IN THE SUPREME COURT OF FLORIDA

Case No. SC05-438

TRISTAN HILTON,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner Tristan Hilton was the defendant in the trial court and the appellant on appeal. Appellee State of Florida was the prosecution at trial and the appellee on appeal. The parties will be referred to in this brief as "Mr. Hilton" and "the state." The symbol "R" will constitute a reference to the record on appeal.

STATEMENT OF THE CASE AND FACTS

On March 22, 2002, an information was filed in the Circuit Court for the Sixth Judicial Circuit of Florida charging that on January 25, 2002, Mr. Hilton committed the offense of possession of marijuana (R 3).

Mr. Hilton filed a motion to suppress the marijuana (R 7-8). A hearing was held on the motion, at which the state presented the testimony of four police officers, Officers Dana Harrison and Mark J. Sena, who were involved with the stop of Mr. Hilton's vehicle, and Officers Kevin Matthews and Thomas Dawe, who arrived at the scene after the stop had occurred.

Officers Harrison and Sena observed Mr. Hilton driving a vehicle with a cracked windshield (R 49, 72). The officers proceeded to stop Mr. Hilton based solely on the fact that the windshield was cracked (R 49, 72). Indeed, Officer Sena testified specifically that if they had not seen the crack, they would not have stopped Mr. Hilton (R 73).

Officer Harrison testified that the crack was in "upper right-hand corner on the passenger's side (R 62)." He stated that there was no glass falling out of the crack (R 62). When asked "And this certainly didn't obstruct the driver's view, did it," he replied, "No, not as far as I know. I don't know (R 62)." He physically indicated the size of the crack (R 62), in a manner described by the court as "about seven or eight inches (R 127)." Officer Matthews described the crack as being "maybe about five or six inches off to the passenger's side of the vehicle, coming from the top of the vehicle down, if you will (R 99)." A photograph of the windshield (R 31), indicating that the crack did come from the top and that it was primarily located in the manufacturer's tinting at the top, was introduced into evidence at the hearing (R 101).

Officer Harrison approached the vehicle and observed that neither Mr. Hilton nor his passenger was wearing seat belts (R 50). He obtained information from the two individuals, returned to his vehicle, and ran the individuals in his computer (R 51). He found that Mr. Hilton was on probation at the time, but that there were no warrants for him and that his driver's license was valid (R 52). At that point, the officer did not believe that there was criminal activity afoot (R 52). He returned to the vehicle with the intent of giving warnings for the cracked windshield and the failure to use seat belts (R 52).

As Officer Harrison spoke with Mr. Hilton, Officer Sena approached and advised him that there was a gun in the back of the vehicle and that he needed to have Mr. Hilton exit (R 54). Officer Harrison did so and escorted Mr. Hilton to the curb (R 54). In the process, Officer Harrison observed the handle and the stock of a barrel on the floor of the back of the vehicle (R 54). As he pulled Mr. Hilton out and escorted him, Officer Harrison smelled an odor of marijuana coming from Mr. Hilton (R 55).

The gun had been initially observed by Officer Matthews (R 97). He brought it to the attention of Officer Sena (R 74), who believed that the crime of possession of firearm by a convicted felon might have been occurring (R 75). Once Officer Harrison had removed Mr. Hilton from the vehicle, Officer Sena smelled a fresh smell of marijuana (R 76). As soon as the occupants were out of the vehicle, Officer Sena retrieved the rifle and secured it to his police cruiser (R 84). At that time, Officer Sena realized that the item was not a rifle, but a Daisy BB gun (R 85).

Officer Harrison proceeded to conduct "a head-to-toe search" of Mr. Hilton to "make sure there's nothing on him (R 56)." Although he observed nothing unusual (R 56), Officer Dawe saw that in the way that Officer Harrison was conducting the search, he was missing a bulge in Mr. Hilton's waistband (R 106-

107). Officer Dawe approached and advised Officer Harrison that Mr. Hilton needed to be searched better in the area of the bulge (R 107-108). Officer Dawe placed his hands on the bulge, anticipating it to be a firearm (R 108). As soon as he got close enough to touch Mr. Hilton, Officer Dawe detected a strong odor of marijuana coming from Mr. Hilton's person (R 108). As he put his hand on the bulge, Officer Dawe asked Mr. Hilton, "What's this," and Mr. Hilton replied, "That's me. That's me (R 110)." When he put his hand in the area, Officer Dawe immediately heard the sound of plastic and could feel "that it was individual baggies clearly with the consistency of how marijuana is packaged for illegal sales of marijuana (R 109)." The officer unbuttoned Mr. Hilton's pants and retrieved a brown paper bag and a clear plastic bag, each of which contained individual baggies packaged with a green, leafy substance (R 111), later determined to be marijuana (R 112).

The trial court denied Mr. Hilton's motion to suppress (R 9, 128). Subsequently, Mr. Hilton entered a plea of no contest (R 40), specifically reserving the right to have reviewed on appeal the denial of his motion to suppress (R 41). He was adjudicated guilty (R 12, 40) and sentenced to 32.4 months imprisonment (R 13, 40).

