IN THE SUPREME COURT OF FLORIDA

TRISTAN HILTON, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC05-438

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

RESPONDENT'S ANSWER BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

Officers Harrison and Sena were on routine patrol in the City of Clearwater on January 25, 2002, at approximately 5:00 p.m. when they saw Petitioner driving a yellow Chevette with a cracked windshield. (T48-49). Officer Harrison testified he and Officer Sena were stopped facing south in their patrol car when Petitioner drove by them. (T49). The officers conducted a stop based on their observation of the cracked windshield. (T51). On cross examination Officer Harrison was asked if he could tell whether the crack in the windshield obstructed the driver's view, he testified: "No, not as far as I know. I don't know." (T62). Officer Harrison testified his intention upon approaching Respondent's vehicle was to give Respondent a warning regarding the cracked windshield. (T52). Upon approaching the vehicle, Officer Sena noted neither Petitioner nor his passenger were wearing seatbelts. (T51). Officer Harrison intended on issuing Petitioner a warning regarding the cracked windshield and seatbelt violations. (T52).

Officer Sena testified he did not recall seeing the crack in the windshield when Petitioner drove by the patrol car. (T71). Rather, he recalled seeing the windshield when the officers were driving behind Petitioner's car. (T72). According to Officer Harrison's recollection, Petitioner's car was about 100 feet

from the officers when he noticed the cracked windshield. (T78). Officer Harrison testified if he had not seen the crack in Petitioner's car's windshield, he would not have initiated the traffic stop. (T73). Officer Sena was not asked any questions on cross examination about whether the crack obstructed the driver's view or otherwise caused a dangerous condition, but he was asked whether he recognized Petitioner prior to making the stop. (T72, 77-85). Office Sena testified he knew Petitioner from working in the community policing unit in Petitioner's neighborhood. (T72).

A check of Petitioner's license revealed Petitioner was on "early release," which indicated to the officers Petitioner likely had a prior felony conviction. (T52). As Officer Harrison began explaining to Petitioner that he (Officer Harrison) was going to issue Petitioner a warning regarding the cracked windshield and seatbelt violations, he was interrupted by Officer Sena who told Officer Harrison to ask Petitioner to get out of the car. (T52-53). After removing Petitioner from the vehicle, Officer Sena pointed out to Officer Harrison what appeared to be a gun on the car's back floorboard. (T54). Officer Harrison testified he could plainly see the stock and barrel of the gun on the floor in the back of the car once Officer Sena pointed it out. (T54).

Once Petitioner was out of the vehicle, Officer Harrison smelled what he recognized to be the odor of marijuana. (T55). By this time, Officers Matthews and Dawe were at the scene. (T55). Officer Harrison began to search Petitioner. As Officer Harrison was conducting the search Officer Dawe approached and asked Petitioner what the large bulge near Petitioner's waist was. (T57). Officer Dawe then took over the search of Petitioner. (T57). Officer Dawe conducted a search of Petitioner because, "Under the circumstances and the nature of this call, the firearm in the car, existence of a firearm was my main concern right in the waistband of the suspect." (T106).

When Officer Dawe approached Petitioner he (Officer Dawe) noticed a strong odor of what he recognized as marijuana. (T108). Officer Dawe began his patdown of Petitioner at the bulge in the waistband expecting to find a firearm. (T108). Instead, when Officer Dawe felt the bulged area of Petitioner's waistband he heard the sound of plastic and felt a substance that, based on his training and experience, had the consistency of marijuana. (T109). Officer Dawe removed the item from Petitioner's waistband and discovered it was a paper bag, and a plastic bag both containing "a large number of individual baggies packaged with a green, leafy substance," later determined to be marijuana. (T111).

At the conclusion of Officers Harrison and Sena's testimony, the trial court expressed concern regarding the true basis for the stop, noting the conflicts in the officers' testimony and Officer Sena's prior knowledge Petitioner. (T89-90, 92). After a discussion of the law regarding pretextual stops, (T89-91), the court permitted the state to call its next witness, Officer Matthews. (T93-94).

Officer Matthews arrived at the scene as backup. (T97). As part of his duties, Officer Matthews took photographs of Petitioner's car. (T99). Officer Matthews pointed out the cracked windshield in the photograph and testified it was about 5 or 6 inches long starting from the top of the passenger's side of the windshield and traveling downward. (T99).

At the conclusion of all the testimony, Petitioner argued the officers' testimony was not credible with regard to whether they saw the crack in the windshield prior to conducting the stop. (T121-22). Specifically, Petitioner argued:

> Judge, just briefly, in addressing the initial matter, Judge -- and again, whether or not there was a crack in the windshield is not an issue. I think you've got two officers -- one officer, Harrison, when I first asked him in cross "Where did you see it? [the crack in the windshield] How far away from the vehicle was it?" he started to say it was twenty feet, or in that fashion, while he was following from behind. Then he said, no, it was during -- when he was coming up -- he saw it while the vehicle

passed him. He was unsure where it was at or how that was accomplished. Officer Sena testified that that did not take place and it was a hundred feet back.

The first issue is whether or not there was, in fact, ***any credible testimony***. And again, it is not a matter of -- pretext is not a matter of anything in regards to that. In this case, Judge, based upon the testimony, I submit there was not.

