IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC05-1173
	)	
FRED O. BURKE,	)	
	)	
Respondent.	)	
	)	
_____	)	

SECOND AMENDED RESPONDENT=S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts Petitioner=s statement of the case and facts with the following additions, corrections and clarifications:

1. Deputies Carter and White were traveling in an unmarked unit on McNab Road approaching the intersection of University Drive. They were in the inside left turn lane facing west. T6, 18 Respondent was driving a vehicle that was in the turn lane to the right of the deputies and one or two cars in front of them. T 6, 18

2. The tail lights were operable. T 13 The right red lens cover was broken and emitting a white light. T 6 White described the right red lens cover as Acracked in nature@ and Apartially covering.@ T 19

3. Deputy White did not observe a crack in the windshield until after the stop. T 19-20 He did not recall the nature or size of the crack. T 20

4. Carter intended to effect a traffic stop of the vehicle based upon the cracked lens cover regardless of the condition of the windshield. T 14

5. At deposition admitted into evidence upon stipulation T23, the owner of the vehicle stated that there was a crack on the passenger side of the windshield which was caused by a rock or pebble striking it. T 14 The taillight was operable. T 14

6. The Circuit Court found that while white light was emitting from a right red lens cover of the tail light, the lens cover was not completely removed. Since the light was partially covered by a red lens cover, no infraction occurred citing Doctor v. State, 592

So.2d 442 (Fla. 1992) and Frierson v. State, 851 So.2d 293 (Fla. 4th DCA 2003), reversed on other grounds, State v. Frierson, Slip Op. 2006 WL 300660 (Fla. Feb. 9, 2006) T 38-39 Relying on the testimony of deputies Carter and White, the court determined that the state had not sustained its burden of establishing that the stop was reasonable based upon the crack in the windshield. T 40 The crack did not cause danger to the driver, occupants of the vehicle or anyone else. ANor was it an impediment to the driver=s vision such that it would cause a safety problem for anyone else.@ T 40 Therefore, the Circuit Court granted the motion. T 40 R 12

7. In addition to addressing the crack in the red tail light lens cover which was quoted in Petitioner=s brief, the Fourth District held:

> Section 316.2952, Florida Statutes (2003), provides that a windshield is required on every motor vehicle and that a violation of this statute is a noncriminal traffic infraction. Section 316.610(1) expressly gives a police officer the authority to require the driver of a vehicle to stop and submit the vehicle to an inspection if the officer has reasonable cause to believe that the vehicle is Aunsafe or not equipped as required by law or that its equipment is not in proper adjustment or repair.@ The parties have not cited any other statute bearing on the question of whether a mere crack in a windshield, regardless of size or location, is unsafe. Nor was there any testimony in this case to that effect.
>
> In Hilton v. State, 901 So.2d 155 (Fla. 2d DCA 2005), the second district, en banc, construed these statutes as follows:
>
> > Although the above two statutes do not specify under what circumstances an officer may stop a car to perform a safety inspection of a broken windshield, we conclude that an officer may stop a vehicle with a visibly cracked windshield regardless of whether the crack creates any immediate hazard.

> The court affirmed the denial of a motion to suppress, where the stop was based on a seven inch windshield crack in the upper corner on the passenger side.
>
> As we noted earlier, the trial court in this case granted the motion to suppress, while in Hilton the trial court denied the motion to suppress; however, it is undisputed that there was a crack in the windshield of the car in this case. If the majority opinion in Hilton is correct, it would follow that the stop in the present case for the crack in the windshield was proper. The correctness of Hilton, may depend on whether Doctor v. State, 596 So.2d 442 (Fla.1992), is still good law in light of Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).
>
> In Doctor, the Florida Supreme Court held that a crack in the lens of a taillight was not a proper basis for the stop of a car because the taillight was still emitting red light in compliance with the statutory requirement for a taillight. Our supreme court held in Doctor that a reasonable officer would have known that the taillight was still in compliance with the law. The majority in Hilton recognized the significance of Doctor, but noted that it was decided prior to Whren. In Whren the United States Supreme Court held that, when determining whether the stop of a vehicle is proper, the standard is whether the officer could have had a reasonable belief that the driver committed a crime or traffic infraction, and that the subjective intent of the officer involved was not relevant.
>
> We conclude that Doctor is still good law and that the majority opinion in Hilton is inconsistent with Doctor. Judge Northcutt, in his dissent in Hilton, has explained all of this in more detail, and we adopt his reasoning. Although the trial court ruled in this case before Hilton was decided, the court's conclusion that the state had not met its burden of demonstrating that the crack in the windshield was a safety problem is consistent with Doctor. We accordingly affirm and certify direct conflict with Hilton.

