**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC08-1102
DCA CASE NO. 3D06-3032, 3D06-3033

**G.M., a juvenile**,

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

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APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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# RESPONDENT'S BRIEF ON THE MERITS


BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar No. 0230987

ANSLEY B. PEACOCK
Assistant Attorney General
Florida Bar No. 0669253
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, FL 33131
Telephone:(305) 377-5441
Facsimile: (305) 377-5655

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## INTRODUCTION

Petitioner, G.M., a juvenile, was the defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stand in this Court. In this brief, the symbol "R" designates the record on appeal in lower court case number 3D06-3032, and "R1" designates the record on appeal in lower court case number 3D06-3033. The symbol "T" designates the transcript of the proceedings held on September 12, 2006.

## STATEMENT OF THE FACTS AND THE CASE

Petitioner was charged, in trial court case number J06-5565, in a Petition for Delinquency for possession of marijuana, an offense committed in Miami-Dade County on August 8, 2006. (R1. 3). Petitioner was also charged with violating his probation in lower court case numbers J06-1734A and J06-1897B. (R. 35-7).

On September 12, 2006, the trial court held a hearing on Petitioner's motion to suppress. At the hearing, the state called Officer Perry Smith of the Miami-Dade Police Department. Officer Smith testified that on August 8, 2006, at approximately 5:00 p.m., he was conducting surveillance at a park where the police had received several complaints regarding narcotics activity. On that day, it was raining slightly. While conducting the surveillance, six to eight individuals were observed loitering by a black Lexus and one other vehicle. Officer Smith and his partner were in an undercover police vehicle that was located across the street from the park and where the individuals were located. Officer Smith observed Petitioner get in and out of the black Lexus several times. The individuals were observed for approximately fifteen minutes and did not commit any crimes, but also did not engage in any activities that were common for the park. (T. 7-15, 19).

Officer Smith decided to approach the individuals, activated the emergency lights, and drove up to the parked vehicles, stopping approximately three feet

away. The purpose for activating the lights was to signal that they were police officers because Officer Smith and his partner were in an undercover police vehicle and were wearing plain clothes. When they exited the vehicle, they identified themselves as police officers by displaying their badges. While Officer Smith believed that some of the individuals would attempt to run, he testified that all of the individuals stayed in place. The purpose of approaching the individuals was to establish their purpose for being in the park. Officer Smith testified that when he approached the vehicles, the individuals were not free to leave for the moment. (T. 14-7, 24-6).

Officer Smith walked up to the left side of the black Lexus and observed Petitioner sitting in the back seat. When walking up to the vehicles, he detected the odor of marijuana emanating from the vehicle's open windows. Officer Smith looked into the open window where Petitioner was sitting and observed Petitioner, with his head down, with marijuana on his lap, rolling a marijuana cigarette. When Officer Smith identified himself as a police officer, Petitioner looked up and placed the cigarette in his mouth. Petitioner subsequently spit out the marijuana. The reasons for believing Petitioner was in possession of marijuana were from the color of the substance and the smell emanating from the vehicle. (T. 14-7, 24).

Officer Elian Cuenca of the Miami-Dade Police Department was Officer Smith's partner on August 8, 2006. On this day, Officer Cuenca was conducting surveillance in an undercover vehicle that was located across the street from Kendall Lakes Park, a location that had been the subject of several citizen complaints regarding drug activity. After conducting surveillance for ten to fifteen minutes, he observed Petitioner and several other individuals entering and exiting the vehicles. At no time did he observe any criminal activity. At this time, Officer Smith and Officer Cuenca drove into the park to approach the individuals. As soon as Officer Cuenca exited the vehicle, he detected a strong odor of marijuana emanating from the black Lexus. Officer Smith approached the Lexus to investigate the odor while Officer Cuenca stayed back to observe the other individuals. At no time did Officer Cuenca draw his weapon, or place his hand on his weapon. (T. 27-32, 39).

Officer Cuenca stated that while he was concerned some of the individuals might run once they realized there were police officers present, that the individuals were free to leave. (T. 38). However, none of the individuals attempted to leave.