The second threshold to get to is once the officers got there and certainly saw -- that ***if, in fact -- confirmed what they may or may not have seen before, that there was a crack in the upper right corner, certainly at that point in time -- again, a cracked windshield, if in fact, it was correctly viewed and the testimony is such that it is credible and believable, then they could examine and investigate that***. (R121-22)(emphasis added).

After hearing argument, the trial court stated:

(Defense Counsel), I absolutely stand by my concerns, as addressed halfway through the presentation of evidence. And I guess I would say the same thing to you, (assistant state attorney). I have concerns about the testimony I heard.

Having said that, and probably having created a false sense of encouragement to the defendant, on reflection and review and consideration of the law, Wren, (sic) and other applicable law, I think I have to at this point accept the testimony of the officers, notwithstanding conflict and notwithstanding that I can think of other possibilities, that I think the proper standard would be to accept that they observed the crack in the windshield, which was supported by the ultimate finding of the

> crack in the windshield, and that was the objective basis of the stop. (T125).

The court further stated:

> I observed the photographs. I've observed and confirmed from the photographs that there is a clearly visible crack in the windshield about the approximate length the officer testified to. Something of about seven or eight inches was his indication of him holding his hands out. (T127).

The trial court denied the motion to suppress. (T128).

Petitioner pleaded guilty to possession of marijuana reserving his right to appeal the dispositive ruling on the motion to suppress. (T40-41).

On direct appeal, a three judge panel of the Second District Court of Appeal reversed the ruling on the motion to suppress and ordered Petitioner discharged. Hilton v. State, 30 Fla. L. Weekly D453 (Fla. 2d DCA June 18, 2004)(Whatley, J. dissenting). The State of Florida filed a timely Motion for Rehearing and/or Motion for Rehearing En Banc.

The Motion for Rehearing En Banc was granted and the full panel of the Second District Court of Appeal issued and opinion affirming the trial court's denial of the motion to suppress. Hilton v. State, 30 Fla. L. Weekly D453 (Fla. 2d DCA February 16, 2005)(Northcutt, J. and Fulmer, J. dissenting). The Second District Court of Appeal certified the following question to

this Court as one of great public importance:[1]

> **MAY A POLICE OFFICER CONSTITUTIONALLY CONDUCT A SAFETY INSPECTION STOP UNDER SECTION 316.610 AFTER THE OFFICER HAS OBSERVED A CRACKED WINDSHIELD, BUT BEFORE THE OFFICER HAD DETERMINED THE FULL EXTENT OF THE CRACK?**

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[1] Subsequently, the Fourth District Court of Appeal certified conflict with the Second District Court of Appeal's decision in Hilton. State v. Burke, 4D03-4879 (4th DCA June 8, 2005). As of the filing of this brief, the Fourth District Court of Appeal's decision has not been finalized.

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the Constitution of the United States, and Article I, § 12 of the Constitution of the State of Florida prohibits unreasonable searches and seizures. The reasonableness of a search or seizure is determined by balancing individuals' reasonable expectation of privacy against the government's interest in protecting the health, safety, and welfare of its citizens. Individuals have a limited expectation of privacy in their vehicles due, in part, to the government's compelling interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and that vehicle safety regulations are being observed.

Chapter 316, known as the "Florida Uniform Traffic Control Law," was enacted to implement Florida's highway safety program. The Legislature has provided that law enforcement officers may stop vehicles where there is "reasonable cause to believe a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair." § 316.610(1), Fla. Stat. (2002). The plain meaning of the word "repair" as used in this statute is, "a relative condition with respect to soundness or need of repairing," or "the state of being in good or sound condition." Webster's Ninth New

Collegiate Dictionary, Merriam-Webster, Inc., 1985.

Such a stop is for the purpose of conducting an inspection of the vehicle in order to determine if the vehicle is, in fact, unsafe. If the vehicle is found to be in unsafe condition, the officer may order the vehicle be immediately repaired or removed from use, or allow 48 hours for repair, depending on the nature and extent of the unsafe condition. § 316.610 (2) Fla. Stat. (2002).

Section 316.2952, Florida Statute requires vehicles, with some exceptions not relevant here, to have windshields. § 316.2952(1), Fla. Stat. (2002). Read in conjunction with § 316.610(1), leads to the conclusion that the windshield must be in "proper adjustment or repair." § 316.610(1), Fla. Stat. (2002). That is, the windshield must be in a state of good or sound condition and not in need of repair. If an officer has reasonable cause to believe a vehicle's required windshield is not in good or sound condition, or is in need of repair, the officer can stop the vehicle and submit it to a brief safety inspection.

The plain meaning of the statute, as well as the Legislative intent to ensure the safety of Florida's roads, and other practical considerations, compel the conclusion that the observation of a cracked windshield provides an officer with

reasonable cause to believe the vehicle's required equipment, the windshield, is not in proper condition or repair. Therefore, an officer can stop the vehicle and, subsequent to that stop, either impound the vehicle, or issue the driver a notice of repair. Such a stop is not an unreasonable infringement of an individual's limited expectation of privacy with regard to their vehicle.

ARGUMENT

LAW ENFORCMENT OFFICERS CAN CONSTITITIONALLY CONDUCT A SAFETY INSPECTION STOP UNDER § 316.610 AFTER THE OFFICER HAS OBSERVED A CRACKED WINDSHIELD, BUT BEFORE THE OFFICER HAS DETERMINED THE FULL EXTENT OF THE CRACK.