Mr. Hilton appealed to the Second District Court of Appeal. A panel of that court entered an opinion reversing Mr. Hilton's

conviction and ordering that he be discharged. *Hilton v. State*, 29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004). One member of the panel, Judge Whatley, wrote a dissenting opinion. On rehearing en banc, the panel decision was withdrawn and the court entered an opinion affirming the conviction. *Hilton v. State*, 30 Fla. L. Weekly D453 (Fla. 2d DCA Feb. 16, 2005)(en banc). Judge Northcutt wrote a dissenting opinion, in which Judge Fulmer concurred. The court certified the following question as one of great public importance:

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

30 Fla. L. Weekly at D455.

Mr. Hilton filed a notice invoking the discretionary jurisdiction of this court, thereby instituting the present proceeding.

SUMMARY OF ARGUMENT

The officers in this case freely admitted that Mr. Hilton was stopped solely because he was driving a car with a cracked windshield. The mere fact that a windshield is cracked, however, is not a violation of Florida law. Rather, a cracked windshield is a violation only when it causes a vehicle to be in "such unsafe condition as to endanger any person or property." Section 316.610, Florida Statutes.

There was absolutely no testimony here that the crack in any way endangered any person or property. Not one of the four testifying officers gave any indication whatsoever of any such endangerment. No glass was coming loose. Moreover, the objective facts give no such indication either. The crack was somewhere between five and eight inches long, was located in the corner of the top of the windshield on the passenger's side, and was primarily in the area tinted by the manufacturer, an area that would likely be obscured when the passenger side sun visor was down. Given the lack of any evidence of endangerment, especially in light of the minor nature and location of the crack, it cannot be said that there existed a reasonable suspicion that any provision of law was being violated. Thus, the stop was unlawful.

This conclusion is in total accord with decisions from both Florida courts and those of other jurisdictions. Those decisions make it clear that stops for cracked windshields are proper only when officers have reasonable cause to believe that the cracks constitute a violation of some specific statutory provision.

The Second District's determination that Section 316.610(1), Florida Statutes, authorizes stops based on the mere fact of a cracked windshield cannot withstand scrutiny. That provision only authorizes stops when there is reasonable cause

to believe that the offense defined by the statute's preceding, unnumbered paragraph is occurring. That paragraph requires that equipment be in proper condition and adjustment "as required in" Chapter 316. Because no provision of that chapter—or any other chapter—makes it unlawful to drive with a cracked windshield, Section 316.601(1) does not authorize stops based on that fact alone.

In *Doctor v. State*, 596 So. 2d 442 (Fla. 1992), a case involving a cracked taillight, this court rejected the very rationale employed by the Second District. The same approach is equally compelled with regard to a cracked windshield.

Simple logic also calls for this conclusion. Accepting the Second District's rationale would allow for stops and the issuance of notices to require repair for cracks that do not violate the law. Moreover, it would sanction the violation of Fourth Amendment rights because it would allow stops in situations in which officers do not have reasonable cause to believe that offenses are being committed.

STANDARD OF REVIEW

Appellate courts "accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues

arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9, of the Florida Constitution." *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). Thus, while review of the trial court's findings of historical fact will not be reversed absent clear error, *id.* at 605, or a lack of competent, substantial evidence, *id.* at 608, the appellate court reviews de novo questions, such as the one presented here, of reasonable suspicion and probable cause. *Id.* at 605.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING MR. HILTON'S MOTION TO SUPPRESS WHEN THE STOP OF HIS VEHICLE WAS BASED SOLELY ON THE FACT THAT HIS WINDSHIELD WAS CRACKED AND NOT ON ANY BELIEF THAT THE CRACKED WINDSHIELD CAUSED MR. HILTON'S VEHICLE TO BE IN AN UNSAFE CONDITION THAT ENDANGERED A PERSON OR PROPERTY.

"In determining the lawfulness of" a "traffic stop," a court "must examine whether the arresting officer had an objective basis" to effectuate the stop. *Gordon v. State*, 30 Fla. L. Weekly D1240, D1241 (Fla. 2d DCA May 13, 2005). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed. 2d 89, 95 (1996); *Gordon*, 30 Fla. L. Weekly at D1241; *Scott v. State*, 710 So. 2d 1378, 1379 (Fla. 5th DCA 1998). In "applying the objective test,

generally the only determination to be made is whether probable cause existed for the stop in question." *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997); *Gordon*, 30 Fla. L. Weekly at D1241. In the present case, application of this test compels the conclusion that the stop was unlawful.

DRIVING WITH A CRACKED WINDSHIELD DOES NOT VIOLATE FLORIDA LAW

It is clear that the officers stopped Mr. Hilton *solely* because his windshield was cracked. Yet, the mere fact that a windshield is cracked does not constitute a violation of law. The statutory requirements for windshields are set forth in Sections 316.2951 through 316.2957, Florida Statutes. They require that vehicles have windshields, that the windshields be equipped with safety glazing and wipers, and that windshields not be covered by various items, including sunscreening in excess of certain limits. They *do not* make it a violation for the windshield to be cracked.

