IN THE SUPREME COURT OF FLORIDA

TOMESHA MARIE HOWARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC05-1486
L.T. No. 1D04-5295

ON PETITION FOR REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 11

ARGUMENT 13

ISSUE 13

WHETHER, AS A MATTER OF LAW, UNDER SECTIONS 316.2952 AND 316.610, FLORIDA STATUTES, THE LEGISLATURE INTENDED THAT A CRACK IN THE WINDSHIELD OF AN AUTOMOBILE WOULD CONSTITUTE A TRAFFIC INFRACTION WHICH WOULD AUTHORIZE A LAW ENFORCEMENT OFFICER TO STOP AND INSPECT THE VEHICLE REGARDLESS OF WHETHER THE CRACK POSED A DANGER TO ITS SAFE OPERATION. (Restated) 13

CONCLUSION 40

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE 41

CERTIFICATE OF COMPLIANCE 42

APPENDIX

TABLE OF CITATIONS

PAGE(S)

FEDERAL CASES

Devenpeck v. Alford,
543 U.S. 146,
125 S.Ct. 588, 160 L.Ed.2d 537 (2004) 39

Maryland v. Wilson,
519 U.S. 408,
117 S.Ct. 882, 137 L.Ed.2d 41 (1997) 32

Ornelas v. United States,
517 U.S. 690,
116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) 14, 38, 39

Whren v. United States,
517 U.S. 806,
116 S.Ct. 1769, 135 L.Ed.2d. 89 (1996) . 24, 29, 32, 33, 39

FLORIDA CASES

B.Y. v. Dep't of Child. & Fams.,
887 So. 2d 1253 (Fla. 2004) 13

Bernie v. State,
524 So. 2d 988 (Fla. 1988) 15

Butler v. State,
706 So. 2d 100 (Fla. 1st DCA 1998) 14, 38, 39

Clines v. State,
912 So. 2d 550 (Fla. 2005) . . . 13, 17, 20, 25, 28, 29, 31, 39

Coleman v. State,
723 So. 2d 387 (Fla. 2d DCA 1999) 32, 33, 34

Dillbeck v. State,
882 So. 2d 969 (Fla. 2004) 14, 15, 38, 39

Doctor v. State,
596 So. 2d 442 (Fla. 1992) . . . . *passim*

Doctor v. State,
573 So. 2d 157 (Fla. 4th DCA 1991) 22

Frierson v. State,
851 So. 2d 293 (Fla. 4th DCA 2003),
rev. granted, 870 So. 2d 823 (Fla. 2004) 35, 36

Harris v. State,
761 So. 2d 1186 (Fla. 4th DCA 2000) 14, 38, 39

Health Options, Inc. v. Agency for Health Care Admin.,
889 So. 2d 849 (Fla. 1st DCA 2004) 14

Hilton v. State,
901 So. 2d 155 (Fla. 2d DCA 2005)(*en banc*) . . . . *passim*

Hilton v. State,
29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004) . . 7, 8, 16

Ivory v. State,
898 So. 2d 184 (Fla. 5th DCA 2005) 38, 39

K.G.M. v. State,
816 So. 2d 748 (Fla. 4th DCA 2002) 32, 33, 34

Maddox v. State,
2006 Fla. LEXIS 6, Case. No. SC03-2110 (Fla. Jan. 12, 2006) . 20

McLaughlin v. State,
721 So. 2d 1170 (Fla. 1998) 17

Perez v. State,
620 So. 2d 1256 (Fla. 1993) 15

Smith v. State,
735 So. 2d 570 (Fla. 2d DCA 1999) 32, 33, 39

State v. Atkinson,
831 So. 2d 172 (Fla. 2002) 27, 31

State v. Breed,
30 Fla. L. Weekly D1457 (Fla. 5th DCA June 10, 2005) . . 38, 39

State v. Burke,
902 So. 2d 955 (Fla. 4th DCA 2005) . . . . *passim*

State v. Gandy,
766 So. 2d 1234 (Fla. 1st DCA 2000) 15

State v. Goode,
830 So. 2d 817 (Fla. 2002) 34, 35

State v. Howard,
909 So. 2d. 390 (Fla. 1st DCA 2005) . . . . *passim*

State v. Nichols,
892 So. 2d 1221 (Fla. 1st DCA 2005) 27

State v. Rife,
789 So. 2d 288 (Fla. 2001) 17, 20, 25, 28, 29, 31, 39

State v. Schuck,
913 So. 2d 69 (Fla. 4th DCA 2005) 36

Thomas v. State,
644 So. 2d 597 (Fla. 5th DCA 1994) 32, 33, 34

FLORIDA CONSTITUTION

Art. I, § 12, Fla. Const. 15, 24, 37, 38, 39

Art. V, § 3(b)(4), Fla. Const. 13

FLORIDA STATUTES

§ 316.221, Fla. Stat. (1987) 21, 22, 23, 25

§ 316.221, Fla. Stat. (2004) 24, 29, 36

§ 316.2225, Fla. Stat. (1987) 22, 23, 24, 25

§ 316.2225, Fla. Stat. (2001) 35

§ 316.2225, Fla. Stat. (2004) 24

§ 316.225, Fla. Stat. (1987) 22, 23, 24, 25

§ 316.2225, Fla. Stat. (2001) 35

§ 316.2225, Fla. Stat. (2004) 24

§ 316.226, Fla. Stat. (1987) 23, 25

§ 316.226, Fla. Stat. (2001) 35

§ 316.226, Fla. Stat. (2004) 24

§ 316.251, Fla. Stat. (2005) 30, 31

§ 316.272, Fla. Stat. (2004) 19

§ 316.2952, Fla. Stat. (2004) 19, 26, 28, 31, 37, 38, 39

§ 316.2956, Fla. Stat. (2004) 26

§ 316.415, Fla. Stat. (1987) 23

§ 316.415, Fla. Stat. (2004) 24

§ 316.610, Fla. Stat. (1987) 20, 23, 24, 25

§ 316.610, Fla. Stat. (2001) 35

§ 316.610, Fla. Stat. (2004) . . . . *passim*

FLORIDA RULES OF APPELLATE PROCEDURE

Fla. R. App. P. 9.030(a)(2)(A)(vi) 13

OTHER

The Bluebook, A Uniform System of Citation, 16th ed. (1997) . 33

Webster’s Third New Int’l Dictionary, Unabridged (1971) . . . 27

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Tomesha Marie Howard, the Appellee in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PBM" will designate Petitioner's brief on the merits, followed by any appropriate page number.

The record on appeal consists of 2 volumes, which will be referenced by Roman numeral according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number.