The Supreme Court of the United States has held, while individuals have some expectation of privacy with regard to their vehicles, that expectation is significantly less than the privacy expectation relating to one's person, home, or office. Carroll v. United States, 267 U.S. 132, 134-35 (1925).[2]

One reason for this lesser expectation of privacy is the

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[2] The right to be free from unreasonable searches and seizures provided by Article I, § 12 of the Constitution of the State of Florida shall be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the Supreme Court of the United States. Fla. Const. Art I, § 12 (2002).

ready mobility of a vehicle. Id. In addition to the element of ready mobility, the Court has justified this lesser expectation of privacy because:

> In discharging their varied responsibilities for ensuring the public safety, law enforcement officers are necessarily brought into frequent contact with automobiles. (citation omitted). Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976).

Moreover, according to the Court, the public is fully aware that they are accorded less privacy in their vehicles because of this "compelling governmental need for regulation." California v. Carney, 471 U.S. 386, 392 (1985).

Nonetheless, stopping a vehicle constitutes a "seizure" under the Fourth Amendment to the United States Constitution. See, United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976). Therefore, with some exceptions - such as DUI checkpoints,[3] and

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[3] See, Michigan Dep't of State Police v. Sitz, 496 U.S. 444

border patrol stops,[4] which require no suspicion whatsoever - there must be some quantum of particularized suspicion to justify a traffic stop. Whren v. United States, 517 U.S. 806, 817-18, citing, Delaware v. Prouse, 440 U.S. 642, 661 (1979), quoting, Martinez-Fuerte, 428 U.S. at 560 (1976). The reasonableness of the traffic stop and, therefore, it validity under the Fourth Amendment, is measured against an objective standard, "whether this be probable cause, or a less stringent test." Prouse, 440 U.S. at 654-55.

The purpose of the Fourth Amendment, according to the Supreme Court of the United States, is the imposition of a reasonableness standard on the exercise of government and law enforcement discretion in order to safeguard individuals' privacy rights against arbitrary governmental intrusion. Id. "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of a legitimate governmental interest." Prouse, 440 U.S. at 655. The Fourth Amendment does not proscribe all seizures, only unreasonable ones. Opperman, 428 U.S. at 372-73; See also,

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(1990).

[4] See, United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

Terry v. Ohio, 392 U.S. 1 (1968).

As the Second District Court of Appeal's en banc decision noted:

> It is worth pointing out that the legislature did not create [§ 316.610] as a method of criminal investigation. This statute was intended to create a noncriminal safety stop to permit police to perform a quick vehicle-specific safety inspection that is cheaper, and less intrusive, and arguably more effective, then methods of mandatory, annual vehicle inspection. It was reasonable for the legislature to require all automobiles to have certain equipment and for that equipment to be in proper repair. Owners and operators of cars are expected to know these legal requirements and should not expect their sense of personal privacy to prevent the police from briefly stopping a car that reasonably appears to have an equipment violation.

Hilton v. State, 30 Fla. L. Weekly D453 (2d DCA February 16, 2005).

The significance of Florida's lack of a required annual vehicle inspection should not be overlooked. In deciding suspicionless "spot checks" on vehicles to check the driver's license and the vehicle's registration were a violation of Fourth Amendment protections, the Supreme Court of the United States stated:

> We agree that the States have a vital interest in ensuring only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for

> safe operation, and vehicle inspection requirements are being observed. . . .The registration requirement, ***and more pointedly, the related annual inspection requirement in Delaware***, are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are essential elements in a highway safety program.

Delaware v. Prouse, 440 U.S. at 658 (emphasis added).

Because Delaware law required a registration sticker to be affixed to the vehicle's license plate, and because Delaware law required proof of an annual safety inspection to obtain vehicle registration, the Court held Delaware could not show random "spot checks" reasonably promoted the state's interest in vehicle safety. Id.

Respondent does not argue the statute in question in this case allows random "spot checks", but rather points out Florida's lack of state-mandated annual vehicle inspection to support the reasonableness of permitting officers to stop a vehicle to conduct a safety inspection when they have reasonable cause to believe the vehicle's equipment is not in proper repair. Such stops are essential elements in Florida's highway safety program.

Chapter 316, known as the "Florida Uniform Traffic Control Law," was enacted to implement Florida's highway safety program.

§ 316.001, Fla. Stat. (2002). As part of that safety program, the legislature enacted § 316.610, which reads:

> **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 of 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 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.

This Court has routinely held legislative intent is the "polestar that guides the Court's inquiry" into the meaning of a statute. Florida Convalescent Center v. Somberg, 840 So. 2d 998, 1000 (Fla. 2003). Such intent is derived primarily from the language of the statute. State v. Bodden, 877 So. 2d 680, 684 Fla. 2004). "It is 'axiomatic that in construing a statute courts must first look at the actual language used in the statute'." Id., quoting, Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 897 (Fla. 2002).

The plain meaning of the word "repair" as used in this statute is, "a relative condition with respect to soundness or need of repairing," or "the state of being in good or sound condition." Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc., 1985. Furthermore, this Court has recognized § 316.610's purpose is to "ensure the safe condition of vehicles operating on our state's streets and highways." Doctor v. State, 596 So. 2d 442, 447 (Fla. 1992).