State v. Burke, 902 So.2d 955, 956-957 (Fla. 4th DCA 2005).

SUMMARY OF THE ARGUMENT

Respondent was stopped after deputies observed a crack in the windshield of the vehicle he was driving. At the suppression hearing, neither deputy was able to describe the size or location of the crack. Based upon the testimony, the Circuit Court granted Respondent=s motion finding that the state did not sustain its burden of proving that the stop was reasonable based upon the cracked in the windshield. On state appeal to the Fourth District Court of Appeal, the order of suppression was affirmed. The appellate court held that driving a vehicle with a crack in the windshield of unknown size, and shape and location which has not been shown to be unsafe is not a violation of Florida law. Conflict with Hilton v. State, 901 So. 155 (Fla. 2d DCA 2005) was certified because Hilton held that driving with a cracked windshield is a *per se* equipment violation justifying an officer to stop a vehicle. The decision of the Fourth District should be affirmed and that of the Second District reversed.

Section 316.2952(1) Florida Statute (2003) requires that vehicles driven in Florida have windshields. The statute does not place any qualifications on the condition of the windshield. Because Respondent=s vehicle was equipped with a windshield, Section 316.2952(1) was not violated even though there was a crack of unknown size in an unspecified location.

Further, the deputies were not justified in stopping Respondent=s vehicle based upon Section 316.610 Florida Statute (2003). A violation of Section 316.610 occurs if

the condition of the vehicle is so unsafe that it endangers persons or property, lacks equipment in proper condition and adjustment as required in chapter 316 or contains equipment that violates chapter 316. The state did not prove that the crack in the windshield rendered the vehicle so unsafe as to endanger persons or property. There was no evidence of the size and location of the crack or of its effect on the structure of the vehicle. The windshield was in proper condition and adjustment as required in chapter 316 since the chapter does not require crack-free windshields. There was no claim that the vehicle contained equipment that violates chapter 316. Therefore, the Fourth District ruled correctly when it affirmed the order of suppression. The decision should be upheld on appeal.

ARGUMENT

THE FOURTH DISTRICT=S DECISION IN STATE V. BURKE, 902 SO.2D 955 (Fla. 4th DCA 2005) SHOULD BE AFFIRMED.

By emphasizing a small portion of Section 316.610(1) Florida Statute (2003), Petitioner maintains that law enforcement may stop a vehicle anytime the officer observes a crack in a windshield. To the extent this argument is statute based, *de novo review* applies, Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd., 894 So.2d 954, 957 (Fla. 2005), and the argument should be rejected.

Before considering whether an officer may stop a vehicle based upon the state of its equipment, one must first consider what equipment is required by law. As far as windshields, the requirements and restrictions are set forth in Section 316.2952 Florida Statute (2003):

> (1) A windshield in a fixed and upright position, which windshield is equipped with safety glazing as required by federal safety-glazing material standards, is required on every motor vehicle which is operated on the public highways, roads, and streets, except on a motorcycle or implement of husbandry.
>
> (2) A person shall not operate any motor vehicle on any public highway, road, or street with any sign, sunscreening material, product, or covering attached to, or located in or upon, the windshield, except the following:
>
> > (a) A certificate or other paper required to be displayed by law.
> >
> > (b) Sunscreening material along a strip at the top of the windshield, so long as such material is transparent and does

not encroach upon the driver's direct forward viewing area as more particularly described and defined in Federal Motor Vehicle Safety Standards No. 205 as the AS/1 portion of the windshield.

(c) A device, issued by a governmental entity as defined in s. 334.03, or its designee, for the purpose of electronic toll payments.

(3) The windshield on every motor vehicle shall be equipped with a device for cleaning rain, snow, or other moisture from the windshield, which device shall be constructed as to be controlled or operated by the driver of the vehicle.

(4) Every windshield wiper upon a motor vehicle shall be maintained in good working order.

(5) Grove equipment, including "goats," "highlift-goats," grove chemical supply tanks, fertilizer distributors, fruit-loading equipment, and electric-powered vehicles regulated under the provisions of s. 316.267, are exempt from the requirements of this section. However, such electric-powered vehicles shall have a windscreen approved by the department sufficient to give protection from wind, rain, or insects, and such windscreen shall be in place whenever the vehicle is operated on the public roads and highways.