Petitioner testified on his own behalf. Petitioner testified that on August 8, 2006, he was located in a Lexus that had tinted windows that were rolled up because it was raining. On cross examination, Petitioner stated that he was present

in the park for approximately five to ten minutes prior to the police officers arriving. He first became aware of the police officers' presence when someone told him. When the officers approached the Lexus he had marijuana on his lap and was rolling a cigarette. (T. 40-4).

After listening to arguments the trial court issued an oral ruling. The court ruled that it was a citizen encounter, and that there was no testimony that Petitioner was detained. The police officers did not display their weapons, did not surround anyone, and did not open the car door where Petitioner was seated. Therefore, the trial court ruled that based on an examination of the totality of the circumstances, it was not a seizure and denied the motion to suppress. (T. 59-60).

After issuing the ruling, the trial court reserved Petitioner's right to appeal finding that the motion was dispositive. Subsequently, Petitioner entered a plea of no contest to the possession of marijuana, and admitted the violations of probation. Petitioner reserved the right to withdraw the admissions if he successfully appealed the denial of the motion to suppress. (T. 60-2).

On November 27, 2006, Defendant filed a notice of appeal. In the initial brief to the Third District, Defendant raised one claim for relief (verbatim):

> The trial court erred in denying the motion to suppress evidence because that evidence was obtained pursuant to an unlawful stop by police officers lacking reasonable suspicion of criminal activity.

On April 23, 2008, the Third District issued an opinion, affirming Defendant's conviction. *G.M. v. State,* 981 So. 2d 529 (Fla. 3d DCA 2008). The court found that at the time the emergency lights were activated, the police officers did not have reasonable suspicion that Petitioner or any of his companions were committing or had committed a crime. However, after reviewing all of the facts and circumstances to determine whether Petitioner had been seized, the district court concluded Petitioner had not been seized prior to the establishment of reasonable suspicion. *Id.* at 533-34. The court first found that "[t]he officers activated their emergency lights before pulling into the park **because** they were in an unmarked vehicle and in plain clothes, and they wished to identify themselves as police officers." *Id.* at 534 (emphasis supplied). The court noted that the emergency lights were mounted somewhere within the vehicle since it was an unmarked police vehicle. *Id.* Additionally, the court found that G.M. did not observe the emergency lights,

> At no time did G.M. testify that he saw the emergency lights flashing from the undercover police vehicle, and, in fact, he testified that he was alerted to the presence of law enforcement officers when one of the other individuals told him they were there. It is undisputed, based upon the testimony of the officers and G.M., himself, that G.M. did not see the officers pull up behind the Lexus with their lights activated, and did not see the officers until he was alerted by someone to their presence and looked up and saw Officer Smith who was already outside the Lexus.

*Id.* Thus, the court concluded "that the record before us overwhelmingly supports a finding that the activation of the emergency lights in this case did not play any role in G.M.'s actions and should not play a role in a Fourth Amendment analysis of the facts and circumstances of this case." *Id.* at 534.

Therefore, examining the remaining facts and circumstances, the court concluded that the police officers' actions did not rise to the level of a seizure. *G.M.*, 981 So. 2d at 534. Additional facts and circumstances elucidated were that the vehicle was parked in a public place; there was no evidence that the officers blocked Petitioner's ability to exit the vehicle: Petitioner was a passenger in the vehicle, not the driver; the police officers did not brandish their firearms or surround Petitioner's vehicle; did not order any of the individuals for identification or question anyone until after smelling and observing marijuana. *Id.*

Finally, the court found that even if Petitioner had observed the emergency signals, the encounter still would not be converted into a Fourth Amendment seizure under federal law principles. *Id.* at  The court found

> [T]hat based upon the totality of the circumstances in the instant case, no seizure occurred prior to the establishment of reasonable suspicion and then probable cause to arrest G.M. There is no evidence that the officers blocked G.M.'s exit from the vehicle, and since G.M. was merely a passenger in the parked vehicle, his ability to drive away was not implicated. The officers did not order anyone to halt or order any of the occupants out of either vehicle. They did not question anyone, ask for identification, or unholster their weapons. They did not direct

> their attention toward anyone in particular or indicate in any way that the individuals in the vicinity were not free to go. We, therefore, conclude that the activation of the officers' emergency lights to identify themselves as police officers did not convert the encounter into a seizure. In fact, the officers demonstrated good police sense by activating their emergency lights when approaching six to eight individuals in an unmarked vehicle, especially when the officers were not in uniform.