DRIVING WITH THE CRACK HERE DID NOT VIOLATE SECTION 316.610, FLORIDA STATUTES, BY CAUSING THE VEHICLE TO BE IN SUCH UNSAFE CONDITION AS TO ENDANGER ANY PERSON OR PROPERTY

Mr. Hilton recognizes that a cracked windshield can under some circumstances constitute a violation of a statutory provision. Specifically, he recognizes that a particular crack can, depending on its location and severity, constitute a violation of Section 316.610, Florida Statutes, by causing a

vehicle to be in "such unsafe condition as to endanger any person or property."

In the present case, there was absolutely no testimony that the crack in any way endangered any person or property. Not one of the four testifying officers gave any indication whatsoever of any such endangerment. Moreover, the objective facts give no such indication either. No glass was coming loose. The crack was somewhere between five and eight inches long, was located in the corner of the top of the windshield on the passenger's side, and was primarily in the area tinted by the manufacturer, an area that would likely be obscured when the passenger side sun visor was down. Given the lack of any evidence of endangerment, especially in light of the minor nature and location of the crack, it cannot be said that there existed a reasonable suspicion that any provision of law was being violated. Thus, the stop was unlawful.

Indeed, given the circumstances here, Mr. Hilton submits that to conclude otherwise would be to say that a stop is justified in any case in which a windshield is cracked. Such a conclusion, although exactly the one reached by the Second District's en banc decision, cannot logically be held to be the law. Had the legislature meant for a cracked windshield to be *per se* unlawful, it would have included a requirement in the statutes that vehicles not be operated with cracked windshields.

Because the legislature did not do so, it is obvious that a cracked windshield, just as any other problem or defect not specifically addressed by the statutory scheme, can only constitute a violation if it creates a situation in which a vehicle is in such an unsafe condition as to endanger a person or property.

FLORIDA LAW SUPPORTS MR. HILTON'S POSITION

Florida courts have therefore consistently recognized, at least implicitly, that the mere existence of a crack does not authorize a stop and that only when the crack creates the unsafe situation envisioned by Section 316.610, Florida Statutes, is a stop lawful.

Indeed, this is true even in the wake of the decision under review. In *Ivory v. State*, 898 So. 2d 184 (Fla. 5th DCA 2005), decided almost a month after the en banc opinion here, the Fifth District, in analyzing a claim that a stop based on a cracked windshield was unlawful, set forth the appropriate framework within which such issues should be considered:

> Section 316.2952, Florida Statutes, provides that a vehicle must have a windshield, and section 316.610 states that it is a civil traffic infraction to drive a vehicle that is in an unsafe condition because of faulty or defective equipment that endangers the driver of other members of the public. Courts have held that it is a violation of this section to drive when the cracked windshield impedes a driver's vision. … More important, 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.

898 So. 2d at 185 (citations omitted).

Although the court rejected the defendant's contention in *Ivory*, it did so because the record supported the trial court's finding that the crack involved impaired the driver's vision and was a safety hazard. Implicit in the court's analysis and disposition is the fact that a crack that does not endanger any person or property is not a proper basis for a stop.

Moreover, the approach taken in *Ivory* is in accord with the approaches taken in cases decided before the decision under review. *See Thomas v. State*, 644 So. 2d 597 (Fla. 5th DCA 1994) (noting that a stop for a cracked windshield was based on Section 316.610, Florida Statutes); *State v. Savino*, 686 So. 2d 811 (Fla. 4th DCA 1997), Warner, J., dissenting (expressing the belief that a stop was justified under Section 316.610, Florida Statutes, when an officer testified that it would have been difficult to see through a "spider" crack in the windshield).[1]

[1] The Second District's en banc opinion cited to *Thomas* and to three other Florida decisions, *K.G.M. v. State,* 816 So. 2d 748 (Fla. 4th DCA 2002), *Smith v. State,* 735 So. 2d 570 (Fla. 2d DCA 1999), and *Coleman v. State,* 723 So. 2d 387 (Fla. 2d DCA 1999), in support of the conclusion that a vehicle stop for a cracked windshield is valid. The court's reliance on those cases was misplaced, however, because they were all concerned with actions occurring after stops, not with the validity of the stops themselves. As stated in Judge Northcutt's dissent to the en banc opinion:

> In short, the notion that the statutes of Florida—or of any other state, for that matter—require that windshields be free of all cracks is simply untrue. The majority's assertion that Florida courts have held to the contrary is plainly wrong. The majority cites four cases involving searches following traffic stops for cracked windshields. But in none of those cases was the propriety of the stop even at issue. In *Smith*, 735 So. 2d at 571-72, the question before the court was the validity of the officers' search of a passenger after the car was stopped. *Coleman*, 723 So. 2d at 388, and *Thomas*, 644 So. 2d at 598, both examined the propriety of pat down searches. In *K.G.M.*, 816 So. 2d at 752-53, the defendant challenged the length of his roadside detention while the officers awaited the arrival of a narcotics detection dog.
>
> None of the opinions in those cases described the windshield cracks giving rise to the stops. This is significant because … a windshield crack might violate the other prohibition in section 316.610 if its location or severity places the vehicle "in such unsafe condition as to endanger any person or property." For this reason, a court's simple observation that a motorist was stopped for having a cracked windshield in violation of Florida law in no way suggests that Florida law prohibits *every* windshield crack.
>
> Most telling, none of those opinions cited to a statute that requires windshields to be free of all cracks, because *there is none*. …

30 Fla. L. Weekly at 457, Northcutt, J., dissenting.

Mr. Hilton additionally notes that Judge Northcutt's comments are equally applicable to the recent decision in *McNichols v. State*, 30 Fla. L. Weekly D999 (Fla. 5th DCA April 15, 2005), which was entered after the decision under review. In that case, although the defendant was stopped for a cracked windshield, the extent of the crack is not apparent from the opinion, and the court dealt only with an issue relating to the continued detention of the defendant after the purposes of the traffic stop were satisfied, not with the validity of the stop.