The Legislature has provided that law enforcement officers may stop vehicles where there is "reasonable cause to believe a vehicle is unsafe or not equipped as required by law, ***or that its equipment is not in proper adjustment or repair.***" §

316.610(1), Fla. Stat. (2002)(emphasis added). Such a stop is for the purpose of conducting an inspection of the vehicle in order to determine if the vehicle is, in fact, unsafe. If the vehicle is found to be in unsafe condition, the officer may order the vehicle be immediately repaired or removed from use, or allow 48 hours for repair, depending on the nature and extent of the unsafe condition. § 316.610 (2) Fla. Stat.(2002).

Section 316.2952, Florida Statute requires vehicles, with some exceptions not relevant here, to have windshields. § 316.2952(1), Fla. Stat. (2002). Read in conjunction with § 316.610(1), leads to the conclusion that the windshield must be in "proper adjustment or repair." § 316.610(1), Fla. Stat. (2002). That is, the windshield must be in a state of good or sound condition and not in need of repair.

If an officer has reasonable cause to believe a vehicle's required windshield is not in good or sound condition, or is in need of repair, the officer can stop the vehicle and submit it to a brief safety inspection. Petitioner asks this Court to require law enforcement officers to stop only those vehicles where a cracked windshield creates an obviously unsafe condition. This is not only contrary to the plain meaning of the statute, but to the Legislature's intent, to United States Supreme Court precedent regarding vehicle stops, and to common

sense.

In addition to the necessity to adhere to the plain meaning of the statute, "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, 823 (Fla. 2002). Pursuant to subsection (2), if after inspection law enforcement determines continued operation of the vehicle would be "unduly hazardous" the vehicle can be impounded. If continued operation would not present unduly hazardous operating conditions, law enforcement can issue a citation requiring "proper repair and adjustment" of the equipment within 48 hours.

The interpretation Petitioner advocates would render § 316.610(1) and (2) meaningless in that an officer would not be able to stop a vehicle with a cracked windshield in order to submit it to an inspection to determine whether the vehicle is, in fact, unsafe. According to Petitioner, that determination must be made prior to stopping the vehicle.

Other jurisdictions have upheld the constitutionality of a traffic stop based on reasonable suspicion the vehicle is in violation of traffic regulations. For example, the Second District Court of Appeal's en banc decision cites United States

v. Cashman, 216 F. 3d 582 (7th Cir. 2000) to exemplify why Petitioner's interpretation of the statute should not be adopted. In Cashman, Trooper Spetz stopped the appellee's vehicle because he noticed a crack in the vehicle's windshield. After conducting the traffic stop, the trooper asked for and received consent to search the vehicle. Upon searching, the trooper discovered methamphetamine and other drug-related items.

The appellee argued that the stop of his vehicle was improper because the crack in the vehicle's windshield did not violate the state law against excessively cracked windshields. In rejecting this argument, the Seventh Circuit Court of Appeals stated:

> The propriety of the traffic stop does not depend . . . on whether Cashman was actually guilty of committing a traffic offense by driving a vehicle with an excessively cracked windshield. ***The pertinent question instead is whether it was reasonable for Trooper Spetz to believe that the windshield was cracked to an impermissible degree.*** Cashman, 216 F. 3d at 587 (emphasis added)

Moreover, the Seventh Circuit Court of Appeals correctly noted, "the Fourth Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one." Id. Therefore, even if § 316.610 can be read to allow law enforcement officers only to stop vehicles made obviously unsafe

by virtue of a cracked windshield, an officer may be reasonable in his or her assessment the vehicle met such a requirement only to be proven wrong by the subsequent inspection.

Other federal circuits have similarly held the ultimate conclusion as to whether a cracked windshield actually violates a given statute is irrelevant to the question of whether an officer has reasonable suspicion to believe the crack might violate a statute or otherwise create a dangerous condition.

In <u>United States v. Callarman</u>, 273 F. 3d 1284 (10th Cir. 2001), the officer could see a crack in Callarman's vehicle's windshield as the officer drove behind Callarman. The officer initiated a traffic stop. When Callarman reached down toward the car's floorboard, the officer became concerned for his safety and ordered Callarman out of the car. He then observed a knotted plastic baggie containing what he suspected to be cocaine. Callarman was subsequently arrested.

Callarman moved to suppress the cocaine arguing the stop was illegal. The trial court denied the motion ruling the stop was supported by either reasonable suspicion or probable cause. On appeal, the Tenth Circuit Court of Appeals first explained "while either probable cause or reasonable suspicion is sufficient to justify a traffic stop, only the lesser requirement of reasonable suspicion is necessary." 273 F. 2d

1286.

While the statute the officer suspected Callarman of violated prohibited windshield cracks that "substantially obstruct the driver's clear view of the highway or any intersecting highway," the Tenth Circuit Court of Appeals held with regard to the issue of reasonable suspicion, "[i]t is irrelevant whether the observed crack was, in fact, large enough to constitute a violation of the law." Id. at 1287.

Even more to the point, in United States v. Smith, (unpublished opinion), 2000 U.S. App. LEXIS 32488 (10th Cir. 2000)[5], the officer "had only a quick initial look at Mr. Smith's car as it drove by in the opposite direction . . . the officer saw a crack in the car's windshield located in the middle or on the passenger side which ran vertically from the bottom of to the middle of the windshield, and the officer thought the car might be in violation of the Wichita traffic ordinance concerning cracked windshields."