"Court Exhibit 1" will be referenced as such.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State rejects Petitioner's statement of the case and facts and provides the following as relevant to the issue presented:

Petitioner, Tomesha Marie Howard, was a passenger in a vehicle stopped on April 16, 2004, for a visibly cracked windshield by Alachua County Deputy Sheriff Joe Hood. (I 1-2). According to the arrest report, following this stop, items of contraband were discovered inside the vehicle and on Petitioner's person. (I 1-2). By five count Information filed May 20, 2004, Petitioner was charged with one count of trafficking in hydrocodone and oxycodone, one count of possession of cocaine with intent to sell or deliver, one count of introducing contraband in to a jail, one count of possession of not more than 20 grams of cannabis, and one count of possession of drug paraphernalia. (I 6-7). All counts were alleged to have been committed on April 16, 2004. (I 6-7). Petitioner entered a written plea of not guilty on May 27, 2004. (I 11).

On November 2, 2004, Petitioner filed a motion to suppress all items of contraband, as well as statements obtained as a result of the traffic stop on grounds that the initial stop was unlawful. (I 19-22). On November 19, 2004, an evidentiary hearing on Petitioner's motion to suppress was held. (II 1-38). At this hearing, both Petitioner and the State agreed that the sole issue presented was "whether or not the window crack is sufficient for the stop." (II 3-5).

For the State, Deputy Hood testified that on April 16, 2004, he was traveling east on State Road 20. (II 7-8). While passing a vehicle, Deputy Hood noticed that its windshield had a large crack that "looked like it was spidered, and looked like an object maybe had hit the window and shattered it." (II 8-9, 11). It was because of this cracked front windshield that Deputy Hood then stopped the vehicle and came into contact with Petitioner. (II 8-10). Deputy Hood testified that in his report he described the windshield as being "severely cracked" meaning that it was "extremely noticeable, and that it can cause some hazard." (II 10). Upon observing this cracked windshield, Deputy Hood positioned himself behind the vehicle, "called in a traffic stop," and stopped the vehicle. (II 10-11). Deputy Hood could not recall the "total size" of the crack but knew it was "[l]arge enough that [he] could see it from where [he] was at." (II 11).

On cross-examination, Deputy Hood testified that he could not describe the crack in the windshield during deposition and "can't describe exactly what the crack looked like today" but he knew it was cracked. (II 12-13). On the trial court's inquiry, Deputy Hood further testified that it was hard for him to remember the location of the crack in the windshield and what he could remember was "somewhat vague," but he thought it "was kind of in the center close to the driver." (II 14-15). While it

was hard for Deputy Hood to explain the severity of the crack, he testified that from where he was sitting, "it was a severe enough crack that [he] could see a crack." (II 15). Still on the trial court's inquiry, Deputy Hood testified that after the conclusion of the traffic stop, he thought that the sister of one of the parties was allowed to drive the vehicle home. (II 17). In response to the trial court's questioning, Deputy Hood further testified that he had no reason other than the cracked windshield to stop the vehicle. (II 19-20).

For the defense, Petitioner's father, Tommy Howard, Jr., testified that he was familiar with Petitioner's vehicle prior to April 16, 2004. (II 22). Mr. Howard testified that the vehicle's windshield "had a hairline crack in it" for a number of years and did so in April of 2004. (II 23). Mr. Howard described this crack as going from "just about to where the rear view mirror is in the car, but it did not protrude past that." (II 23). At the behest of the trial court, Mr. Howard drew a picture of the location and size of the crack in the windshield, describing it as being on the passenger side and "roughly, say, 14 inches long." (II 23-24, 27). This drawing by Mr. Howard was entered into the record as Court Exhibit 1. (II 28; Court Exhibit 1). Mr. Howard stated that there was only one crack and would not have interfered with one's vision or ability to operate the vehicle. (II 25). Mr. Howard testified that the

windshield was replaced "[p]robably within a day or two after that." (I 26).

Arguing in opposition to Petitioner's motion to suppress, the State contended that section 316.610, Florida Statutes, "states 'or that its equipment is not in proper adjustment or repair.'" (II 29). Based on this portion of the statute, the State argued:

> Your Honor, a 14-inch crack on the window is the smallest crack that could possibly be there from the evidence presented. The State contends that the crack was actually larger than that. But even in a light most favorable to the Defense, it is a 14-inch crack in the center of the window. And it's the State's position that that size of a crack makes the windshield not in proper adjustment or repair. Therefore, there is a nonmoving traffic violation on the vehicle. Therefore, the officer had probable cause for the stop.

(II 29).

In response, Petitioner argued that the evidence showed that the crack was "not an unduly hazardous condition" and under the case law of "Hilton Vs. State,"[1] the statute "requires only that a vehicle have a windshield." (II 29-30). Petitioner argued that under "Hilton Vs. State," the statute did not require that the windshield "be perfectly intact." (II 30). Because the weight of the testimony was that this crack was not unsafe, Petitioner argued that "the stop was not with probable

[1] Hilton v. State, 29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004).

cause for a traffic infraction, and therefore not lawful." (II 30).

The State provided the trial court with other case law which it contended "stand for the proposition that a cracked windshield is a legal basis for a stop." (II 5, 30-32). Based on these authorities, the State further argued that the "type of crack, the size of the crack, or anything else" need not be examined because "a cracked windshield in and of itself is sufficient ...." (II 31-32). In addition, the State reiterated its earlier argument that the Florida statute it had referenced earlier "only requires that the equipment is not in proper adjustment or repair" and that "[a] cracked window is not in proper repair or adjustment." (II 32).

Relying on "Hilton," Petitioner again argued that Florida statute 362.2952 does not make it illegal to drive with a cracked windshield." (II 32). Accordingly, Petitioner contended that "the blanket statement that driving with a cracked windshield is a violation is -- is not a true legal statement."[2] (II 32). Petitioner maintained, "Hilton, I think, lays out the law as it is in Florida and is on point." (II 32).

The trial court then distinguished each of the cases upon which the State relied, holding:

[2] The transcript of proceedings incorrectly identifies the prosecutor as presenting this argument.

The only case that seems to be at all on point is the one that both of you gave me, which is the Hilton case. Hilton V. State.[[3]] This is a two-to-one decision. The dissent basically comes down on the side of the State, and the majority opinion comes down on the side of the Defendant. The majority opinion is -- I think is the controlling precedent here, and that is that it's not enough for there to be a crack, but indeed the cracked windshield would have to be an unsafe condition and create a traffic hazard.

And Deputy Hood is honest enough and frank enough to say that he doesn't today remember much about it, and that because of a malfunctioning or nonfunctioning camera, he didn't have a photograph. Deputy Hood knows what the lawyers know, and because of his training and what I know as a judge, and that is that in a motion to suppress evidence, if it's a warrantless search, the State, the police have the burden of proof. And thus as a trained professional, it's his responsibility to gather the evidence and preserve the evidence, which is done with a camera. There were at least two on the scene, or should have been. And that evidence wasn't gathered.

Frankly, that would sure make it easy for us if we had a photograph. Because if there was a photograph that demonstrated that the cracked windshield created a safety issue, there would be no problem. If there was a photograph that indicated it didn't create a safety issue, there'd be no problem.