*Id.* at 535-36. The district court noted that the case was a case of first impression in the district and certified direct conflict with cases from other district courts of appeal. However, when certifying conflict, the district court noted that the per se ruled utilized in the other district courts is in direct conflict with United States Constitutional Law. *Id.* at 536 (*citing United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 439 (1991)).

On September 9, 2008, this Court accepted jurisdiction of this case.

## SUMMARY OF ARGUMENT

The Third District Court of Appeal did not err in finding that the police officers use of their emergency signals prior to approaching two parked vehicles and a group of individuals surrounding those vehicles did not constitute a seizure. When determining whether an encounter constitutes a seizure, the court must examine a totality of the circumstances. The district court correctly examined the totality of the circumstances and found that based on the fact that by Petitioner's own testimony that he only became aware of the police presence when Officer Smith approached the vehicle he was sitting in, that the use of the emergency lights should not be considered in the examination.

Further, even if Petitioner had observed the emergency lights, the district court correctly determined that the use of the lights did not result in the interaction constituting a seizure. The district court correctly determined that prior case law from other district courts in the State incorrectly found a per se rule that the use of the emergency lights results in a stop becoming an investigatory stop. Instead, the district court examined the totality of the circumstances, and the purpose for the use of the lights, in finding that the Petitioner was not seized at the time Officer Smith observed Petitioner with marijuana.

## ARGUMENT

**THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE POLICE OFFICERS' ACTIVIATION OF THEIR EMERGENCY POLICE LIGHTS AS THEY DROVE THEIR UNDERCOVER POLICE VEHICLE BEHIND THE PARKED VEHICLE WHERE PETITIONER DID NOT CONSTITUTE A FOURTH AMENDMENT SEIZURE.**

Pursuant to the Fourth Amendment of the United States Constitution, individuals have the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. The right against unreasonable searches and seizures is incorporated in the Florida Constitution in section twelve of the Declaration of Rights, "this right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Fla. Const. art I, § 12.

Thus, this Court has found that there are three levels of police-citizen encounters: consensual encounters; investigatory stops; and arrests. *Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993). In consensual encounters, a "citizen may either voluntarily comply with a police officer's requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked." *Id.* at 186. In determining whether a police interaction is a consensual encounter or is a seizure, this Court has "recognized there is no litmus-paper test for distinguishing a consensual encounter from a

seizure." *Errickson v. State,* 855 So. 2d 700, 701 (Fla. 5th DCA 2003) (*citing Popple,* 626 So. 2d at 187-88). Thus, absent a seizure the Fourth Amendment is not implicated. *Errickson,* 855 So. 2d at 702. In the instant case, the district court ruled that while the police did not have reasonable suspicion in order to justify an investigatory stop, the contact between the police officers and Petitioner was not a seizure.

To determine whether a particular encounter constitutes a seizure, the court must look to all the circumstances surrounding the encounter when deciding if the police conduct would have communicated to a reasonable person that the person was free to leave or to terminate the encounter. *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991) (*citing Florida v. Royer*, 460 U.S. 491, 502 (1983)). *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

*Id.* at 554-55. Additionally, the subjective intentions of an officer are irrelevant unless they were conveyed to the person who is the subject of the encounter. *Id.* at 555.

### A. The District Court did not err in finding that Petitioner did not observe the emergency signals, and finding, therefore, that the use of the lights should not be considered when examining the totality of the circumstances.

The district court first found that "record before us overwhelmingly supports a finding that the activation of the emergency lights in this case did not play any role in G.M.'s actions and should not play a role in a Fourth Amendment analysis of the facts and circumstances of this case." *G.M. v. State,* 981 So. 2d 529, 534 (Fla. 3d DCA 2008). This factual conclusion was based on the analysis that "there is no evidence in the record suggesting that G.M. saw the emergency lights of the officers' vehicle prior to the officers smelling marijuana coming from the vehicle G.M. was seated in and Officer Smith seeing G.M. in possession of the marijuana." *Id.* at 534.