The district court in Smith ultimately found the crack did not violate the ordinance, but denied the motion to suppress because the officer had reasonable suspicion to believe the

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[5] Copies of unpublished opinions referred to herein are included in the Appendix as Exhibit 7.

windshield may have been in violation of the ordinance. The Tenth Circuit Court of Appeals agreed and stated, "The district court's ultimate conclusion that the windshield was not cracked in such a way as to violate the ordinance is irrelevant." Id. at *5.

The Sixth Circuit Court of Appeal reached a similar conclusion in United States v. Whiteside, (unpublished opinion) 22 Fed. Appx. 453, 2001 U.S. LEXIS 22883 (6th Cir. 2001). There, the officer stopped Whiteside because Whiteside's vehicle had a "busted windshield." During the initial stop, the officer gave Whiteside a verbal warning to have the windshield fixed, to which Whiteside agreed. The next day, the officer again saw Whiteside's vehicle and the windshield was not repaired. The officer stopped Whiteside and reminded him of their previous conversation. The officer asked for and received consent to search the car. Meanwhile, the officer's partner patted down Whiteside and found a bag of crack cocaine in his pocket. Whiteside was arrested and also issued a citation for driving with his "vision being obstructed due to the large crack in his windshield."

Subsequently, the officers learned that the citation was issued under the wrong ordinance. The ordinance the citation was issued under prohibited signs, poster, or other nontransparent

material upon the front of the windshield that obstructs the driver's view. However, there was also a city ordinance that made it a misdemeanor for "any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on a highway any vehicle or combination of vehicles which is in an unsafe condition as to endanger any person . . . .

At the suppression hearing, Whiteside produced photographs of his car that clearly showed the crack did not obstruct his view. Therefore, he argued, the officers did not have reason to believe he was operating his vehicle in an unsafe condition. The Sixth Circuit Court of Appeals noted courts should consider "what has been learned from other cases, all reasonable inferences drawn therefrom, as well at its own common sense" in determining the reasonableness of an officer's actions. 22 Fed. Appx. at 459.

In applying this standard, the Sixth Circuit Court of Appeals held,

> While it's true that the photographs of defendant's vehicle indicate that the cracks in the windshield were not directly in front of the driver's side of the windshield, but were more centrally located in the windshield, the fact remains that the photographs do support the officers' contention that the windshield was badly cracked. A common sense understanding of cracks in windshields is such that they usually branch off in several directions over a period of time, and that the cracks

> themselves lessen the strength of the windshield. In addition, common sense also tells us that a driver does not simply use the portion of the windshield in front of him when driving, but rather uses all of the windshield at various times for a complete view of the road and surrounding area. As a result, cracks of the type in Defendant's windshield may have from time to time impeded his view of thing in the periphery. We therefore find the officers' testimony as to their belief for stopping Defendant's vehicle was credible.
>
> Accordingly, we conclude that the officers had reasonable grounds – and thus probable cause – for believing that Defendant was operating his vehicle in an unsafe condition when stopped . . .

Id.

Similarly, other state jurisdictions have upheld vehicle stops based on an officers observation of a cracked windshield. For instance, in Arizona v. Vera, 996 P. 2d 1246 (Ariz. Ct. App. 1999), as Vera drove past the officer, the officer saw that Vera's vehicle's windshield was cracked. Vera filed a motion to suppress that was granted by the trial court. The state appealed presenting one issue, similar to the issue before this Court: "Whether the traffic stop to investigate a possible vehicle violation was constitutional." The appellate court answered the question in the affirmative.

In doing so, the court noted the Fourth Amendment provides a constitutional imperative that seizures be reasonable. The

court then held:

> Appellee makes much of the fact that there is no Arizona statute specifically prohibiting driving an automobile with a cracked windshield. Section 28-957(A), A.R.S., however, requires a passenger vehicle to have an "adequate windshield." Whether the windshield on a motorist's automobile is "adequate" is first investigated by a police officer and next determined by a fact finder if the officer issues a citation for an alleged violation [of the statute]. It is undisputed that appellee's windshield was, in fact, cracked. (citation omitted). The officer had a legitimate reason to stop appellee's vehicle to investigate the inadequacy of his windshield. In enforcing traffic laws, officers often "detain persons 'under circumstances which would not justify an arrest." (citation omitted). Such is the case here. The officer was not required to determine the adequacy of the windshield before he stopped appellee's automobile to investigate the obviously cracked windshield.

Id. at 1247-48.

Further, in a case of first impression in Maryland, Muse v. Maryland, 807 A. 2d 113 (Md. Ct. App. 2002), an officer on routine patrol noticed the car in front of him had a cracked windshield. Nothing else about the car, or its operation raised the officer's concern. The officer pulled the car over and confirmed the windshield did indeed have a crack about 24 inches long. After conducting the stop, and investigating the crack,

the officer asked the driver, Muse, for his driver's license. The officer learned Muse's license was suspended, and the driver was arrested. During a search incident to arrest, cocaine was found in Muse's shirt pocket. Muse filed a motion to suppress contesting the validity of the traffic stop.

The court noted:

> Appellant places considerable weight on the State's failure to point to any provision in the Code which specifically addresses a "cracked windshield," and avers that, "assuming that [equipment standards set forth in the Transportation Article] apply, the State failed to prove that [his] windshield apparently does not meet the Code's standards[.]" As explained below, we disagree with the suggestion that Officer Bouder lacked an objectively reasonable basis to stop appellant in order to investigate the damaged windshield.

