the wiper position when stating its reasons for denying suppression. T.44-6. This suggests the court found the crack unproven.

Where as here, the state has failed to present any evidence that the cracked windshield obstructed Daniel's view of the road, it has failed to show that a reasonable officer would have stopped him for such.[5]

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[5]Petitioner argues that defense counsel "in essence, conceded that a cracked windshield alone would have been sufficient to justify the stop" IB.19. However, the defense's alleged concession is not found in the excerpts petitioner provides. IB.19. Petitioner failed to mention defense counsel's earlier statement on this point. Defense counsel stated: "If there was a crack on the windshield that might make matters different...." T.38(e.s.). Defense counsel's use of the qualifier "might" shows he was not conceding the point and gives context to his later statement, excerpted by petitioner. It is more reasonable to view defense counsel's statements as indicating his desire to focus the trial court on the wiper's position, the only fact which was sufficiently proven.

3. No reasonable supervising patrol sergeant would have diverted his attention from his important work to stop Daniel for the minor violations.

Even assuming a reasonable patrol officer would have stopped Daniel, the state failed to prove that a reasonable officer operating under Deal's circumstances would have stopped Daniel. Deal was a supervising sergeant, not a patrol officer. Consequently, he was not in possession of a citation book, and his car was not equipped with front blue lights, designed to stop motorists. These facts make it even more unlikely that a reasonable officer operating under the circumstances Deal confronted would have diverted himself from his supervisory work to stop Daniel. The nature of Deal's duties is an objective factor taken into account when considering whether the reasonable officer would have stopped Daniel. E.g., Hills v. State, 629 So. 2d 154 (Fla. 1st DCA 1993), rev. denied, 639 So. 2d 981 (Fla. 1994)(state failed to show that officers, while engaged in their duties as narcotics investigtors as opposed to patrol officers, would have stopped a car for minor traffic violations).

C. The district court's decision should be affirmed.

The Fourth Amendment requires the state prove a reasonable officer would stop a citizen for a minor traffic violation. The state failed in meeting this burden. Consequently, the district court was correct in reversing the trial court's denial of suppression. Should this Court grant review, it should answer the certified question in the affirmative and affirm.

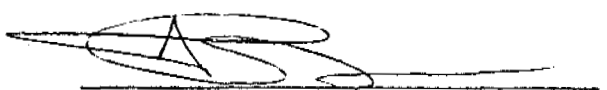
CONCLUSION

Based on the foregoing argument, Daniel requests this Court affirm the opinion of the first district court of appeal.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been delivered by U.S. m to Assistant Attorney General Stephen White, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, on 17 January 1995.

Respectfully submitted,



ABEL GOMEZ #832545
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458