(6) A former military vehicle is exempt from the requirements of this section if the department determines that the exemption is necessary to maintain the vehicle's accurate military design and markings. However, whenever the vehicle is operating on the public roads and highways, the operator and passengers must wear eye-protective devices approved by the department. For purposes of this subsection, "former military vehicle" means a vehicle, including a trailer, regardless of the vehicle's size, weight, or year of manufacture, that was manufactured for use in any country's military forces and is maintained to represent its military design and markings accurately.

(7) A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

There is no need to resort to rules of statutory construction since the language of the windshield statute is clear and unambiguous. As this Court explained:

> In construing a statute we are to give effect to the Legislature's intent. See State v. J.M., 824 So.2d 105, 109 (Fla.2002). In attempting to discern legislative intent, we first look to the actual language used in the statute. Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla.2000); accord BellSouth Telecomms., Inc. v. Meeks, 863 So.2d 287, 289 (Fla.2003). When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. See Lee County Elec. Coop., Inc. v. Jacobs, 820 So.2d 297, 303 (Fla.2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. See State v. Burris, 875 So.2d 408, 410 (Fla.2004). When the statutory language is clear, Acourts have no occasion to resort to rules of construction-they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.@ Nicoll v. Baker, 668 So.2d 989, 990-91 (Fla.1996).

Daniels v. Florida Dept. of Health,898 So.2d 61, 64 (Fla. 2005)

Subsection (1) simply requires a windshield. Unlike subsection (3) which requires windshield wipers which **Ashall** be maintained in good working order,@ subsection (1) does not place any qualifications on the condition of the windshield itself. This Court should not impose a qualification where none was enacted by our legislature. See,State v. Mark Marks, P.A., 698 So.2d 533, 541 (Fla.1997) (quoting Dep't of Prof'l Regulation v. Durrani, 455 So.2d 515, 518 (Fla. 1st DCA 1984)) (A[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.@); Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911, 914 (Fla.1995) (AWhen the legislature has used a term in one section of the statute but omits it

in another section of the same statute, we will not imply it where it has been excluded.@)

Rather, the only restrictions are found in subsection (2) which delineates what may be affixed to a windshield. Other than the restrictions of subsection (2), our legislature has chosen to require only that vehicles have windshields.

Unlike Florida, other states have chosen to place qualifications on the condition of a windshield. For instance, Illinois law provides:

> No person shall drive a motor vehicle when the windshield, side or rear window are in such **defective condition or repair as to materially impair the driver=s view to the front, side or rear**.

Illinois Vehicle Code (625 ILCS 5/12-503(e))(West 2002). Likewise, Kansas law provides:

> No person shall drive any motor vehicle with a **damaged front windshield or side or rear windows which substantially obstructs the driver=s clear view** of the highway or any intersecting highway.

'8-174(b)Kan. Stat. See also, Iowa Code '321.438(1) (2003) (AA person shall not drive a motor vehicle equipped with ...windows which do not permit clear vision.@); Wis. Admin. Code ' Trans. 305.34(3)(windshield of an automobile Amay not be excessively cracked or damaged.@)[1]

[1]Without review of the individual state statutes, Petitioner=s reliance upon cases from other jurisdictions should not be persuasive. As discussed by Judge Northcutt in his dissent and as illustrated above, windshield requirements vary across our nation. Hilton v. State, 901 So.2d 155, 165-166 (Fla. 2d DCA 2005)(Northcutt,Judge, dissenting) Unless the out of state statute is substantially the same as ours, the results will be different. For instance in United States v. Cashman, 216 F.3d 582 (7th Cir. 2000), cited by Hilton, stop

Had our legislature wanted to require crack-free, damage-free windshields, like sister states, it could have done so. Since no such qualification appears in our laws, by the plain and unambiguous language of Section 316.2952(1) Florida Statute (2003), vehicles driven in Florida must have windshields, not perfect windshields, but windshields. Hilton v. State, 901 So.2d 155, 160 (Fla. 2d DCA 2005)(Northcutt, Judge, dissenting)(Section 316.2952(1) simply requires a windshield, not a Apristine@ windshield)

In Hilton v. State, 901 So.2d at 155-156, the Second District held Athat the officers lawfully stopped Hilton=s car based on the cracked windshield because the equipment violation was a noncriminal traffic infraction.@; Accord, State v. Howard, 909 So.2d 390, 394 (Fla. 5th DCA 2005) To the extent that the appellate court determined that a cracked windshield is a *per se* equipment violation, the decision rewrites the statute. The opinion legislates motorists to maintain perfect windshields notwithstanding the absence of any such language from Section 316.2952(1) Florida Statute (2003). The Second District however, is not empowered to rewrite the law by adding conditions which