"The standard of review to be applied to factual findings of the trial court is whether competent, substantial evidence supports the findings." *Hines v. State,* 737 So. 2d 1182 (Fla. 1st DCA 1999). Thus, the court, "must construe all the evidence, and reasonable inferences therefrom, in a manner most favorable to upholding the trial court's decision." *State v. Kindle,* 782 So. 2d 971, 973 (Fla. 5th DCA 2001)

(citations omitted). In cases where the trial court was ruling on a motion to suppress, "[a] reviewing court must accept the trial court's findings of fact in an order on a motion to suppress, so long as those findings are supported by the record; however, a suppression order that turns on an issue of law is reviewed by a de novo standard of review." *Underwood v. State,* 801 So. 2d 200, 202 (Fla. 4th DCA 2001).

In Petitioner's brief, Petitioner disputes the district court's findings that Petitioner did not observe the police officers until Officer Smith was next to the vehicle. Petitioner argues that the trial court made no finding on whether Petitioner observed the emergency lights prior to seeing Officer Smith. The court, when ruling that Petitioner was not detained, laid out several circumstances that demonstrated there was not a seizure. While the trial court did not specifically mention the emergency lights, the trial court did find that "[b]ased on a totality of these circumstances, the Court is going to deny the motion to dismiss." (T. 60).

Since this is a finding of fact, this Court should accept the trial court's findings. In the instant case, the finding was supported by the record, specifically by the testimony of Officer Smith.

> [STATE]: Okay, and you approached the vehicle and then what happened?

[OFFICER SMITH]: And then when I looked into the window, he had Marijuana on his lap with a blunt. What they do is they cut off the dust a little the blunt wrap

. . .

[OFFICER SMITH]: And had Marijuana in his lap and that's when he saw me, and I identified myself as a Police Officer.
[DEFENSE COUNSEL]: An objection, as to referring to it as Marijuana.
[JUDGE]: Try suspect Marijuana.
[OFFICER SMITH]: Okay. Suspect Marijuana. He placed it in his mouth. Then he spit it out. And that's when I recovered the narcotics. It was on his lap and the blunt rot actually fell on the floor. And it was actually drizzling that day a little bit, so it got wet so I recovered that and that's pretty much it and I placed him into custody.
[STATE]: Now before seeing the Respondent with the Marijuana had you said anything to him.
[OFFICER SMITH]: No. When he looked at me and he saw me with my badge and I identified myself as a Police Officer, that's when he put it into his mouth.
[STATE]: Did, could you see him as, the Respondent, in the car as you were approaching the car?
[OFFICER SMITH]: Yes.
[STATE]: Did he ever look up at you?
[OFFICER SMITH]: He had his head down when I first saw him because he didn't see me coming from the back. He had his head down. Because like I said, it appeared that he was rolling a Marijuana cigarette and then that's when I identified myself. He looked up and then he put it in his mouth. Suspect Marijuana.

(T. 16-7). This testimony of Petitioner not observing Officer Smith until he was next to the vehicle was supported by Petitioner's own testimony.

[STATE]: How did you know the Officers were outside the car?
[PETITIONER]: Someone told me.
[STATE]: Was there someone in the car?

[PETITIONER]: Yes.
[STATE]: What did you do when the Officers approached the car?

. . .

[PETITIONER]: I had Marijuana in my lap and I was rolling. I put it in my mouth.

(T. 43-4). Thus, there was no conflict in evidence since both Officer Smith and Petitioner testified that Petitioner was not aware of the presence of the police officers until he was informed by another person in the vehicle.

In *California v. Hodari D.*, 499 U.S. 621 (1991), the Court ruled that to constitute a seizure, there must be either the application of physical force, even slight physical force, or submission to a police officer's show of authority to restrain the defendant's liberty. In this case, an unmarked police vehicle was patrolling a high crime area when the police observed four or five juveniles huddled around a vehicle. *Id.* at 622. When the juveniles observed the police vehicle, they scattered and took flight. While running, the defendant threw away a small item that was later discovered to be crack cocaine. *Id.* at 623. The Court found the issue presented in the case was whether the defendant had been seized within the meaning of the Fourth Amendment at the time that he abandoned the crack cocaine. *Id.* at 623-24. The defendant argued that a seizure occurred when

the officer by means of physical force or a show of authority has restrained the liberty of a defendant. *Id.* at 625.