Based on his lack of memory and the lack of evidence and based upon the uncontradicted testimony of Mr. Howard, who testified that he's very familiar with this car and observed it at the time of the incident or soon following the incident, and that the crack was a 14-inch hairline crack basically on the passenger side, and in the diagram that he drew for me, actually above eye level, this court finds as a matter of fact that it did not create a safety issue. And no reason to believe that the vehicle was unsafe, based on the evidence presented.

And consequently, based on the evidence preserved and presented, I cannot find that the -- that the stop was valid. And based upon the precedent of Hilton, which discusses exactly this issue and says that I'm obligated to rule in favor of the Defendant. And I will follow the Hilton precedent and say to Deputy Hood, one, thanks for your candor and your honesty. And two, get a camera that

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[3] Hilton v. State, 29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004).

> works and keep it in your car and take a picture, and this problem is solved.

(II 34-36).

The trial court orally granted Petitioner's motion to suppress, while stating in its November 22, 2004, written order: "For the reasons cited in the record, and upon the authority of Hilton v. State, 2004 WL 1358996 [29 Fla. L. Weekly D1475] (Fla. App. 2 Dist, June 18, 2004), said motion be and the same is hereby **GRANTED**." (I 23-24; II 36)(bold in original). The State filed notice of appeal on November 29, 2004. (I 26).

By written opinion, the First District Court of Appeal reversed the order of the trial court granting Petitioner's motion to suppress. State v. Howard, 909 So. 2d. 390 (Fla. 1st DCA 2005). This decision is attached hereto in an appendix. In so ruling, the Court in Howard explained:

> * * *
>
> After the instant proceedings concluded in the trial court, the Second District Court reviewed *Hilton* I *en banc*, withdrew the original decision, and substituted an opinion affirming *Hilton*'s conviction. *See Hilton* II, 901 So. 2d 155, 30 Fla. L. Weekly at D453-54. *Hilton* II construed sections 316.2952 and 316.610(1) as establishing that the officers had lawfully stopped *Hilton* based on the cracked windshield because such an equipment violation is a noncriminal traffic infraction. The court stated: "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." 901 So. 2d at 157, Id. at D454. Recognizing that this issue impacts law-enforcement policies throughout Florida, the court in *Hilton* II certified a question as a matter of great public

importance. *See* 901 So. 2d at 160, *id*. at D455; Fla. R. App. P. 9.030(a)(2)(A)(v).

More recently, the panel in *State v. Burke*, 902 So. 2d 955, 30 Fla. L. Weekly D1435 (Fla. 4th DCA June 8, 2005), reached a result contrary to *Hilton* II by affirming an order suppressing evidence of drugs retrieved from *Burke*'s pocket after an officer stopped Burke for having a cracked windshield and a partially broken taillight. *See Id*. The Fourth District Court observed that the correctness of *Hilton* II could depend on whether *Doctor v. State*, 596 So. 2d 442 (Fla. 1992), remains the law after *Whren*, 517 U.S. at 806. * *Burke* set out the issue as follows:

> 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*.

902 So. 2d at 957, 30 Fla. L. Weekly at D1436. The Fourth District Court certified direct conflict with *Hilton* II. *See id*.

> * We are constitutionally charged to construe the people's right to protection from unreasonable searches and seizures in conformity with the federal Fourth Amendment, "as interpreted by the United States Supreme Court." *See* Art. I, § 12, Fla. Const.

Given our agreement with the reasoning in Hilton II, we conclude that Deputy Hood had an objective reasonable

> suspicion to stop Appellee's car and inspect the windshield, so that the evidence discovered after the stop should not have been suppressed. *See Ivory v. State*, 898 So. 2d 184 (Fla. 5th DCA 2005) (affirming denial of motion to suppress, where deputy had reasonable suspicion to conduct traffic stop and inspect cracked windshield observed while driving behind defendant's vehicle); *State v. Breed*, 2005 Fla. App. LEXIS 8787, 30 Fla. L. Weekly D1457 (Fla. 5th DCA June 10, 2005). Accordingly, we REVERSE the trial court's suppression order and REMAND WITH INSTRUCTIONS to deny the motion to suppress. We certify direct conflict with *Burke*.

Id. at 393-394. Based on Howard's certification of direct conflict with State v. Burke, 902 So. 2d 955 (Fla. 4th 2005), Petitioner now seeks review of the First District's decision in this Court.

SUMMARY OF ARGUMENT

Following the reasoning of the Second District Court's *en banc* majority in Hilton v. State, *infra*, the First District Court of Appeal correctly held in the instant case that under sections 316.2952 and 316.610, Florida Statutes, the Legislature intended that a crack in the windshield of an automobile would constitute a traffic infraction regardless of whether it posed any immediate hazard to its operation. Therefore, the First District's determination that section 316.610 authorized the stop of the vehicle in which Petitioner was a passenger, based solely on its cracked windshield, was also correct.

Opposite the holding of the First District, while expressly relying on Judge Northcutt's dissent in Hilton, the Fourth District Court of Appeal in State v. Burke, *infra*, held that under this Court's decision in Doctor v. State, *infra*, a mere visible crack in a windshield is not proscribed by law unless can be shown to pose a "safety problem." However, contrary to the reasoning of Judge Northcutt, adopted by the Fourth District in Burke and on which Petitioner relies in the instant case, the judgment of the First District is entirely consistent with the analysis and reasoning of Doctor.

In Doctor, this Court held that the stop of an automobile pursuant to section 316.610 was unlawful because the cracked equipment on the vehicle that prompted the stop was not

equipment required by law. Therefore, there was no traffic infraction. In the instant case, however, because a windshield is equipment that is specifically required by law, then under the plain language of section 316.610, a visible crack in the windshield in and of itself will authorize a law enforcement officer to stop and inspect that vehicle.

Because the judgment and reasoning of the Second District's *en banc* majority in Hilton was correct, the holding of the First District in the instant case, having expressly followed Hilton's reasoning, was also correct. Accordingly, the First District's decision in Howard reversing the trial court's order granting Petitioner's motion to suppress should be affirmed and the conflicting decision of the Fourth District in Burke should be disapproved.

ARGUMENT

ISSUE

WHETHER, AS A MATTER OF LAW, UNDER SECTIONS 316.2952 AND 316.610, FLORIDA STATUTES, THE LEGISLATURE INTENDED THAT A CRACK IN THE WINDSHIELD OF AN AUTOMOBILE WOULD CONSTITUTE A TRAFFIC INFRACTION WHICH WOULD AUTHORIZE A LAW ENFORCEMENT OFFICER TO STOP AND INSPECT THE VEHICLE REGARDLESS OF WHETHER THE CRACK POSED A DANGER TO ITS SAFE OPERATION. (Restated)

Jurisdiction

Article V, Section 3(b)(4), of the Florida Constitution provides, as relevant: "[The Supreme Court m]ay review any decision of a district court of appeal … that is certified by it to be in direct conflict with a decision of another district court of appeal." See Fla. R. App. P. 9.030(a)(2)(A)(vi). In State v. Howard, 909 So. 2d. 390 (Fla. 1st DCA 2005), the First District Court certified direct conflict with the decision of the Fourth District in State v. Burke, 902 So. 2d 955 (Fla. 4th DCA 2005). Accordingly, this Court has jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Standard of Review

"The standard of appellate review on issues involving the interpretation of statutes is de novo." Clines v. State, 912 So. 2d 550 (Fla. 2005), quoting, B.Y. v. Dep't of Child. & Fams., 887 So. 2d 1253, 1255 (Fla. 2004). Under the *de novo* standard of review, the appellate court pays no deference to the

trial court's ruling; rather, the appellate court makes its own determination of the legal issue. See Health Options, Inc. v. Agency for Health Care Admin., 889 So. 2d 849, 851 (Fla. 1st DCA 2004). Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. However, a trial court's factual findings on which its decision of law is based will be sustained and given deference by the appellate court if supported by competent substantial evidence. See *e.g.* Dillbeck v. State, 882 So. 2d 969, 972-973 (Fla. 2004)(addressing a mixed question of law and fact).