OTHER JURISDICTIONS SUPPORT MR. HILTON'S POSITION

Decisions from other states have employed similar reasoning under similar statutory schemes and have consistently required more than just a cracked windshield to support a stop.

For instance, in *Commonwealth v. Shuck*, (unpublished opinion)[2] 2004 WL 236681 (Ky.App. Oct. 22, 2004), the court found that because Kentucky law does not specifically prohibit driving with a cracked windshield, doing so is a traffic violation only if the crack is of sufficient gravity to unreasonably obscure the drive's visibility so as to result in a threat to the rights of other traffic or to public safety. This conclusion was based on a general "public safety" statute, one similar to the Florida provision discussed above. In its decision, the court specifically noted that a cracked windshield is not, per se, a violation of the Kentucky statute at issue, indicated that the question of whether particular cracks constitute violations will have to be determined on a case-by-case basis, and found that the stop in the case at issue was improper because the cracks involved there did not support the conclusion that they could have reasonably interfered with a driver's ability to see so as to interfere with the rights of other traffic or endanger public safety.

[2] A copy of this opinion, and of the other unpublished opinions cited in this brief, is included in the appendix being filed by Mr. Hilton.

Likewise, in *State v. Latham*, (unpublished opinion) 2004 WL 104578 (Ohio App. 2 Dist. May 7, 2004), the court rejected the state's contention that a stop is proper whenever a windshield is cracked. Instead, the court found that the simple appearance of a crack does not give rise to a reasonable suspicion of a violation of a state code provision that prohibits driving a vehicle that is in such an unsafe condition as to endanger any person. The court therefore noted the need to determine whether the particular facts surrounding the crack in question gave rise to such a suspicion, did so, and concluded that they did not.

The same approach was undertaken in *State v. Pease*, 531 N.E.2d 1207 (Ind. App. 1 Dist. 1988), with the court applying an Indiana statute strikingly similar to the one at issue here.[3] In that case, a vehicle was stopped because it had a "badly cracked" windshield, *id.* at 1209, 1210, such that the officer making the stop "determined the vehicle to be unsafe." *Id*. at 1210. In upholding the stop, the court stated that "even though the Legislature did not expressly prohibit the operation of a motor vehicle with a broken or cracked windshield, as Pease argues, if a vehicle is operated in such an unsafe condition, by

[3] The Indiana provision made it an offense for a person to operate any vehicle "which is in such an unsafe condition as to endanger any person, 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." *Pease*, 531 N.E.2d at 1210.

virtue of the condition of its windshield, as to endanger the driver or another person, a violation has occurred." *Id*.[4]

See also State v. Flowers-Roscoe, (unpublished opinion) 2005 WL 470424 (Wash. App. Div. 2 Mar. 1, 2005) (upholding stop when officer observed crack which he believed was likely to obstruct the driver's view and which "looked like a 'glow stick' when light reflected off of it, causing obstruction and distractions for the driver," and stating that officer "saw a cracked windshield, *believed it to be a safety hazard*, and, thus, had an objective basis for stopping defendant [emphasis

[4] The cracked windshield in *Pease* provides a perfect example of the sort of circumstances under which a vehicle can be deemed to be in an unsafe condition because of its windshield. In that case, the court stated that from the perspective of one picture introduced into evidence, "one observes one deep break in the windshield running diagonally across the passenger's side of the windshield from the hood to the roof." 531 N.E.2d at 1210. The court went on to say, "The main break is composed of three or four long, parallel cracks with a star-shaped focal point at each end. Each focal point has multiple cracks radiating from it, the smaller being approximately four to five inches in diameter." *Id.* at 1211. From another photograph, the court stated, "damage to the passenger side of the windshield appears more extensive, with many focal points and several large cracks, suggesting the possibility of chipping glass and obscured vision through the passenger's side." *Id.* Given these facts, the court found that "the damage was sufficiently excessive to lead a reasonably prudent person to believe that the vehicle, when driven, created a dangerous situation for those entering the area where the driver's peripheral vision is obscured by the breakage. While the damage may not wholly block the driver's view, the numerous cracks and their location would make it difficult at best to discern objects in that area. One can envision possible danger to pedestrians crossing in front of the vehicle and to the occupants of vehicles merging from the driver's right or changing lanes." *Id.*