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of vehicle with crack in windshield between 7 to 10 inches long upheld based on officer=s reasonable belief that windshield violated Wisconsin statute prohibiting driving vehicle with Aexcessively cracked@ windshield, windshield that Aextends more than eight inches from the frame or is located within the >critical area=...@ Because Florida law does not provide in a like manner, Cashman is inapposite.

do not appear in the statute for to do so is an abrogation of legislative power. Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) While this view may appear simplistic, it stems from the simplicity of the provision which requires only a windshield and necessitates reversal of the Hilton decision.

Given that vehicles driven in Florida are required to have a windshield, not a crack-free, damage-free windshield, but simply a windshield under Section 316.2952(1) and Respondent=s vehicle was equipped with a windshield, the stop of his vehicle was lawful only if authorized by 316.610 Florida Statute (2003) ASafety of vehicle; inspection.@ Section 316.610 provides:

> It is a violation of this chapter for any person to drive or move, or for the owner or his or her duly authorized representative to cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person or property, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter, or for any person to do any act forbidden or fail to perform any act required under this chapter.
>
> (1) 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.
>
> (2) In the event the vehicle is found to be in unsafe condition or any required part or equipment is not present or is not in proper repair and adjustment, and the continued operation would probably present an unduly hazardous operating condition, the officer may require the vehicle to be immediately repaired or removed from use. However, if continuous

> operation would not present unduly hazardous operating conditions, that is, in the case of equipment defects such as tailpipes, mufflers, windshield wipers, marginally worn tires, the officer shall give written notice to require proper repair and adjustment of same within 48 hours, excluding Sunday.

Judge Northcutt in his Hilton dissent explained the statute=s three prohibitions:

> Unlike subsection (1) of the statute, the initial paragraph actually describes the violation that is necessary for a lawful traffic stop under the Fourth Amendment.[fn2] As can be seen, the statute proscribes three types of conduct: (1) driving a vehicle that is in such unsafe condition as to endanger any person or property; (2) driving a vehicle that lacks equipment in proper condition and adjustment as required in chapter 316; and (3) driving a vehicle that contains equipment in violation of chapter 316.
>
> > FN2 The prohibitions contained in the introductory paragraph of section316.610 are also set forth verbatim in Section 316.215(1)[Scope and effect of regulations]

910 So.2d at 162; See, State v. Perez-Garcia, 917 So.2d 894 (Fla. 3d DCA 2005)(relying the 3 prohibitions of the initial paragraph, vehicle with inoperable left rear brake light is an unsafe vehicle within the meaning of the first paragraph even though the vehicle is equipped with an operable right and middle brake light). In Hilton, Judge Northcutt eliminated the third violation because, like the instant case, there has been no claim below that it contained equipment in violation of Chapter 316.

Considering the second possible violation, whether the defendant was Adriving a vehicle that lacks equipment in proper condition and adjustment as required in chapter 316,@ Judge Northcutt observed that in Doctor v. State, 596 So.2d 442, 446 (Fla. 1992),

this Court held that Section 316.610(1) Amust be read in conjunction with those statutes which delineate the specific equipment requirements for vehicles.@ See also, Forsythe v. Longboat Key Beach Erosion Control Dist.,604 So.2d 452 (Fla. 1992) (AIt is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. See, e.g., Marshall v. Hollywood, Inc., 224 So.2d 743, 749 (Fla. 4th DCA 1969), writ discharged, 236 So.2d 114 (Fla.), cert. denied,400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970). Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. E.g., Villery v. Florida Parole & Probation Comm'n, 396 So.2d 1107, 1111 (Fla.1980)@). This analysis flows from the language, Aas required in this chapter,@ set forth in the introductory paragraph of Section 316.610.

In Doctor, this Court considered that Section 316.221(1) Florida Statute, required Aat least 2 taillamps mounted on the rear, which, when lighted ... shall emit red light plainly visible from a distance of 1,000 to the rear...@ Doctor=s vehicle was in compliance with Section 316.221(1) because it had Atwo sets of rear lights consisting of a signal light on the outside of the light bank, then a brake light, then a reverse light, and finally a lens cover, or reflector.@ 596 So.2d at 446 Therefore, although the lens cover was cracked, the officer did not have a reasonable basis to stop the vehicle because it was equipped as required by statute.