The Court first determined that the common law meaning of seizure is "not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control." *Id.* at 624.

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . .It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure. Nor can the result respondent wishes to achieve be produced - - indirectly, as it were - - by suggesting that [the officer's] uncomplied-with show of authority was a common-law arrest, and then appealing to the principle that all common-law arrests are seizures. An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority.

*Hodari D.,* 499 U.S. at 626 (emphasis supplied). Thus, the Court found that a seizure did not occur because the defendant did not stop upon the police officer's show of authority. *Id.* at 629. *See also Perez v. State,* 620 So. 2d 1256 (Fla. 1993) (holding that a defendant is not seized until he is physically subdued by the police or submits to a police officer's show of authority). Therefore, if a seizure does not occur when a person ignores an order to stop, a seizure does not occur when a person is unaware of the presence of the police or the use of emergency lights on a police vehicle.

In *Kwai v. Immigration & Naturalization Service*, 411 F.2d 683 (D.C. Cir. 1968), immigration agents went to the defendant's place of business with the purpose of interrogating any aliens located within the restaurant. *Id.* at 684. The agents surrounded the building, but did not know the identity of any of the persons inside the business. *Id.* The defendant was one of the persons inside, but did not speak English. *Id.* When an interpreter arrived, it was determined that the defendant was illegally in the country, and the defendant was subsequently arrested. *Id.* at 685. On appeal, the defendant alleged that he was seized at the time the restaurant was surrounded. *Id.* The court disagreed, finding that pursuant to the Fourth Amendment,

> [A] "seizure" must be personal, not general; that it must contain the element of awareness on the part of the protagonist and the antagonist; and it must restrain the liberty of the individual to the extent that he is not free to leave. And arrest, under the *fourth amendment*, cannot be effected in a vacuum. There must be knowledge of the situation on behalf of both the police and the suspect. There can be no seizure where the subject is unaware that he is "seized."

*Kwai*, 411 F.2d at 686. *See also State v. Stone*, 698 N.W. 2d 133 (Wis. Ct. App. 2005) (holding that while the defendant's car was blocked in by the police, there was no Fourth Amendment seizure because the defendant was asleep and did not know that his vehicle was blocked).

In *Houston v. State*, 925 So. 2d 404 (Fla. 5th DCA 2006), two undercover police officers, wearing civilian clothes and driving an unmarked vehicle, were parked at a gas station conducting surveillance on a case not related to the defendant. *Id.* at 405. While conducting the surveillance, the officers noticed the defendant's vehicle pull into the parking lot and park away from the gas station. *Id.* Fifteen minutes later, after observing another man join the defendant in the vehicle, the officers pulled up behind the defendant's vehicle, effectively blocking in the vehicle. *Id.* The officers did not employ their emergency signals. *Id.* When the officers walked up to the defendant's window, he observed the defendant with white powder on a folded bill. *Id.* The officer testified that the defendant did not see him until he approached the window. *Id.*

At the hearing on the motion to suppress, the defendant testified that police officers surrounded his vehicle before there was an opportunity to view the cocaine. *Houston,* 925 So. 2d at 406. The trial court denied the motion to suppress, ruling in favor of the officers, and found that no seizure occurred because the defendant was not aware that the police officers had blocked in his vehicle. *Id.* The court found that this case was distinguishable from other cases where the courts have held that blocking in a vehicle, coupled with the use of the emergency signals, results in an investigatory stop rather than a consensual encounter. *Id.* at

407-08 (*citing Hrezo v. State*, 780 So. 2d 194 (Fla. 2d DCA 2001); *Young v. State*, 803 So. 2d 880 (Fla. 5th DCA 2002)). The court held that

> The officers' actions in pulling behind Houston and walking up to Houston's truck were so unobtrusive that neither he nor Clark were even aware of the officers.
>
> Moreover, the officers were in plain clothes and not in uniforms. Even after he noticed the men, Clark did not realize they were law enforcement officers. The officers did not give any commands or display their weapons.
>
> Up until this point, no reasonable person would have believed he had been 'seized.'"