added]"); *State v. Wayman-Burks*, 114 Wash. App. 109, 56 P.3d 598 (2002) (finding stop for "severely cracked windshield," *id.* at 599, valid under Washington statute allowing stops of "vehicles whose windshields are in such an unsafe condition as to endanger any person." *Id*. at 600 (footnote omitted)); *Muse v. State,* 146 Md. App. 395, 807 A.2d 113 (2002) (upholding stop when crack was over 24 inches and extended from one side of the windshield to the other, *id.* at 116, in light of Maryland provision making it unlawful to drive a vehicle "in such unsafe condition as to endanger any person." *Id.* at 119.); *State v. Glinsey*, (unpublished opinion) 1999 WL 628673 (Ohio App. 6 Dist. Aug. 20, 1999) (affirming order suppressing evidence after stop for cracked windshield when crack was approximately 12 inches long with six inches protruding beyond the shaded top portion of the windshield and when evidence did not show that the windshield was in such an unsafe condition as to endanger any person); *People v. Carda*, 819 P.2d 502 (Colo. 1991) (invalidating a stop, despite a Colorado statute prohibiting the operation of a vehicle when a driver's vision through any required glass equipment is not normal and unobstructed, when testimony was nebulous an unclear as to the type and location of a crack in a windshield).

***CASHMAN* SUPPORTS MR. HILTON'S POSITION**

The decision under review cites to *United States v. Cashman*, 216 F.3d 582 (7th Cir. 2000), in support of its statement that "it would not be practical to require a law enforcement officer to make a determination of the extent of a crack in a windshield until the vehicle is actually stopped." 30 Fla. L. Weekly at D454. The decision in *Cashman*, however, supports Mr. Hilton's position.

As noted in Judge Northcutt's dissent, *Cashman* was concerned with a stop that was predicated on a Wisconsin code provision that prohibits driving a vehicle with a windshield that is "excessively cracked," a term defined as a crack that "either extends more than eight inches from the frame or is located within the 'critical area,' i.e., 'that portion of a motor vehicle windshield normally used by the driver for necessary observations to the front of the vehicle … includ[ing] the areas normally swept by a factory installed wiper system." 30 Fla. L. Weekly at D455-456, Northcutt, J., dissenting. The crack in *Cashman* was between seven and ten inches in long, extending above the bottom of one of the resting windshield wipers. In upholding the stop in that case, the Seventh Circuit stated:

> Careful measurement after the fact might reveal that the crack stopped just shy of the threshold for "excessive" cracking or damage; but the Fourth

> Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one. Given the evident length of the crack and its proximity to the portion of the windshield swept by the wipers, Trooper Spetz had probable cause to stop Cashman's vehicle.

Id. (citation omitted).

Thus, ***Cashman*** was not concerned with a stop based on the mere fact that a windshield was cracked, nor on a belief that a crack endangered any person. Rather, the stop there was based on the officer's belief that the crack violated a specific code provision that prohibited cracks of more than a specified length or located in a specific area.

Although Wisconsin provides such specific provisions, while Florida, like most states, ***Hilton***, 30 Fla. L. Weekly at D457, Northcutt, J., dissenting, does not expressly regulate windshield cracks, ***Cashman*** does provide guidance here. It demonstrates that a stop cannot be based on the mere fact that a windshield is cracked, but is proper only when the crack is of such a nature that it provides an officer with reasonable cause to believe that an offense defined by law is being committed. In Wisconsin, that offense is defined by the length or location of a crack. In Florida, it arises from a crack causing a vehicle to be in an unsafe condition. In ***Cashman***, the officer's observation clearly gave him reason to believe that the law was being violated due to the length and location of the crack. Here, by contrast, there is not even a hint that the officers

had any belief whatsoever, reasonable or otherwise, that the crack rendered Mr. Hilton's vehicle unsafe.

As stated by Judge Northcutt:

> As can be seen, *Cashman* stands for the proposition that, if the facts observed by an officer objectively support his reasonable belief that the vehicle is being operated in violation of the traffic laws, the validity of the stop is not vitiated if later investigation reveals that, in fact, there was no violation. *Cashman* does *not* hold, as the majority suggests, that officers may stop a vehicle based on a mere hunch that the operator is violating the traffic laws.[5] Neither does Florida's subsection 316.610(1). The majority's concern about practicality notwithstanding, the statute—consistent with the Fourth Amendment—requires that an officer have reasonable cause to believe that the vehicle is being operated in violation of the law *prior* to stopping the vehicle.

30 Fla. L. Weekly at 456, Northcutt, J., dissenting.

In essence, the *Cashman* court applied the same analysis utilized in *Ivory* and discussed above. That analysis calls for courts to determine whether officers have reasonable cause to believe that a cracked windshield violates some statutory provision.[6] When they do have such cause, a stop is proper.

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[5] Judge Northcutt's comment in this regard is well supported by prior precedent, which makes it clear that a "hunch" that a violation of the law is occurring is not a sufficient basis to support a stop. *LaFontaine v. State*, 749 So. 2d 558, 560 (Fla. 2d DCA 2000); *Estep v. State*, 597 So. 2d 870, 870 (Fla. 2d DCA 1992); *McCloud v. State*, 491 So. 2d 1164, 1167 (Fla. 2d DCA 1986).

[6] Another case applying this rationale, *State v. Cuevas*, (unpublished opinion) 2002 WL 1227301 (Wash. App. Div. 3 June 6, 2002), expresses sentiments applicable to the present case. There, a stop resulted from a crack extending the entire length

When they do not, a stop is unlawful. Although such cause existed in *Cashman*, it did not here, so applying the analysis undertaken in both *Cashman* and *Ivory* compels the conclusion that Mr. Hilton was improperly stopped.