Id. at 116-17.

The court initiated its analysis by reiterating the Fourth Amendment's prohibition against only those seizures that are unreasonable. 807 A. 2d at 117. The court further held certain traffic stops, such as the one in question, are for purposes of investigation and, therefore, require reasonable suspicion rather than probable cause. Id. The court ultimately held the officer had reasonable suspicion to stop Muse's vehicle and inspect the windshield. The court further held:

> We emphasize that the officer was not required to establish to his satisfaction,

> prior to the stop, that the windshield called into question the safety of the vehicle. Contrary to Appellant's assertion that the State has "failed to prove" that his windshield was in violation of [the traffic code], or any other applicable equipment provision . . . we hasten to note that the **State has no such burden of proving a violation to justify an officer's actions at the *initial investigatory stage*. . . . the fundamental purpose of a Terry-stop, based as it is on reasonable suspicion, *is to confirm or dispel* that suspicion . . . .**

807 A. 2d at 119 (bold emphasis added, italics in the original); See also, State v. Pease, 531 N.E. 1207 (Ill. Ct. App. 1988)(an officer need not have been convinced beyond a reasonable doubt that the vehicle endangered others; rather, to justify the stop, he must have reasonable suspicion). Darby v. Georgia, 521 S.E. 2d 438 (Ga. Ct. App. 1999)(holding an officer can stop a vehicle to determine if the crack in the windshield is in fact a violation of the law. "Often such determinations cannot be made absent a traffic stop, so that the officer may examine and measure the break in the windshield. An investigative stop can be utilized to determine if a law is being broken").

More importantly, the district courts of this state have routinely stated a stop based on a cracked windshield is valid. Most recently, in Ivory v. State, 898 So. 2d 184 (Fla. 5th DCA 2005), Ivory argued the traffic stop in his case was improper

because the crack in his car's windshield did not impede his vision nor endanger himself or others, therefore, there was no statutory basis for the traffic stop.

The Fifth District Court of Appeal disagreed. The court recognized § 316.610 makes it a civil traffic infraction to drive a vehicle that is in an unsafe condition "because of faulty or defective equipment that endangers the driver or other members of the public." The court further stated,

> More importantly, under section 316.610(1), if a law enforcement officer has reasonable cause to believe a vehicle is unsafe or not equipped as required by law, the officer may require the driver to stop the vehicle and submit it to an inspection.

Ivory, 898 So. 2d at 185.

The Fifth District Court of Appeal noted the issue before the trial court was whether there was a constitutional basis for the stop, i.e. whether the officer had reasonable suspicion to stop Ivory. In reviewing the record evidence, the court held:

> The deputy testified that he observed the cracked windshield while driving behind Ivory's car. ***Once he stopped Ivory and examined the windshield***, he determined that it was unsafe. The deputy testified it was a substantial crack and not a hairline crack or chip. After Ivory stated he did not have a license, the deputy wrote a traffic citation for driving with a suspended license which he later amended to driving while license suspended or revoked when he learned that Ivory was a habitual traffic

> offender. The court found that the deputy had an objective reasonable suspicion ***to stop Ivory and inspect the windshield***.

Ivory, 898 So. 2d at 186 (emphasis added).

Only a few months after the Ivory decision, the Fifth District Court of Appeal had another opportunity to address the constitutionality of a stop for a cracked windshield. In State v. Breed, 5D04-282 (Fla. 5th DCA June 10, 2005), the Breeds' motor home was stopped due to a crack in the windshield. The officers then obtained consent to search the motor home and - after a two or three hour search - discovered marijuana. The trial court found the stop was valid, but suppressed the evidence due to the length of the subsequent search. Although the court ultimately reversed the granting of the motion to suppress finding the Breeds freely, voluntarily, and knowingly consented to the search without limitation, the Fifth District Court of Appeal held the trial court properly applied the law when it concluded that the initial stop for the cracked windshield was valid. The court cited a number of cases from other Florida districts, including the case at bar, Smith v. State, 735 So. 2d 570 (Fla. 2d DCA 1999)(stating, "The vehicle in which Mr. Smith was riding was stopped for having a cracked windshield, a violation of Florida law." and "Because the

windshield was cracked, the vehicle's stop was justified."); K.G.M. v. State, 816 So. 2d 748 (Fla. 4th DCA)(the defendant was stopped for operating a vehicle with a cracked windshield. "It is not disputed that the initial stop was valid.") But See, State v. Burke, 4D03-4879 (Fla. 4th DCA June 8, 2005); Thomas v. State, 644 So. 2d 597 (Fla. 5th DCA 1994)(the defendant was stopped for driving a vehicle with a cracked windshield "a non-criminal traffic infraction", citing, § 316.610).

Petitioner dismisses these cases because the issue before those courts was the propriety of the search subsequent to the stop. While correct as to the issue litigated in those cases, Petitioner's argument merely supports the state's position that the common, prevalent, and ***correct*** understanding of the statute permits a traffic stop where an officer observes a cracked windshield.