*Houston*, 925 So. 2d at 408.

While in the instant case, the officers utilized their emergency signals, the same analysis applied in *Hodari D.* and *Houston* can be applied here. The plain clothes officers were so unobtrusive, including the use of the emergency signals, that Petitioner did not have any knowledge of their presence until he was informed by another passenger, at which same time; Officer Smith had approached the window where Petitioner was seated. Only at this point, did Petitioner know of the police presence and put the marijuana in his mouth. Thus, Petitioner was not seized because he had not been physically touched by the police, nor had he submitted to a show of authority since he did not even have knowledge of the police presence. Therefore, if Petitioner was not aware of the presence of the

police officers until the officer was next to him, and did not observe the emergency signals, then a reasonable person would not have believed himself to be seized.

Further, as the Officer Smith's subjective intentions are irrelevant to a Fourth Amendment analysis, the fact that he testified that the individuals were not free to leave should not be considered when determining whether the encounter was a consensual encounter or rose to the level of an investigatory stop. *See United States v. Mendenhall,* 446 U.S. 544, 555 (1980).

### B. The District Court did not err in finding that even if Petitioner had observed the emergency lights, the contact did not constitute a seizure.

The district court found that "even if G.M. **did** see the emergency lights activated by the officers, we would find that this fact did not convert this police encounter into a Fourth Amendment seizure under federal law principles." *G.M. v. State,* 981 So. 2d 529, 534 (Fla. 3d DCA 2008). The district court decision found that the other district courts decisions finding that the use of emergency lights results in a seizure are "based upon application of a per se rule holding that the use of emergency lights to identify officers as police officers when approaching an already stopped vehicle, constitute a Fourth Amendment seizure." *Id.* at 536. Thus, the district court examined a totality of the circumstances and concluded that "the

activation of the officers' emergency lights to identify themselves as police officers did not convert the encounter into a seizure." *Id.* at 535-36.

Petitioner argues that the overwhelming weight of authority across the state and the country find that the use of the emergency signals is a show of authority that constitutes a seizure. Petitioner argues that only in limited situations, such as when the emergency signals are only turned on for a moment or for traffic safety purposes, does the use of the signals not result in an investigatory stop. While cases from courts across the country that have held that the activation of the emergency signals results in a Fourth Amendment seizure, state and federal courts around the country have also held that the use of emergency signals does not result in a seizure, that "[a] reasonable person would know that while flashing lights may be used as a show of authority, they also serve other purposes." *State v. Hanson,* 504 N.W. 2d 219, 220 (Minn. 1993).

In *Martin v. State,* 104 S.W. 3d 298 (Tex. Ct. App. 2003), a police officer observed the defendant's vehicle traveling down the road with a loud engine noise. *Id.* at 299. The officer attempted to initiate a traffic stop, but lost sight of the vehicle. *Id.* The officer later observed the vehicle parked in the lanes of travel. *Id.* The officer pulled up behind the defendant and turned on his overhead lights to

inform the defendant of his presence and for traffic safety purposes. *Id.* The defendant was subsequently arrested for driving under the influence. *Id.*

The court found that the issue was the point in time that the defendant was detained. The court found that "[a] detention occurs when a person yields to an officer's show of authority or when a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter." *Martin,* 104 S.W. 3d at 300. The court first found that a detention does not occur merely by a police officer pulling up behind a parked vehicle. *Id.* at 301. The court then found that the fact that the emergency lights were used, as opposed to a spotlight, was a distinction without a difference. The court found that

> We can conceive of many situations in which people in stopped cars approached by officers flashing their lights would be free to leave because the officers would be simply communicating with them to ascertain that they are not in trouble. Under such circumstances, depending on the facts, the officers may well activate their emergency lights for reasons of highway safety or so as not to unduly alarm the stopped motorists.

*Id.* (*quoting State v. Baldonado,* 115 N.M. 106 (N.M. Ct. App. 1992)).