SECTION 316.610(1), FLORIDA STATUTES, DOES NOT AUTHORIZE THE STOP OF ANY VEHICLE WITH A CRACKED WINDSHIELD

In its en banc opinion, the Second District did not find that any statutory provision prohibited the operation of a vehicle with a cracked windshield, nor did it even suggest that the crack here was of a nature that it created such unsafe condition as to endanger any person or property. Rather, the court based its conclusion that the stop here was proper entirely on the wording of Section 316.610(1), Florida Statutes, which states that a police officer may require the driver of a vehicle to stop and submit to an inspection "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." Specifically, the court relied on the last portion of this provision, which refers to stops when a

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of a windshield from one end to the other. The admission of subsequently seized evidence was upheld pursuant to a Washington provision making it a traffic infraction to drive a vehicle in such unsafe condition a to endanger any person. Rejecting the defendant's claim that interpreting the statute to justify the stop would be to give officers unlimited discretion to stop any vehicle with a cracked windshield, the court made it clear that "the officer's discretion is limited by the requirement that he or she have a well founded suspicion based on objective facts that the windshield is so unsafe as to be dangerous."

vehicle's equipment is not in proper adjustment or repair,[7] and concluded that this wording allows officers to stop any vehicle with a cracked windshield.

THE WORDING OF THE STATUTE COMPELS THE REJECTION OF THE DISTRICT COURT'S RATIONALE

Mr. Hilton suggests that the Second District's interpretation of this language is erroneous. In the first place, it must be realized that the language in Section 316.610(1), Florida Statutes, does not define the offense of driving with equipment not in proper repair. Rather, it merely is the language authorizing stops for that offense. The offense itself is defined in the preceding, unnumbered paragraph of Section 316.610, Florida Statutes. That provision states, in pertinent part (emphasis added):

> It is a violation of this chapter for any person to drive or move … on any highway any vehicle … 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.

[7] Clearly, there was no basis for a stop in the present case based on either of the first two portions of the provision. For the reasons discussed previously in this brief, Mr. Hilton's vehicle was not "unsafe." Moreover, there is not even a suggestion that the vehicle was not "equipped as required by law." Indeed, implicit in an issue involving a cracked windshield is the fact that the vehicle involved does have a windshield, as required by law.

Thus, it is only when equipment is not in proper adjustment or repair *as required by Chapter 316 of the Florida Statutes* that an offense occurs.[8] This requirement is part of the statute

[8] This fact is vividly demonstrated by the fact that each of the cases regarding traffic stops cited by the Second District in addition to those discussed in n. 1, *supra*, involved an offense of precisely this nature. As stated by Judge Northcutt:

> [T]he majority's five other examples of traffic stops based on equipment violations all derived from specific requirements in chapter 316. Thus, in *Smith* [*v. State*], 687 So. 2d [875] at 877 [(Fla. 2d DCA 1997)], the defendant was stopped because her tag light was too dim to make the tag clearly legible for 50 feet, as required by section 316.221(2). [*State v.*] *Snead*, 707 So. 2d [769] at 770 [(Fla. 2d DCA 1998)], involved an inoperable taillight in violation of section 316.221, which requires every vehicle to have two taillights visible for 1,000 feet, and inoperable brake lights contrary to section 316.222, which requires two brake lights visible for 300 feet. [*State v.*] *Kindle*, 782 So. 2d [971] at 974 [(Fla. 5th DCA 2001)], also involved an inoperable taillight. In [*State v.*] *Moore*, 791 So. 2d [1246] at 1248 [(Fla. 1st DCA 2001)], the officer stopped the defendant because his windows appeared to be tinted beyond the specific limitations set forth in sections 316.2951-.2956. In *Scott*, 710 So. 2d at 1379, the motorist's turn signal was inoperable, violating sections 316.222(2) and 316.234(2), which together require that every vehicle be equipped with front and rear turn signals that in normal sunlight are visible from 300 feet or 500 feet, depending on the size of the vehicle.
>
> Under *Doctor* [*v. State*, 596 So. 2d 442 (Fla. 1992)], those stops were proper under section 316.610 because they all involved violations of statutes delineating specific equipment requirements for vehicles. On the other hand, no Florida statute prohibited Hilton to drive with a crack in his windshield. Therefore, the officers were not authorized to stop Hilton for violating section 316.610's prohibition against driving with equipment that is not "in proper condition and adjustment as required in [chapter 316]."

for one obvious reason. Without it, officers would only be able to stop vehicles for being in an unsafe condition or for not having the equipment required by law, not for having required equipment that is faulty in some respect.[9] No offense is committed when equipment is not in proper adjustment or repair in some other respect. Because a cracked windshield alone does not violate any provision of the chapter (or any other law), it is does not violate the provision requiring equipment to be in proper adjustment or repair *as required by Chapter 316.*[10]

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30 Fla. L. Weekly at D457-D458, Northcutt, J., dissenting.