Furthermore, as stated in Butler v. State, 706 So. 2d 100 (Fla. 1st DCA 1998):

> Review of a Florida motion to suppress is a mixed question of law and fact, yoked to federal law. Art. I, § 12, Fla. Const.; *Perez v. State*, 620 So. 2d 1256 (Fla. 1993). The standard of review for the trial judge's factual findings is whether competent substantial evidence supports the judge's ruling. *Caso v. State*, 524 So. 2d 422 (Fla. 1988). The standard of review for the trial judge's application of the law to the factual findings is *de novo*. *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

Id. at 101. Thus, an appellate court must defer "to the factual findings of the trial judge that are supported by competent substantial evidence," but consider for itself "whether as a matter of law those facts amount to a reasonable suspicion or probable cause." Harris v. State, 761 So. 2d 1186, 1188 (Fla. 4th DCA 2000); see Ornelas v. United States, 517 U.S. 690, 699,

116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996); Dillbeck, *supra*. In doing so, the courts of this state are "constitutionally required to interpret search and seizure issues in conformity with the Fourth Amendment of the United States as interpreted by the United States Supreme Court." State v. Gandy, 766 So. 2d 1234, 1235 (Fla. 1st DCA 2000), citing Art. I, § 12, Fla. Const., Perez v. State, 620 So. 2d 1256 (Fla. 1993), and Bernie v. State, 524 So. 2d 988 (Fla. 1988).

Merits

The First District Court of Appeal correctly held that under sections 316.2952 and 316.610, Florida Statutes (2004), a visible crack in the windshield of an automobile is a violation of Florida law which will permit the stop and inspection of that vehicle by law enforcement pursuant to section 316.610, notwithstanding whether the crack creates any immediate hazard to its operation. State v. Howard, 909 So. 2d. 390 (Fla. 1st DCA 2005)(hereinafter Howard).

The language of section 316.610, Florida Statutes, is plain and unambiguous. The specific point of certified conflict between the instant case and State v. Burke, 902 So. 2d 955 (Fla. 4th DCA 2005)(hereinafter Burke), as well as Burke and the *en banc* majority in Hilton v. State, 901 So. 2d 155 (Fla. 2d DCA

2005)(hereinafter Hilton II),[1] arises from Judge Northcutt's dissenting interpretation of section 316.610 in Hilton II based on this Court's decision in Doctor v. State, 596 So. 2d 442 (Fla. 1992)(hereinafter Doctor). Although in expressly adopting Judge Northcutt's reasoning, the Burke Court found "that the majority opinion in *Hilton* [II] is inconsistent with *Doctor*," it nevertheless conceded, "If the majority opinion in *Hilton* [II] is correct, it would follow that the stop in the present case for the crack in the windshield was proper." Burke at 956-957.

Opposite Burke, in the instant case, the First District Court expressly agreed with and relied upon the reasoning of the *en banc* majority in Hilton II in reaching its decision that is now before this Court. Howard at 390, 393-394. For those reasons discussed below, because Judge Northcutt's reasoning in his Hilton II dissent is based on an erroneous interpretation and application of Doctor, the reasoning of the Hilton II majority, on which the holding of the First District in the instant case is grounded, was correct. Accordingly, Howard, by way of the majority decision in Hilton II, should be affirmed and Burke disapproved.

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[1] Having granted rehearing *en banc*, the Second District withdrew the previous panel decision in Hilton v. State, 29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004)(Hilton I). Consequently, Hilton I is not published in the Southern Reporter. Notably, the only dissent in Hilton II was comprised of the two judge majority panel in Hilton I.

"'When construing a statutory provision, legislative intent is the polestar that guides' the Court's inquiry." State v. Rife, 789 So. 2d 288, 292 (Fla. 2001), quoting, McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998). "Legislative intent is determined primarily from the language of a statute." Rife, *supra* (citations omitted). "[T]he plain meaning of statutory language is the first consideration of statutory construction." Clines v. State, 912 So. 2d 550 (Fla. 2005)(citations omitted). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Id. (citations omitted).

In the present case, the plain meaning of the statutory language in section 316.610 is unambiguous and definite. Clearly expressing its intent, the Legislature has provided:

> 316.610. **Safety of vehicle; inspection**. -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 <u>its equipment is not in proper adjustment or repair</u>, 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 <u>*required* part or equipment</u> is not present or <u>is not in proper repair and adjustment</u>, 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.

§ 316.610, Fla. Stat. (2004)(underscore & italics added).

Thus, as relevant to this cause, the plain language of section 316.610 expressly provides that regardless of whether it is equipment required by Chapter 316, if an officer has reasonable cause to believe it is "in such unsafe condition as to endanger any person or property," then she may stop and inspect that vehicle. § 316.610, Fla. Stat. (2004). This point is clearly evident by the Legislature's reference, as an example, to "marginally worn tires" in subsection (2). <u>Id</u>. Elsewhere, Chapter 316 does not address the wear of tires at all, but by its inclusion in section 316.610, the Legislature has recognized that tire wear may render the condition of a vehicle unsafe. In this circumstance, section 316.610

authorizes an officer with an objective reasonable belief that such condition is unsafe to stop and inspect that vehicle. Id.

Independent of this provision, the plain language of section 316.610 also expressly provides that where it is equipment *required* by Chapter 316 that is involved, an officer may stop and inspect that vehicle if she has reasonable cause to believe it is not "in proper adjustment or repair." Id. This point is also clearly evident by the Legislature's reference, as an example, to tailpipes, mufflers, and windshield wipers. Id. Each of these pieces of equipment are required by law. See § 316.272, Fla. Stat. (2004)(tailpipe and muffler); § 316.2952(3)&(4), Fla. Stat. (2004)(windshield wipers). Thus, where statutorily required equipment is at issue, section 316.610 authorizes an officer to stop and inspect that vehicle notwithstanding whether the damage or defect to that equipment poses an immediate safety hazard. Id.