Furthermore, this Court's decision in Doctor v. State, 596 So. 2d 442 (Fla. 1992) does not compel this Court to find a vehicle stop based on an observation of a cracked windshield is unconstitutional. In Doctor, the officers testified that the Florida Highway Patrol, in concert with the St. Lucie Police department were operating a drug interdiction program. The purpose of the program was to interdict drugs and "the primary

mode of operation was to stop all traffic violators." Both officers involved in the stop of Doctor testified he was stopped because of a "defective taillight". Both officers testified the defect was a crack in the innermost lens of the taillight.

This Court began its examination of the stop by noting, "In Kehoe v. State, 521 So. 2d 1094, 1096 (Fla. 1988) this Court observed that 'when the police realize that they lack a founded suspicion, they sometimes attempt to justify a stop on some obscure traffic violation.' We held that a stop will not be valid just because an officer could have lawfully made the stop . . . ." Id. at 446. The Court went on to say, "The state must show that under the facts and circumstances a reasonable officer would have stopped the vehicle absent an additional invalid purpose." 596 So. 2d at 446. This approach has subsequently been overruled by the Supreme Court of the United States in Whren v. United States, 517 U.S. 806, 818 (1996), where the Court held:

> . . . we are aware of no principle that would allow us to decide at what point a code of law become so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important as to merit enforcement.

This Court also examined the alleged basis of the stop by looking to § 316.610, the statute under which the officers claimed to have stopped Doctor. In conjunction with § 316.610 the Court looked at the statutory requirements regarding taillights. § 316.221(1), Fla. Stat. (1987). Because Doctor's car had at least two taillights that emitted a red light plainly visible from 1,000 feet, at the statute required, this Court found "a reasonable officer would have known that Doctor's taillight was in compliance with the law since red taillights were visible on both ends of the vehicle." Doctor, 596 So. 2d at 446.

As the Second District Court of Appeal points out, Doctor was decided before Whren eliminated the issue of pretext. Further, Doctor does "not involve a situation in which the law enforcement officer applied the correct law but later determined after closer inspection that there was no violation." Hilton, 30 Fla. L. Weekly D453.

As in Vera and Muse, Petitioner makes much of the fact there is no specific portion of the statute prohibiting driving an automobile with a cracked windshield. Petitioner's argument fails to recognize Florida law requires all vehicles to have windshields and, further, mandates that all required equipment

be in “proper condition and repair.” Petitioner’s argument also fails to recognize that law enforcement officers need not establish a violation of the law prior to stopping a vehicle to investigate. Indeed, the function and purpose of a stop based on reasonable suspicion is to permit officers to confirm or dispel their suspicion as to whether the law is being broken.

Petitioner points to other jurisdictions that require a windshield to be cracked to a certain degree before becoming a violation of the law. Petitioner’s argument in this respect is similarly flawed. First, other jurisdictions are entitled and empowered to have different, even more stringent requirements regarding the condition of vehicles on their roads. The fact other jurisdictions may prohibit an eight inch crack, or an excessively cracked windshield does not make Florida’s requirement a windshield must be in proper condition and repair legally deficient in any way. Second, Petitioner also fails to recognize that even in those jurisdictions were the extent of a crack is statutorily defined officers are justified in stopping vehicles *to determine the if the extent of the crack is in violation of the law*.

Petitioner’s position also would require the Legislature to enumerate and detail the “proper repair” of every piece of a

vehicle's equipment. Petitioner's argument rests on the proposition that because the Legislature did not define the "proper repair" of a windshield, only defects that are obviously hazardous justify a traffic stop. Not only would it be unduly burdensome for the Legislature to define the "proper repair" of every piece of equipment on a vehicle, the Legislature is authorized to allow law enforcement officers to use their discretion in determining whether certain equipment defects cause a vehicle to be unsafe, so long as the officers do not exercise that discretion arbitrarily. In other words, officers must be able to articulate the basis for the stop, and that articulated basis must be reasonable.

As Petitioner points out, the Legislature has explicitly defined requirements for certain required equipment. For example, § 316.220 requires vehicles to have at least two headlamps that emit a white light placed on each side of the front of the vehicle not more than 54 inches not less than 24 inches high. Section 316.221 requires motor vehicles to have at least two taillamps on both sides of the back of the vehicle that emit a red light visible from a distance of 1,000 feet. Section 316.234 requires vehicles to have stop lamps on the rear of the vehicle that emit a red or amber light visible from a distance of not less than 300 feet.

As shown by the above examples, certain equipment defects are more apparent than others. Additionally, as shown by these examples, certain equipment requirements are quantifiable. Either a vehicles taillamps emit a red light, or they do not. Either a vehicle's headlamps emit a white light, or they do not. Either the vehicles headlamps are mounted at the correct height, or they are not. Either a vehicles stop lamps emit a red or amber light visible at 300 feet, or they do not. Law enforcement officers might not be able to determine whether a cracked windshield poses a safety hazard until after the car is stopped and inspected.

More importantly, the fact the Legislature has chosen to make certain equipment defects presumptively unsafe, therefore, unlawful does not necessarily lead to the conclusion that the Legislature is required describe in detail all possible equipment defects that may or may not be unsafe.

Notably, § 316.610 allows law enforcement to issue a notice to repair, rather than impound the vehicle, in the case of *non-hazardous* equipment defects including, but not limited to, "tailpipes, mufflers, windshield wipers, marginally worn tires." No where in Chapter 316 does the Legislature define the "proper repair" of a vehicle's tires. Yet, the Legislature recognized

that worn tires are equipment defects that may or may not be hazardous, thereby justifying a brief stop and safety inspection.