[9] There are a huge number of possible bases for stops in this regard. For example, Chapter 316 establishes requirements for the location of headlamps, Section 316.220(2) and reflectors, Section 316.225(1), the aiming of headlamps, Section 316.237, the visibility of taillamps, Section 316.221, and reflectors, Section 316.226, the color of lighting devices, Section 316.224, bumper heights, Section 316.251, the need for mud flaps to effectively prevent splashes, Section 316.252, the size of lettering on ice cream trucks, Section 316.253, the stopping distance of brakes, Section 316.262, the sound level of horns, Section 316.271, the allowable noise level for exhaust systems, Section 316.272, motor vehicle noise, Section 316.273, air pollution control, Section 316.2935, the view provided by mirrors, Section 316.294, and the use of sunscreening material, Section 316.2954.

[10] The fact that Section 316.610(1), Florida Statutes, does not also contain a reference to the requirements of Chapter 316 in no way changes this conclusion. First, as noted previously, the initial, unnumbered paragraph of Section 316.610 sets forth the offense. The language used in Section 316.610(1) merely authorizes officers to take the actions necessary to enforce the preceding paragraph. Thus, the fact that the legislature may have used a bit of verbal shorthand in referring back to the elements of the offense set forth in the unnumbered paragraph does not eliminate those requirements to which specific reference is not made. Any other reading of the statute would strip the words “as required in this chapter,” as set forth in

THIS COURT'S INTERPRETATION OF SECTION 316.610

This court has not specifically addressed the meaning of Section 316.610, Florida Statutes, in the context of a cracked windshield, but it has done so with regard to a cracked

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the unnumbered paragraph, of any meaning. It is well settled that in construing two subsections of the same statute, courts must read the subsections in pari materia. *Payne v. State*, 873 So. 2d 621, 622 (Fla. 2d DCA 2004), citing to *State v. Riley*, 638 So. 2d 507, 508 (Fla. 1994). Likewise, courts must construe all parts of a statute together in order to achieve a consistent whole. *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273, 1287-1288 (Fla. 2000); *M.W. v. Davis*, 756 So. 2d 90, 101 (Fla. 2000); *T.R. v. State*, 677 So. 2d 270, 271 (Fla. 1996); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Additionally, "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), citing *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996), and *Forsythe*, 604 So. 2d at 456. Thus, where possible, courts should give effect to all statutory provisions and construe related provisions in harmony with one another, *M.W.*, 756 So. 2d at 101; *T.R.*, 677 So. 2d at 271, *Unruh*, 669 So. 2d at 245; *Forsythe*, 604 So. 2d at 455; *Villery v. Florida Parole and Probation Comm.*, 396 So. 2d 1107, 1111 (Fla. 1980), as well as give effect to each word of such provisions. *Gretz v. Florida Unemployment Appeals Comm.*, 572 So. 2d 1384, 1386 (Fla. 1991). Interpretations that render statutory provisions superfluous, on the other hand, are, and, should be, disfavored. *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999), citing *Johnson v. Feder*, 485 So. 2d 409, 411 (Fla. 1986), quoting *Patagonia Corp. v. Board of Govs. of Fed. Res. Syst.*, 517 F.2d 803, 813 (9th Cir. 1975). Applying these principles to the present case clearly calls for the adoption of Mr. Hilton's position. Any other approach would constitute a failure to achieve a consistent whole and to give effect to all statutory provisions, and would also render meaningless and superfluous the words "as required in this chapter."

taillight and its decision in that regard provides guidance that strongly supports Mr. Hilton's position.

In *Doctor v. State*, 596 So. 2d 442, 447 (Fla. 1992), this court rejected the claim that the statute allowed for a stop when a vehicle had a cracked taillight that did not pose a safety hazard. This court stated:

> The State argues that section 316.110 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 would allow police 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.

Certainly, the same conclusion applies with equal force to cracked windshields. The decision under review attempts to distinguish *Doctor*, however on the basis that it was decided prior to the decision in *Whren*, the basis that in *Doctor*, the officer making the stop was mistaken as to the requirements of the law, and on the basis that, unlike the air conditioner and radio referred to by this court in *Doctor*, a windshield is required by law.

Mr. Hilton submits that these factors in no way diminish the applicability of the *Doctor* reasoning to the present case.

In the first place, *Whren* was concerned with the question of whether a pretext stop had occurred and the Court found that

the propriety of a stop must be measured by an objective assessment of the facts known to the detaining officer, not that officer's subjective intent. The present case does not, however, deal with a claim that a pretext stop occurred. Rather, Mr. Hilton submits that applying the objective test mandated by *Whren* compels the conclusion that the stop of his vehicle was improper because as a matter of law, a vehicle cannot properly be stopped as the result of nothing more than a cracked windshield. He further suggests that the decision in *Doctor* is nothing more than an application of this principle and that *Doctor* is therefore unaffected by *Whren*. Mr. Hilton's conclusions regarding *Whren* are bolstered by the fact that the Fourth District Court of Appeal applied *Doctor* to a post-*Whren* cracked taillight case, *Frierson v. State*, 851 So. 2d 293 (Fla. 4th DCA 2003), rev. granted, 870 So. 2d 823 (2004), stating, *id.* at 296:

> 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.