Like the Hilton dissent, the Fourth District Court of Appeal in Burke determined

that Doctor compelled holding that a cracked windshield is not a *per se* basis to stop a vehicle. The Fourth District wrote:

> In Doctor, the Florida Supreme Court held that a crack in the lens of a taillight was not a proper basis for the stop of a car because the taillight was still emitting red light in compliance with the statutory requirement for a taillight. Our supreme court held in Doctor that a reasonable officer would have known that the taillight was still in compliance with the law. The majority in Hilton recognized the significance of Doctor, but noted that it was decided prior to Whren. In Whren, the United States Supreme Court held that, when determining whether the stop of a vehicle is proper, the standard is whether the officer could have had a reasonable belief that the driver committed a crime or traffic infraction, and that the subjective intent of the officer involved was not relevant.
>
> We conclude that Doctor is still good law and that the majority opinion in Hilton is inconsistent with Doctor. Judge Northcutt, in his dissent in Hilton, has explained all of this in more detail, and we adopt his reasoning. Although the trial court ruled in this case before Hilton was decided, the court's conclusion that the state had not met its burden of demonstrating that the crack in the windshield was a safety problem is consistent with Doctor. We accordingly affirm and certify direct conflict with Hilton.

State v. Burke, 902 So.2d at 957. Respondent submits that Doctor properly applied an objective test although the decision predated Whren v. United States, 517 U.S. 806 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) and remains valid law. See, State v. Frierson, Slip. Op. 2006 WL 300660 (Fla. Feb. 09, 2006)[2] (Pariente, C.J., dissenting)(ANine years

[2]In Frierson v. State, 851 So.2d 293 (Fla. 4th DCA 2003) reversed on other grounds State v. Frierson, Slip. Op. 2006 WL 300660 (Fla. Feb. 09, 2006), the Fourth District affirmed the circuit court=s ruling to the extent that it found that the stop of the defendant=s vehicle was unlawful based on a cracked lens cover and failure to use a turn signal when turning left in a left turn lane. This Court declined to consider the validity of the stop in rendering its decision.

before the stop in this case, this Court had held that as long as a vehicle has two functioning tail lamps, a cracked lens cover is not a violation of the Florida Traffic Code justifying a traffic stop. See Doctor v. State, 596 So.2d 442, 447 (Fla.1992)@).

AThe correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop.@ Dobrin v. Florida Department of Higway Safety and Motor Vehicles, 874 So.2d 1171, 1174(Fla. 2004). Doctor recognized the objective standard and applied it:

> Finally, we reject the State's suggestion that the stop in this case was legal because the officers Areasonably suspected@ that the taillight was in violation of the law. The trial judge held the stop permissible because Athe officer determined in his own mind on that evening ··· that the left rear taillight was out.@ **Reasonable suspicion, however, is not judged by a subjective standard, but rather by an objective one**. Terry, 392 U.S. at 21-22, 88 S.Ct. at 1879-1880. Law enforcement officers are charged with knowledge of the law. **A reasonable officer would have known the statutory requirements for taillights as prescribed by section 316.221. Thus, a reasonable officer would have known that Doctor's vehicle was in compliance with the law since red taillights were visible on both ends of the vehicle**.

596 So.2d at 447; See, Bender v. State, 737 So.2d 1181, 1181-1182 (Fla. 1st DCA 1999)(AWhether an officer has probable cause to make a traffic stop is judged not by the officer's subjective belief, but by an objective standard based on the observed violations. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Doctor v. State, 596 So.2d 442, 447 (Fla.1992); See also State v. Hernandez, 718 So.2d 833, 836 (Fla. 3d DCA 1998)("[U]nder Whren, the test is whether an officer could have stopped the

vehicle for a traffic infraction.@)@). Thus, Doctor has continuing validity.

Doctor compels this Court to reject Petitioner=s argument that an officer is authorized by Section 316.610(1) to stop a vehicle where the officer has reasonable cause to believe that the Aequipment is not in proper adjustment or repair@ simply because there is a crack in the windshield. Under the objective test, an officer does not have reasonable cause to believe that the equipment is not in proper adjustment or repair so long as there is a Awindshield in a fixed and upright position which windshield is equipped with safety glazing as required by federal safety-glazing material standards@ as required by Section 316.2952(1)[3] Florida Statute (2003) While a particular officer may not be aware that Florida law does not contain a *per se* prohibition against driving a vehicle with a cracked windshield, his/her mistaken understanding of the law does not provide a good faith justification for a stop. See, D.F. v. State,682 So.2d 149, 152 (Fla. 4th DCA 1996)(AIgnorance of the law does not excuse a private citizen; it certainly does not excuse a law enforcement officer from violating a statute designed to regulate police conduct.@)

[3]The language, Ain proper adjustment and repair@ is not rendered meaningless by Respondent since an officer could stop a vehicle which did not have any cracks if the windshield was not equipped with safety glazing as required by federal safety -glazing material standards. Safety glazing is required by Section 316.2952(1) Florida Statute (2003), crack free windshields are not.