Under subsection (2), where, after stopping and inspecting the vehicle, the officer finds that its continued operation would present an "unduly hazardous" condition, the officer "may require the vehicle to be immediately repaired or removed from use." § 316.610(2), Fla. Stat. (2004). However, if, after inspection, the officer finds that in spite of the violation, "continued operation would not present unduly hazardous operating conditions, ... the officer shall give written notice

to require proper repair and adjustment of same within 48 hours, excluding Sunday." Id.

Thus, read as a whole, the meaning and purpose of section 316.610 is clear and definite. See Maddox v. State, 2006 Fla. LEXIS 6, *9, Case. No. SC03-2110 (Fla. Jan. 12, 2006); Clines; Rife, *supra*. As its plain language reflects, while section 316.610 provides law enforcement with broad, general authority to stop and inspect a vehicle where there is "reasonable cause to believe" that it is "in such unsafe condition as to endanger any person or property," it provides a more narrow grant of authority directed to "equipment;" specifically, equipment that is required by Chapter 316. It is this "required equipment" provision that lies at the heart of this Court's decision in Doctor and on which the certified conflict between the instant case and Burke, as well as Burke and Hilton II, is derived.

In Doctor, this Court addressed the legality of a traffic stop made pursuant to section 316.610 where the basis for the stop was "a crack in the innermost lens of the left taillight assembly." Id. at 446. After quoting subsection (1) of section 316.610 in its entirety, this Court observed and held:

> Section 316.610, however, must be read in conjunction with those statutes which delineate the specific equipment requirements for vehicles. *See, e.g.*, § 316.220, Fla. Stat. (1987) (headlamps); *id.* § 316.221 (taillamps); *id.* § 316.222 (stop lamps and turn signals); *id.* § 316.2225 (additional equipment required on certain vehicles). The only such statute arguably applicable in the present case is section

316.221(1), which specifies the requirements for a vehicle's taillights:

> Every motor vehicle . . . shall be equipped with at least two taillamps mounted on the rear, which, when lighted as required in s. 316.217, shall emit a red light plainly visible from a distance of 1,000 feet to the rear . . . .

The evidence at trial revealed that Doctor's vehicle was equipped with two 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. **n3** 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 and was not in violation of the law. *See Wilhelm v. State*, 515 So. 2d 1343 (Fla. 2d DCA 1987).

> **n3** This was not designed to cover a lighting apparatus, but was merely a reflector to reflect rather then emit light.

Id. at 446-447 (bold & underscore added). As the above reflects, in so holding, this Court was careful to note that the crack at issue did not involve that portion of the taillamp responsible for the emission of the red light required by section 316.221(1). Id. Moreover, although in Doctor it was part of the "taillight assembly," under the plain language of section 316.221(1), a reflector is not "required equipment" on a

simple passenger automobile.[2] Id.; § 316.221(1), Fla. Stat. (1987).

In his Hilton II dissent, Judge Northcutt did not take into full account the implication of this Court's statement that "[s]ection 316.610 … must be read in conjunction with those statutes which delineate the specific equipment requirements for vehicles." Doctor at 446. Specifically, Judge Northcutt did not consider the significance of this Court having expressly dismissed the applicability of "§ 316.2225 (additional equipment *required* on certain vehicles)" in illustrating this point and, in doing so, finding that "[t]he *only* such statute arguably applicable in the present case is section 316.221(1), which specifies the requirements for a vehicle's taillights …." Id. (italics added).

The pertinent fact overlooked by Judge Northcutt, and, by extension, the Fourth District in Burke, was that the necessary reason for this Court's rejection of section 316.2225(1) as being applicable was that its plain language only requires reflectors on "**every bus or truck**." § 316.2225(1), Fla. Stat. (1987)(bold added). In conjunction with this requirement for buses and trucks, speaking directly to the issue presented in Doctor, section 316.225(1)(b), Florida Statutes (1987),

[2] Doctor at 444 (describing Doctor's vehicle as a car), quashing, Doctor v. State, 573 So. 2d 157, 158 (Fla. 4th DCA 1991)(Doctor's vehicle was a "large car.").

provides: "Any *required* red reflector on the rear of a vehicle may be incorporated *with the taillamp*, but such reflector shall meet all the other reflector requirements of this chapter." (italics added); see § 316.226(1), Fla. Stat. (1987)(visibility requirements for reflectors "upon any vehicle referred to in s. 316.2225"); see also § 316.415, Fla. Stat. (1987)("Every motorcycle and motor-driven cycle shall carry on the rear, either as part of the taillamp or separately, at least one red reflector.").

Hence, upon reading section 316.221(1) "in conjunction with those statutes which delineate the specific equipment requirements for vehicles," because the cracked reflector incorporated into the taillight assembly of Doctor's car was not equipment required by sections 316.2225(1) and 316.225(1)(b), Florida Statutes (1987), there was no violation of section 316.221 in that case. Doctor. In other words, because there was no damage or defect in the two required taillamps on Doctor's car responsible for emitting the red light visible from a distance of 1,000 feet to the rear, they were in compliance with the law because this was all that sections 316.221(1) and 316.610 required. Id. at 446-447.

On the other hand, had the vehicle in which Doctor was a passenger been a "bus or truck," then the cracked reflector as part of the taillight assembly would have constituted a

violation of sections 316.2225(1) and 316.225(1)(b), Florida Statutes (1987). Doctor. Therefore, under this circumstance, Doctor's stop by law enforcement would have been lawful pursuant to section 316.610 because this *required* equipment would not have been "in proper adjustment and repair."

With the exception of one addition to section 316.221(1), not material to the resolution of the case at bar,[3] it and sections 316.2225(1) and 316.225(1)(b), Florida Statutes (1987), are identical to those in effect at the time the events in the instant case transpired on April 16, 2004. Howard at 390; see §§ 316.221(1); 316.2225(1); 316.225(1)(b); 316.226(1), Fla. Stat. (2004); see also § 316.415, Fla. Stat. (2004). Thus, Doctor remains valid law with respect to the legality of a stop and inspection pursuant to section 316.610, concerning a reflector on a simple passenger automobile, including where it is part of its taillight assembly.[4] Accordingly, the Fourth District in Burke correctly found that "*Doctor* is still good law;" however, with its express adoption of Judge Northcutt's

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[3] The 2004 version additionally includes: "An object, material, or covering that alters the taillamp's visibility from 1,000 feet may not be placed, displayed, installed, affixed, or applied over a taillamp."

[4] As observed by the majority in Hilton II, Doctor's holding that the traffic stop in that case was unlawful because it was pretextural came prior to the U.S. Supreme Court's decision in Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d. 89 (1996). Accordingly, this aspect of Doctor's holding is no longer valid in light of Whren and the conformity clause of Article I, Section 12, of the Florida Constitution.

reasoning in his <u>Hilton II</u> dissent, its conclusion that "the majority opinion in *Hilton* [II] is inconsistent with *Doctor*[,]" is not correct. <u>Burke</u> at 957; <u>see</u> <u>Doctor</u>; §§ 316.2225(1); 316.225(1)(b); 316.226(1); 316.610, Fla. Stat. (1987).