Petitioner also makes much of the fact that there was no testimony regarding whether the crack caused a dangerous condition. First, Officer Harrison testified that when he first noticed the cracked windshield he did not know if the crack obstructed the driver's view. (T62). This very reason justifies a traffic stop to determine if the vehicle is in such an unsafe condition as to warrant impoundment. Further, the issue of whether the crack caused an unsafe condition was not the basis of Petitioner's argument to the trial court regarding the legality of the stop. Petitioner's argument was based on the credibility of the officers' testimony regarding when, where, and how they saw the crack in Petitioner's vehicle's windshield. (T122). The argument with reference with whether the crack obstructed the driver's view was with reference to the actions the officer could legally take *after* they conducted the stop. (T122).

Other practical considerations justify stopping a vehicle when an officer observes a cracked windshield. As pointed out in the state's Motion for Rehearing and/or Rehearing En Banc, a

vehicle's windshield is an important structural element for roof integrity and strength. *Eigen, Ana Maria "Examination of Rollover Crash Mechanisms and Occupant Outcomes"* National Center for Statistical Analysis - National Highway Traffic and Safety Administration, December 2003. (Exhibit 1, p. 3)[6]. A damaged windshield may present an unsafe condition even if the damage does not impair the driver's view.

An Australian study, upon which the National Highway Traffic and Safety Administration relied on in part for its evaluation of roll over crashes, showed the "windscreen, and its bonding to the body structure . . . has a great influence on the resistance to crush (in a roll over crash), because the screen is supporting the pillar." *Henderson, Michael; Paine, Michael*, "*Passenger Car Roof Crush Strength Requirements"* Department of Transport and Regional Development, The Federal Office of Road Safety (Australia), 1998. (Exhibit 2, p. 60-61). Therefore, the windshield is part of the vehicle's "safety equipment" and must be maintained properly in order to serve its multiple purposes, including supporting the roof in a roll-over crash.

When a 1991 S/T Cab Pick Up, and a 1981 S10 Pick Up were

tested pursuant to the NHTSA Roof Crush Performance Test[3] they both showed a 36% reduction in roof strength when tested without the windshield. (Exhibit 3, p. 88).[7]

Furthermore, front-seat passenger air bags are designed to deploy against the windshield. In a front-end collision, a cracked windshield can fail and the force of the air bag can blow the windshield out. As a result, unrestrained passengers could be ejected from the vehicle. (Exhibit 4, p. 90; Exhibit 5, p. 92-93).

Even a small "ding" can develop into a major crack as a result of "thermal shock," which can occur when the cold air of the vehicle's air conditioning comes in contact with a sun-heated windshield. This is particularly dangerous in Florida's climate. (Exhibit 6, p. 96). Due to important safety considerations, including maintaining the integrity of the roof and roof strength, consumers are urged to maintain the factory-

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[6] FMVSS 216, National Highway Traffic Safety Administration Regulations.

[7] This test was conducted in the course of civil litigation against General Motors alleging defective roof and seatbelt design and was introduced as one of the plaintiff's exhibits. Lambert v. General Motors, Case No.: RCV039570 (Cal. 4th App. Dist. 2003)(unpublished opinion).

installed windshield. (Exhibit 4, p. 90; Exhibit 6, p. 96-97).[6]

Therefore, it is important to identify and repair damaged windshields as soon as possible, before the damage is such that replacement is the only option. Section 316.610 provides law enforcement an opportunity to advise drivers of the necessity of maintaining their vehicle's windshield in proper repair or condition to avoid potentially dangerous consequences.

Petitioner misapprehends the purpose and intent of § 316.610, which is to give law enforcement officers the ability to make reasoned decisions regarding a vehicle's safety ***after*** an examination and inspection of the vehicle. Naturally, a stop executed in order to make such an inspection and determination must be based on reasonable cause to believe the vehicle's equipment is not in proper repair or adjustment.

According to Petitioner's reasoning, officers would be permitted to stop only those vehicles that are obviously unsafe. That determination, according to Petitioner, must be made while

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[6] Notably, § 627.7288 mandates that, "the deductible provisions of any policy of motor vehicle insurance, delivered or issued in this state by any authorized insurer, providing comprehensive coverage or combined additional coverage shall not be applicable to damage to the windshield of any motor vehicle covered under such policy." See also, F.A.C. 690.142.011(11)(b)(5) - Insurer Conduct Penalty Guidelines.

the vehicle in question, or the officer’s vehicle, or both are traveling on Florida’s highways or roads at speeds up to 70 miles per hour. The law does not require such certainty. Rather, the law requires governmental or law enforcement intrusion to be reasonable when balanced against individuals’ expectation of privacy. Individuals have a limited expectation of privacy in their automobiles that must be balanced with the state’s compelling interest in ensuring the safety of Florida’s roads and highways. Section 316.610 sufficiently balances those competing interests. Therefore, law enforcement officers can constitutionally stop a vehicle after observing a cracked windshield, but prior to determining the extent of the crack.

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm the Second District Court of Appeal’s decision affirming the denial of Petitioner’s motion to suppress.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to ANTHONY C. MUSTO, Special Assistant Public Defender, Officer of the Public Defender, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831, this ____ day of June, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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