Turning to the last possible basis for the stop, driving a vehicle that is in such unsafe condition as to endanger any person or property, this aspect of the issue turns on the condition of the particular vehicle and therefore must be reviewed on a case by case basis. E.g. Ivory v. State, 898 So.2d 184 (Fla. 5th DCA 2005)(where cracked windshield impeded driver=s vision, stop was lawful because equipment, windshield, was unsafe); State v. Pease, 531 N.E.2d 1207 (Ind. App. 1 Dist. 1988)(under Indiana statute with language like that of Florida law, stop of vehicle with badly cracked windshield upheld because vehicle unsafe); See also, State v. Schuck, 913 So.2d 69 (Fla. 4th DCA 2005)(holding stop of vehicle with hole the size of a fist in a red lens cover of the tailight which was covered with tape was distinguishable from a crack in the lens cover and valid)[4]

[4]Petitioner suggests that the Schuck court receded from Burke and dispensed with the requirement that equipment must cause a safety problem to justify a detention. Respondent disagrees. The Schuck court considered a lens cover with a hole in it the size of a fist and covered with tape. It distinguished Burke as well as Doctor and Frierson and thus, employed a case by case analysis based upon the state of the particular equipment at issue:

> We reject Shuck's argument that an affirmance in this case is required under Doctor v. State, 596 So.2d 442 (Fla.1992), Frierson v. State, 851 So.2d 293 (Fla. 4th DCA 2003),[footnote omitted] and Johnson v. State, 888 So.2d 122 (Fla. 4th DCA 2004). Each of those cases held unlawful a stop based solely on a crack in the plastic lens covering the taillight of the defendant's vehicle. In the instant case, in contrast, the officer observed a hole the size of a fist in the red lens covering the taillight. Similarly, we distinguish our recent opinion in State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005). In Burke, we concluded without discussion that the trial At bar, the trial court determined that the state had not sustained its burden of establishing that the condition of the

windshield was unsafe so as to endanger any person or property. T40 The Court made the following factual findings:

> Deputy Carter testified that he didn=t know where it was as did Detective White. The only evidence is that it was able to be seen from one car length away, but the size and the location of it couldn=t be determined. While Deputy Carter testified to its shape in some way, I can=t find based upon his testimony that this crack resulted in any inherent danger to the driver or occupants of the vehicle nor to anyone else. Nor was it an impediment to the driver=s vision such that it would cause a safety problem for anyone else.
>
> court properly applied Frierson in finding that although there was a crack in the red lens which was emitting white light, the red lens still partially covered the taillight and the stop for the cracked taillight was improper.

913 So. 2d at 71. Further, as this Court recognized, appellate courts generally do not recede from their opinions *sub silentio.* Puryear v. State, 810 So.2d 901, 905 (Fla.2002). And one panel generally does not overrule the decision of another panel of the same district court of appeal without undergoing *en banc* review.

T 40 The trial court=s conclusions come to this court clothed in a presumption of correctness. McNamara v. State, 357 So. 2d 410 (Fla. 1978). Factual findings are afforded great deference by the appellate court. Johnson v. State, 438 So.2d 774 (Fla. 1983); Connor v. State, 803 So.2d 598, 605 (Fla. 2001) In testing the accuracy of the trial court=s conclusions on questions of facts, this Court should interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in the light most favorable to those conclusions. Cameron v. State, 112 So. 2d 864, 869 (Fla. 1st DCA 1959); Rodriquez v. State, 189 So. 2d 656, 660 (Fla. 3d DCA 1966). Since the trial court granted the motion to suppress, the record should be viewed in the light most favorable to the successful movant, the Respondent-Defendant with all conflicts in the evidence resolved in his favor. State v. Nova, 361 So. 2d 411 (Fla. 1978); Brown v. State, 397 So. 2d 320 (Fla. 2d DCA 1981).