Overall, as illustrated above, <u>Doctor</u> holds that, unless it should cause the vehicle to be in an "unsafe condition as to endanger any person or property," section 316.610 does not authorize a law enforcement officer to stop and inspect a vehicle with equipment that is not in proper adjustment or repair if that equipment is *not* required by Chapter 316. <u>See</u> <u>Clines</u>, *supra* (statute's plain language must be given effect); <u>Rife</u>, *supra* (legislative intent). Thus, section 316.610 would not authorize a stop and inspection for a simple dent in a door panel, for example, because a door panel is not equipment required by Chapter 316. On the other hand, a dented door panel would authorize a stop and inspection if it gave rise to an objective reasonable belief by an officer that it caused the vehicle to be "in such unsafe condition as to endanger any person or property." § 316.610, Fla. Stat. (2004).

Therefore, being equipment required by statute, it is where that portion of the taillamp responsible for the emission of the red light in the manner required by law is not in proper repair or adjustment that section 316.610 will permit a stop and inspection by law enforcement. <u>Doctor</u>; §§ 316.221(1); 316.610,

Fla. Stat. (1987). Hence, in light of these statutes' plain language, this Court explicitly rejected the State's argument "that section 316.110 (sic) allows police to stop a vehicle for malfunctioning equipment, even if the equipment is *not required by statute*, poses no safety hazard, or otherwise violates no law." Doctor at 447 (italics added). This Court explained: "Such an interpretation of section 316.110 (sic) would allow police to stop vehicles for malfunctioning air conditioners or even defective radios, a result clearly beyond the statute's intended purpose of ensuring the safe condition of vehicles operating on our state's streets and highways." Id.

In the instant case, opposite the cracked reflector at issue in Doctor, it is not disputed that a windshield is "required equipment." Howard; Burke; see Hilton II; § 316.2951(7), Fla. Stat. (2004)("'Windshield'" means the front exterior viewing device of a motor vehicle."); § 316.2952, Fla. Stat. (2004)("A windshield in a fixed and upright position … is required on every motor vehicle …."); § 316.2956(2), Fla. Stat. (2004)("The replacement or repair of any material legally installed is not a violation of ss. 316.2951 - 316.2954."). As such, it is simply contrary to reason to presume that in enacting those laws which require specific equipment it has deemed necessary to ensure the safe operation of vehicles on the streets and highways of this state, the Legislature did not

intend that that equipment be free of damage or defects. See State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002)("A basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences.").

In the manner utilized by the Legislature, "repair" is a word of common usage and understanding, being defined as:

> **1a:** to restore by replacing a part or putting together what is torn or broken: FIX, MEND … **b:** to restore to a sound or healthy state: RENEW, REVIVIFY … **2:** to make good: REMEDY ….
>
> * * *
>
> **1a:** the act or process of repairing: repairing to a state of soundness, efficiency, or health … **2a:** relative condition with respect to soundness or need of repairing … **b:** the state of being in good or sound condition ….

Webster's Third New Int'l Dictionary, Unabridged 1923 (1971)(bold & caps in original); see State v. Nichols, 892 So. 2d 1221, 1227 (Fla. 1st DCA 2005), quoting, id. (relying on dictionary for definition of statutory term at issue in a constitutional vagueness challenge). Likewise, "adjustment" is commonly known to mean:

> **1:** the act or process of adjusting: as **a:** the bringing into proper, exact, or conforming position or condition … **3:** the state of being adjusted: as **a:** a satisfactory or desirable solution or arraignment … **b:** a harmonized or balanced condition ….

Webster's Third New Int'l Dictionary, *supra* at 27 (bold in original). As the common, plain meaning of these terms dictate, as well as common sense demands, a windshield that is cracked is

not one that is in proper repair *or* adjustment. See §§ 316.2952; 316.610, Fla. Stat. (2004).

Indeed, so important has the Legislature deemed an automobile's windshield that, consistent with section 316.610's "intended purpose of ensuring the safe condition of vehicles operating on our state's streets and highways[,]" Doctor, it has provided that "[t]he deductible provisions of any policy of motor vehicle insurance … shall not be applicable to damage to the windshield of any motor vehicle covered under such policy." § 627.7288, Fla. Stat. (2004). Thus, with section 627.7288, the Legislature has made a sound policy decision to encourage drivers to maintain the proper adjustment and repair of their windshields by eliminating the immediate out-of-pocket expense of paying an insurance deductible to replace or repair one that is damaged. See Rife, *supra*. The reasoning of Judge Northcutt's dissent, adopted by the Fourth District in Burke, is not consistent with this policy.

Moreover, Judge Northcutt's presumption that the Legislature did not intend that required safety equipment be free of damage or defect is expressly contrary to the plain language of section 316.610. See Clines; Rife, *supra*. Without need to resort to "rules of statutory interpretation or construction[,]" id., the unambiguous language of section 316.610 conveys a clear and definite meaning, as found by the *en*

banc majority in Hilton II. Id. at 156-160; see Clines; Rife, *supra*. That meaning being that a law enforcement officer is authorized to stop and inspect any vehicle where there is reasonable cause to believe that its equipment that is required by law under Chapter 316 is not in proper repair or adjustment.[5] Hilton II; §§ 316.221(1); 316.610, Fla. Stat. (2004).

Accordingly, with the decision of this Court in Doctor turning on whether the cracked reflector in that case was or was not equipment required by Chapter 316, fatal to Judge Northcutt's analysis of Doctor is his treatment of the cracked reflector as "required equipment;" erroneously regarding the reflector and taillamp as one in the same. Having expressly adopted Judge Northcutt's reasoning in finding that "*Hilton* [II] is inconsistent with *Doctor*[,]" the decision of the Fourth District in Burke suffers the same flaw. This is expressly born out as Judge Northcutt explains in dissent:

> Neither is *Doctor* distinguishable because, as the majority observes, it rejected an interpretation of subsection 316.610(1) that would permit stops for malfunctioning air conditioners or radios. "In contrast," the majority writes, "a windshield is required by statute." This statement completely ignores that *Doctor* involved the application of subsection 316.610(1) to a cracked taillight, which also was required by statute. Certainly,

[5] Expressly relying on the fact that "a windshield is required by statute[,]" Hilton II's majority interpreted Doctor in the same manner the State contends was correct in instant case. Hilton II at 159-160. Thus, although the Burke Court mentions only Hilton II's observation that Doctor was decided prior to Whren, this was not the only distinguishing fact noted or relied upon by the majority in Hilton II.

> the majority knows that the court gave those other somewhat hyperbolic examples when rejecting the very same expansive reading of the statute that the majority advocates in this case:
>
> > The State argues that section 316.110 [sic] allows police to stop a vehicle for malfunctioning equipment, even if the equipment is not required by statute, poses no safety hazard, or otherwise violates no law. We do not agree. Such an interpretation of section 316.110 [sic] would allow police to stop vehicles for malfunctioning air conditioners or even defective radios, a result clearly beyond the statute's intended purpose of ensuring the safe condition of vehicles operating on our state's streets and highways.
>
> *Doctor*, 596 So. 2d at 447.
>
> Although the law does not require vehicles to be equipped with air conditioners or radios, the supreme court as easily could have made its point with hypothetical examples that clearly do fall within chapter 316.