The Second District's effort to distinguish the present case from *Doctor* on the ground that the officer there was mistaken as to the requirements of the law also fails. The same

is true here. The officers stopping Mr. Hilton's vehicle were under the impression that they could properly conduct a stop based on the mere fact of a cracked windshield, just as the officer in *Doctor* believed he could stop for a cracked taillight. The officer in *Doctor* was wrong and, for the same reasons and others set forth in this brief, so were the officers here.

The final distinction drawn by the Second District, the fact that windshields, unlike air conditioners and radios, are required by law, must also be rejected. Most basically, it ignores the fact that, while this court used air conditioners and radios of examples of the absurd results that would have been compelled under the logic of the state's position there, the case itself dealt with a cracked taillight and taillights, like windshields, are required by law. As stated by Judge Northcutt, the Second District's en banc decision "completely ignores that *Doctor* involved the application of subsection 316.610(1) to a cracked taillight, which also was required by statute. Certainly, 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." 30 Fla. L. Weekly at D456-D457, Northcutt, J., dissenting.

Moreover, the fact that air conditioners and radios are not mandated is not relevant under the statute relied upon by the Second District, which merely refers to "equipment" that is not in proper adjustment or repair, not "required equipment." Mr. Hilton submits that it cannot be deemed appropriate to read into the provision the word "required" in this context, but to ignore it with regard to the reference to equipment not being in proper condition or adjustment as "required" in Chapter 316.

Further, the absurd results imagined by this court in *Doctor* also exist with regard to equipment required by law.

As to windshields alone, the principle adopted by the Second District would allow for stops whenever a windshield has mud or bird droppings on it, whenever a windshield fogs up (even if the wipers have cleared the area they cover), whenever a windshield has a parking decal or an inspection sticker from another state in one of its lower corners, whenever a windshield is smeared by passing through the habitat of the "love bugs" that frequent portions of this state, or under any of the countless circumstances that might cause a windshield to be in less than totally pristine condition. Likewise, an object hanging from a rear view mirror, such as fuzzy dice, a graduation tassel, or an air freshener,[11] which would inherently

[11] Although the logic of the decision under review would compel the conclusion that a stop would be proper when an air freshener

block a portion of the windshield from the view of a driver, would justify a stop.

Similarly, mud, bird droppings or bugs on headlights, taillights, or license plates would also justify a stop under the Second District's rationale.

Further, as discussed by the dissent in the Second District, that court's conclusion would also allow for stops of any vehicle with a dented bumper, because bumpers are required by law. Section 316.251, Florida Statutes.

Thus, the fact that windshields are required by law should not be deemed to distinguish this case from *Doctor* or to require the application of reasoning different from that expressed in that case.

OTHER CONSIDERATIONS

Logical considerations also compel the conclusion that the approach taken by the Second District should be rejected.

For instance, the court's opinion envisions an officer, pursuant to Section 316.610(2), Florida Statutes, giving written notice to repair a vehicle when a cracked windshield does not create an unduly hazardous condition. 30 Fla. L. Weekly at

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blocked some portion of the windshield, the Second District in *Gordon* invalidated just such a stop. The court did not discuss either the present case or Section 316.610, Florida Statutes, limiting its analysis instead to statutory provisions that deal with material on windshields, Sections 316.2004(2)(b) and 316.2952(2), Florida Statutes.

D454. Yet, under such circumstances, the windshield would not be in violation of any statute, so there would exist no authority to require that the problem be repaired. If motorists fail to comply with notices to require proper repair in such situations, no action could be taken against them because they would not be in violation of any law. It would simply make no sense to allow stops and warnings when there has been no such violation. Further, doing so would allow a motorist with a cracked windshield who chooses not to repair it to be stopped over and over again for the issuance of pointless and ineffective notices.

Moreover, accepting the district court's rationale would be to sanction violating Fourth Amendment rights. As discussed above, a stop is proper only when an officer has reasonable cause to believe that an offense is being committed. Stops made without such a belief are plainly improper, yet the decision under review sanctions them.

THE CERTIFIED QUESTION

Based on the foregoing, Mr. Hilton submits that this court should answer the certified in the negative and indicate that a stop may not be based on the mere fact that a windshield is cracked, but that a stop is proper only when such a crack causes the vehicle to be in such unsafe condition as to endanger any person or property.

SUPPRESSION IS REQUIRED

Because there is no suggestion that Mr. Hilton's vehicle was in an unsafe condition, and because the stop was based solely on the fact that his windshield was cracked, the stop here was unlawful. As a result, the subsequently seized evidence should have been suppressed. *See Romanello v. State*, 365 So. 2d 220 (Fla. 4th DCA 1978). Mr. Hilton is thus entitled to have his conviction vacated and to be discharged.

CONCLUSION

Based on the foregoing argument and authorities, Mr. Hilton respectfully submits that the en banc decision of the Second District Court of Appeal should be reversed and the matter remanded with directions that the judgment and sentence in this cause be vacated and that Mr. Hilton be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Charles Crist, Attorney General, Concourse Center #4, 3507 Frontage Road, Ste. 200, Tampa, FL 33607 this 25th day of May, 2005.

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ANTHONY C. MUSTO

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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ANTHONY C. MUSTO