Here, the trial court=s factual findings are supported by the evidence. While both deputies observed a crack, neither could describe its location. Deputy Carter was not certain whether it was on the passenger or driver side of the vehicle. T 6 Further, neither deputy could specifically recall its appearance. After being unable to describe the crack on both direct and cross-examination T 6,14, Deputy Carter gave it one last effort on re-direct examination:

> I don=t recall it being like a bullseye. **I think** it was more of a line with smaller lines coming off of it. **But I mean, I made**

> **so many stops on cracked windshields and seen so many cracked windshields, I didn=t note it in the report. So I just remember it was cracked.**

T 15 On re-cross examination, he agreed that he did not have any recollection of this particular crack. T 16

Based upon the lack of any specificity, the trial court=s determination that the state had not met its burden of showing that the windshield was in an unsafe condition so as to endanger others is supported by the record[5]. This factual finding should be paid appropriate deference on appeal. See, Ivory v. State, 898 So.2d 184 (Fla. 5th DCA 2005)(trial court=s factual finding based upon testimony of witnesses and review of photographs were supported by deputies testimony that there was a substantial crack, not a hairline crack or chip which rendered vehicle unsafe accorded great deference).

Petitioner suggests that the deputies= observation of the crack entitled them to stop the vehicle to Ainvestigate whether the crack actually obstructed respondent=s vision.@ Petitioner=s Brief at p. 13. Without giving any consideration to the size and location of the crack, allowing law enforcement to stop a vehicle simply because there is a crack is

[5]In the trial court, the state did not, as it does here, argue that any cracked windshield renders a vehicle unsafe nor did it endeavor to show that Respondent=s windshield rendered his vehicle structurally unsafe. Petitioner=s Brief at p. 16 The state did not present expert testimony nor were any treatises or articles presented for the trial court=s consideration. Therefore, any claim that all cracked windshields are unsafe as a matter of law was not litigated below and is unsupported by the instant record. See e.g., Arroyo-Munoz v. State,744 So.2d 536, 537 (Fla. 2d DCA 1999)(A a prosecutor may not give unsworn testimony regarding facts outside the record@)

tantamount to permitting a stop based upon a hunch. However, more than mere suspicion is necessary to render a stop lawful. Popple v. State,626 So.2d 185, 186 (Fla. 1993) Further, it allows the legality of the stop to turn upon what it discovered after the detention. In Fourth Amendment jurisprudence, however, the ends can not justify the means. Therefore, this assertion is contrary to the Fourth Amendment to the United States Constitution and Article I Section 12 of the Florida Constitution.

Section 316.610(2) which permits the officer to give written notice that immediate repair or adjustment is required if equipment is unsafe or equipment is missing is not rendered meaningless. The officer is empowered by the legislature to take this action so long as the initial stop of the vehicle is authorized by law and comports with the State and Federal Constitutions.

In sum and as both the trial court and the Fourth District Court of Appeal held, the deputies did not have reasonable cause to stop Respondent=s vehicle pursuant to Section 316.610 Florida Statute. First, the trial court=s factual finding that the vehicle was not in such unsafe condition as to endanger any person or property is supported by the record and must be affirmed. Second, the vehicle did not lack equipment in proper condition and adjustment as required in chapter 316 since the vehicle was equipped with a windshield which complied with the requirements of Section 316.2952 Florida Statute (2003). Third, there was no claim that Respondent drove a vehicle that contained equipment in violation of chapter 316. Therefore, the decision of the Fourth District

Court of Appeal in State v. Burke, 902 So.2d at 955 must be upheld by this Court.

Finally, regarding Petitioner=s effort to have this Court review the propriety of the trial court=s finding that the officer was not justified in stopping Respondent=s vehicle based upon the cracked tail light, it should be noted that this issue is outside the scope of the certified conflict and need not be reached by this Court. See, Ross v. State, 601 So. 2d 1190, 1193 (Fla. 1992)(AThe remaining issues lie beyond the scope of the issue for which jurisdiction lies, and we see no need to exercise our prerogative to reach them.@); Salters v. State, 758 So. 2d 667, 669 n.5 (Fla. 2000) (AThese additional claims are clearly outside the scope of the certified conflict issue, and we decline to address them.@); Welsh v. State, 850 So. 2d 467, 471 n.6 (Fla. 2003) (AWe decline to address the other issues raised by Welsh that are not the basis of our jurisdiction.) Wood v. State, 750 So. 2d 592, 595 n. 3 (Fla. 1999) (declining to address issues beyond the scope of the certified conflict); Raford v. State, 828 So. 2d 1012, 1021 n.12 (Fla. 2002) (AWe decline to address the other issues raised by petitioner because they are beyond the scope of the certified conflict in this case.@); Barnett v. Barnett, 768 So. 2d 441 n.1 (Fla. 2000) (AWe decline to address petitioner's second issue on appeal because it is beyond the scope of the certified conflict in this case.@); Jones v. State, 759 So. 2d 681, 682 n.1 (Fla. 2000) (AFurther, we decline to address Jones' ineffective assistance of trial counsel claim here, as the Third District fully addressed that claim in the decision below and the claim clearly is outside the scope of the certified conflict before us.@); Williams v. State, 759 So. 2d 680 n.1 (Fla. 2000)