Hilton II at 163-166.

Thereafter, Judge Northcutt offers an example where, under the majority's reasoning, "an officer would be permitted to stop a motorist who is driving with a dented bumper simply because the law requires that vehicles be equipped with bumpers." Id. at 164.; § 316.251(1), Fla. Stat. (2005). Having failed to recognize that the holding of Doctor turned on the fact that the cracked reflector at issue in that case was not "required equipment," he then reasoned:

> Under *Doctor*, the dent would not justify a stop because the statute delineating the specific bumper requirements for vehicles does not require that bumpers be free of dents. In other words, a bumper may be dented and still comply with section 316.610 if it is 'in proper condition and adjustment *as required in this chapter*.'" (Emphasis supplied.)

Id.

However, for those reasons discussed above, Judge Northcutt's example of a dented bumper is in actuality a prime example of equipment, when *required* pursuant to the dictates of section 316.251(1), that falls squarely within the plain, unambiguous language of section 316.610 authorizing the stop and inspection where an officer has a reasonable cause to believe that it is not in proper repair or adjustment. See Clines; Atkinson; Rife, *supra*. Notwithstanding the statutory law of foreign jurisdictions, it is imminently within the authority of the Legislature of this state, as a matter of sound public policy serving the interest of vehicular safety, to require that a windshield be, as Judge Northcutt describes, "pristine." See Rife, *supra*. With sections 316.2952 and 316.610, Florida Statutes, the Legislature of this state has done so.

As observed by the Second District's majority in Hilton II, this interpretation is consistent with its prior case law:

> This court has held that a vehicle stop for a cracked windshield is justified. *Smith v. State*, 735 So. 2d 570, 571 (Fla. 2d DCA 1999)("The vehicle in which Mr. Smith was riding was stopped for having a cracked windshield, a violation of Florida law. … Because the windshield was cracked, the vehicle's stop was justified."); *see also Coleman v. State*, 723 So. 2d 387 (Fla. 2d DCA 1999)(noting that appellant conceded that traffic stop for cracked windshield was valid); *K.G.M. v. State*, 816 So. 2d 748, 752 (Fla. 4th DCA 2002)(recognizing that initial stop for operating vehicle with cracked windshield was not disputed); *Thomas v. State*, 644 So. 2d 597, 597 (Fla. 5th DCA 1994)("Thomas was stopped for driving a vehicle with a

> cracked windshield, a non-criminal infraction, and was given a citation.")(footnote omitted).

Id. at 159. The contrary view of Judge Northcutt, as well as Petitioner in this cause, that these cases do not hold that the Florida statutes "require that windshields be free of all cracks[]" because "in none of those cases was the propriety of the stop even at issue[,]" is not correct as to Smith v. State, 735 So. 2d 570 (Fla. 2d DCA 1999), and misapprehends the majority's reliance upon Coleman v. State, 723 So. 2d 387 (Fla. 2d DCA 1999), K.G.M. v. State, 816 So. 2d 748 (Fla. 4th DCA 2002), and Thomas v. State, 644 So. 2d 597 (Fla. 5th DCA 1994). (PBM 13-14); Hilton II at 166.

As noted by Judge Northcutt, in Smith, *supra*, "the question before the court was the validity of the officers' search of a passenger after the car was stopped." Hilton II at 166. However, essential to its resolution of this Fourth Amendment issue was whether the condition precedent that the stop of the vehicle be lawful was also satisfied. Smith at 571-572. This is so because it was the traffic stop which led to Smith being ordered to exit the vehicle and, in turn, led to the subsequent search of his person. Id. Only after disposing of this issue by finding that the stop for a cracked windshield was lawful[6] did the Smith Court then go on to explain that "the authority to

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[6] Whren, *supra*; Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997)(a passenger may be ordered to exit the vehicle pending the completion of the traffic stop).

remove Mr. Smith from the car did not automatically confer upon the officer the authority to frisk him." Id. The Smith Court went on to reverse the trial court's order denying Smith's dispositive motion to suppress based on the unlawfulness of the search of his person. Id.

Thus, in conducting this analysis, the question of whether a crack in the windshield constituted an infraction under Florida law that would authorize a lawful traffic stop pursuant to Whren, *supra*, was essential to the holding in Smith, *supra*. Accordingly, citing Smith, *supra*, the statement of the Hilton II majority that "[t]his court has held that a vehicle stop for a cracked windshield is justified[,]" was correct. Id. at 159. Also, contrary to Judge Northcutt's argument in dissent, the majority in Hilton II did not represent that Coleman, K.G.M., and Thomas, *supra*, likewise *held* that a cracked windshield is a violation of Florida law. Rather, the Hilton II majority cited and relied upon each of these three cases by way of the introductory signal "see also." Id. at 159. "'*See also*' is commonly used to cite authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed." The Bluebook, A Uniform System of Citation 22, 16th ed. (1997)(italics in original). As quoted above, this is precisely the purpose and manner in which

the majority utilized Coleman, K.G.M., and Thomas, *supra*. Hilton II at 159.

Furthermore, Judge Northcutt's dissenting interpretation of section 316.610, adopted by Burke, renders subsection (2) meaningless. As its plain language reflects, subsection (1) identifies under what standard and under what circumstances an officer may stop a vehicle in order to conduct an inspection. § 316,610, Fla. Stat. (2004). The plain language of subsection (2) contemplates that this inspection, to determine if the vehicle is in an "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," will take place *after* the stop. Id. (italics added). Thus, Judge Northcutt's conclusion that an officer must make the determination of whether a crack in a vehicle's windshield poses a safety problem prior to even stopping that vehicle, is in conflict with the intent of the Legislature as expressed through the plain language of section 316.610. "In addition to the statute's plain language, a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." State v. Goode, 830 So. 2d 817, 824 (Fla. 2002)(citations omitted). Giving effect to Burke's

adoption of Judge Northcutt's reasoning violates this tenet. Goode, *supra*.

In addition, the Fourth District's misapprehension of this Court's reasoning and analysis in Doctor is further illustrated by its treatment of the cracked taillight also at issue in Burke. Id. at 956. Specifically, in affirming the trial court's judgment that the stop of Burke's vehicle for a cracked taillight was unlawful, the Fourth District Court relied on the reasoning it had employed in its prior decision in Frierson v. State, 851 So. 2d 293, 294, 296 (Fla. 4th DCA 2003), rev. granted, 870 So. 2d 823 (Fla. 2004). In Frierson, *supra*, the Fourth District observed and held:

> The facts in *Doctor* are also nearly identical to the facts in the present case. Officer Miller did not testify that the red lens cover was missing from the vehicle. Rather, he testified that it was cracked, and as a result, he observed white light emanating through the crack. In *Doctor*, the Supreme Court held that such a defect was not violative of the law and was not a valid basis to conduct a traffic stop.