(AMoreover, we decline to address Williams' claim challenging the Third District's interpretation of section 775.084(1)(c)1., Florida Statutes (1997), which is clearly outside the scope of the certified conflict issue.@).

Should this Court determine that re-consideration of Doctor v. State, 596 So.2d at 442 is necessary to the resolution of the issue before the Court, it was correctly decided and applied to the instant cause as discussed above.

The Fourth District relied upon Doctor in Frierson v. State, 851 So.2d 293 (Fla. 4th DCA 2003), reversed on other grounds, State v. Frierson, Slip. Op. 2006 WL 300660 (Fla. Feb. 09, 2006) to hold in Respondent=s favor. In State v. Frierson, Slip. Op. 2006 WL 300660, this Court declined to reached the issue of the impropriety of the stop based upon a cracked tail lens cover. Doctor and the Fourth District=s decision in Frierson determining that the stop based upon the crack in the lens cover was unlawful supplied the basis for the trial court=s ruling which was affirmed in Burke.

Factually, both tail lights were operable. T 13 The right lens cover was broken so that white light was visible. T 6 However, the lens cover was not removed completely. Rather, it was cracked but Apartially covering@ the area. T 19 Based upon the evidence, the court made the factual finding that while white light was emitting from a tail light, the lens cover was not completely removed. Since the light was partially covered by a red lens cover, no infraction occurred:

With regard to the cracked taillight, based upon the information that=s given B

> and again, the State does have the burden **B** I do not find in fact that this car as a result of the cracked taillight violated the statute or that the driver was violating the statute, because there were two taillights, one was partially covered in red. Ms. Coward [defense counsel] is right. While there was white light being emitted, the State has not overcome the burden to show that there weren=t two red operating taillights.

T39 Approval of the trial court=s application of the law to the facts is warranted based upon this excerpt from Doctor:

> It was the reflector that was cracked, rather than one of the lights. Trooper Burroughs confirmed that the vehicle had taillights shining on each side of the rear of the vehicle, despite the **cracked lens cover**, at the time of the stop. Thus, as Trooper Burroughs conceded, the vehicle had "at least two taillamps" in working order when it was pulled over and was not in violation of the law.... [A] reasonable officer would have known that Doctor's vehicle was in compliance with the law since red taillights were visible on both ends of the vehicle.

Doctor v. State, 596 So. 2d at 446-447. Therefore, neither the Circuit Court nor the Fourth District went astray in holding that observation of the cracked lens cover did not support the traffic stop since the light itself was operable.

Petitioner attempts to distinguish Doctor maintaining that it concerned a cracked reflector while the instant case involves a cracked lens cover. Petitioner=s Brief at page 19-20. This is a distinction without a difference because as the above quote illustrates, the term Areflector@ was used interchangeably with Alens cover@.

In Doctor, just as in the instant case, the state did not present evidence that the light itself was inoperable. The lens covers or reflector was cracked but not removed completely.

Since a portion of the red lens covered the light, one can infer red light shone through even though white light also emitted. Therefore, as in Doctor, the equipment was in compliance with the law which requires rear mounted tail lamps that emit a red light. ' 316.221(1) Fla. Stat. The trial court=s ruling affirmed by the Fourth District should therefore also be affirmed by this Court.

Since the trial court correctly held that the windshield and taillights of Respondent=s vehicle were in compliance with Florida law, the deputies did not have an objective basis for the stop. The decision of the Fourth District Court of Appeal in State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005) which approved the ruling of the trial court must be affirmed by this Court.

CONCLUSION

Based on the foregoing argument and the authorities cited, Respondent requests that this Court affirm the opinion of the Fourth District Court of Appeal in State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of March, 2006.

_____

Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2), this___ day of March, 2006.

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Assistant Public Defender