Id. at 296 (underscore added).

The conclusion of the Frierson Court, expressly relied upon in Burke, is not in harmony with Doctor, but is in conflict with it. As opposed to the crack in the reflector this Court found was not statutorily required in Doctor, §§ 316.2225(1); 316.225(1)(b); 316.226(1); 316.610, Fla. Stat. (2001), the crack at issue in Frierson, *supra*, was in the specific portion of the taillamp directly responsible for emitting the red light

required by section 316.221(1). See Doctor at 446-447; § 316.221(1), Fla. Stat. (2004); compare State v. Schuck, 913 So. 2d 69 (Fla. 4th DCA 2005)(finding stop for broken taillight lawful because there was "a hole the size of a fist in the red lens;" distinguishing *Frierson* and *Burke* on this basis).

Thus, contrary the reasoning of Frierson, *supra*, on which Burke relies, because the "red lens cover," as part of the "taillight assembly," is directly and solely responsible for the light emitted therefrom being the statutorily required hue of red, then consistent with the reasoning of Doctor, it is by necessity, equipment that must be in proper repair and adjustment. See §§ 316.221(1); 316.610, Fla. Stat. (2004). As quoted above, in Doctor this Court was careful to note, not only that the crack at issue was in a reflector that did not involve the emission of light, but also that the reflector "was not designed to cover a lighting apparatus …." Id. at 446 & n.3. This specific observation suggests that, although not required equipment on Doctor's car, had the cracked reflector covered that portion of the taillamp responsible for the emission of the statutorily required red light, then a stop and inspection pursuant to section 316.610 would have been authorized. Id.

In the instant case, Petitioner conducts no significant analysis of Doctor, but merely echoes Judge Northcutt's treatment of that case in his Hilton II dissent and in its

adoption by the Fourth District in Burke. (PBM 13-18). Furthermore, while Petitioner asks that, notwithstanding the crack in the windshield, it be noted that "Deputy Hood did not issue the driver of the vehicle a citation, and Deputy Hood allowed the vehicle to be driven away after it was stopped[,]" these observations are relevant only to the Deputy's subjective motivations for stopping her car in the first place. (PBM 15); see Devenpeck v. Alford, 543 U.S. 146, 125 S.Ct. 588, 593-594, 160 L.Ed.2d 537, 545 (2004)(rejecting the proposition that the criminal offense for which there is probable cause to arrest must be "closely related" to the offense stated by the arresting officer at the time of arrest because it is grounded in the subjective intentions of the arresting officer); Art. I, § 12, Fla. Const. It is well-settled and not disputed in the instant case that such considerations of subjective intent are irrelevant to the existence of legal, justifiable cause for the initial stop. (PBM 18); Devenpeck, *supra*; Art. I, § 12, Fla. Const.

In sum, as the foregoing discussions reveal, because a windshield is "required equipment," then under the plain language of sections 316.2952 and 316.610, the Legislature intended that a crack therein would constitute a non-criminal traffic infraction that would authorize a law enforcement officer to stop and inspect that vehicle "regardless of whether

the crack creates any immediate hazard." Hilton II at 390; Howard; §§ 316.2952; 316.610, Fla. Stat. (2004); see State v. Breed, 30 Fla. L. Weekly D1457 (Fla. 5th DCA June 10, 2005); Ivory v. State, 898 So. 2d 184 (Fla. 5th DCA 2005); see also Doctor. Thus, contrary to the conclusion of the Fourth District Court in Burke and the argument of Petitioner in this cause, the *en banc* majority opinion of the Second District in Hilton II is entirely consistent with Doctor. For sake of argument, even if the crack in Petitioner's windshield must cause a "safety problem" to constitute a violation of Florida law, Deputy Hood was still authorized under section 316.610 to stop her vehicle based on an objective reasonable belief that this crack may pose such a concern for safety in order to effectively assess its condition. § 316.610, Fla. Stat. (2004).

In the instant case, the trial court's factual finding that there was a crack in the windshield of the vehicle in which Petitioner was a passenger is not disputed and, furthermore, is supported by competent, substantial evidence. (PBM 10-18; II 8-15, 23-25, 34-36; Court Exhibit 1); Howard at 390-392; see Ornelas; Dillbeck; Harris; Butler, *supra*; Art. I, § 12, Fla. Const. Likewise, as well as being supported by the record, it is also undisputed that the sole reason for the stop of Petitioner's vehicle was this crack in the windshield. (PBM 10-18; II 3-5, 19-20, 34-36; Court Exhibit 1); Howard at 391; see

Ornelas; Dillbeck; Harris; Butler, *supra*; Art. I, § 12, Fla. Const.

In light of these historic facts, in expressly following the judgment and reasoning of the majority in Hilton II, the legal conclusion of the First District that the crack in the windshield of Petitioner's car alone constituted a traffic infraction pursuant to sections 316.2952 and 316.610, Florida Statutes, was correct. Howard at 392-394; see Dillbeck; Hilton II; Breed; Ivory; Harris; Smith; Butler, *supra*; §§ 316.2952; 316.610, Fla. Stat. (2004). Therefore, the First District's legal determination that the stop of Petitioner's vehicle solely on the basis of the crack in the windshield was lawful under the Fourth Amendment, as interpreted by the U.S. Supreme Court in Whren, *supra*, was also correct. Howard at 392-394; see Whren; Ornelas; Dillbeck; Hilton II; Breed; Ivory; Harris; Smith; Butler, *supra*; Art. I, § 12, Fla. Const.; §§ 316.2952; 316.610, Fla. Stat. (2004). In contrast, Burke's holding that under Doctor and sections 316.2952 and 316.610, Florida Statutes, the State is required to demonstrate that a crack in a windshield is "a safety problem" in order to constitute a traffic infraction that would permit a lawful stop pursuant to section 316.610, is in contravention of these statutes' plain language and is inconsistent with this Court's reasoning and analysis in Doctor. See Clines; Rife, *supra*; § 316.2952; 316.610, Fla. Stat. (2004).

As noted above, Burke concedes that “[i]f the majority opinion in *Hilton* [II] is correct, it would follow that the stop in the present case for the crack in the windshield was proper.” Burke at 956-957. As the foregoing discussions establish, the judgment and reasoning of the *en banc* majority in Hilton II are correct; therefore, the decision of the First District Court in Howard is correct.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests that this Honorable Court affirm the decision of the First District Court in Howard and disapprove that of the Fourth District Court in Burke.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by U.S. mail to David P. Gualdin, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe St., Tallahassee, Florida 32301, attorney for Petitioner, this __17__ day of January, 2006.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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IN THE SUPREME COURT OF FLORIDA

TOMESHA MARIE HOWARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC05-1486
L.T. No. 1D04-5295

INDEX TO APPENDIX

Howard v. State, 909 So.2d 390 (Fla. 1st DCA 2005)