In *State v. Dubois,* 75 Ore. App. 394 (Ore. Ct. App. 1985), a police officer observed a motorcycle abruptly pull off the road and then observed the defendant pushing the motorcycle. *Id.* at 396. The officer turned around, pulled behind the motorcycle, and turned on his overhead lights as a safety precaution. *Id.*

Subsequently the officer discovered that the defendant was intoxicated. *Id.* The court found that while the officer did not have reasonable suspicion at the time he turned on the overhead lights, "an officer's use of overhead lights alone does not necessarily cause an encounter to be a stop." *Id.* at 398. "In deciding whether an encounter is a stop, we must look at the totality of the circumstances." *Id.* (citations omitted). Based on the totality of the circumstances, the court found that the stop did not constitute a seizure.

In *State v. Baldonado,* 115 N.M. 106 (N.M. Ct. App. 1992), the officer noticed the defendant's vehicle, parked in a vacant lot with the engine running, at approximately one in the morning. *Id.* at 107. The officer believed the vehicle to be broken down or that something suspicious was occurring, so the officer pulled in behind the vehicle and turned on his emergency lights. *Id.* When he approached the vehicle, the officer observed that the defendant was intoxicated. *Id.* The court affirmed the denial of the motion to suppress finding that the use of emergency lights does not result in the encounter rising to the level of a seizure. *Id.* at 109. The court found that the use of the emergency lights was acceptable under certain circumstances, and that

> We are loathe to create a situation in which officers would be discouraged from acting to help stranded motorists, from acting in the interest of the safety of the travelling public, or from acting in the interest of their own safety.

*Id.*

In *Baldonado,* the court specifically distinguished two cases cited by Petitioner in his initial brief. The court found that in *State v. Walp,* 65 Ore. App. 781 (Ore. Ct. App. 1983), the finding that the use of emergency signals resulted in a seizure was based

> [I]n part on a statute making it a crime to drive after police lights are activated. However, to the extent that it holds that, as a matter of law, a stop that must be supported by at least reasonable suspicion occurs whenever lights are activated, regardless of the officer's motive and actions and regardless of facts supporting a belief that the stopped driver is free to leave, we disagree with it.

*Baldonado,* 115 N.M. at 109. *See also State v. Mireles,* 133 Idaho 690, 692 (Idaho Ct. App. 1999) (holding that the activation of emergency lights resulted in a "technical, de facto detention," pursuant to state statute which prohibited a person leaving once signaled to stop by an officer's emergency lights and/or siren). Further, the court in *Baldonado,* distinguished *State v. Stroud,* 30 Wash. App. 392 (Wash. Ct. App. 1981), by emphasizing that in *Stroud,* the officer activated the emergency signals and then approached the vehicle asking accusatory questions. *Baldonado,*115 N.M. at 109.

In *State v. Blair,* 171 Ore. App. 162 (Ore. Ct. App. 2000), late at night, two police officers on patrol, observed the defendant's van on the shoulder of a two-

lane highway. *Id.* at 165. The van was slowly rolling on the shoulder. *Id.* at 170. The officers pulled up behind the van and turned on the overhead signals because they thought the van might need assistance. *Id.* at 165. Immediately, one of the occupants of the van exited and approached the patrol vehicle. *Id.*

The court found that "[t]he test is whether, objectively, a motorist in the position that the defendants were in would view the officers' conduct in stopping behind them, and activating the vehicle's overhead lights, to be a significant restriction on the motorist's liberty." *Id*. at 172. The court found that "the fact that an officer halts a citizen and restrains the citizen's freedom to leave for a brief period to request or impart information is not a basis on which the contact becomes a 'seizure' for constitutional purposes." *Blair*, 171 Ore. App. at 172. Thus, the court found that the contact did not constitute a seizure because the use of overhead lights does not necessarily result in a seizure. *Id.* at 172-73.

In *State v. Johnston*, 85 Ohio App. 3d 475 (Ohio Ct. App. 1993), in the early morning hours, the defendant pulled into a parking lot and parked next to a police officer. *Id*. at 476. The officer activated his overhead lights and exited his vehicle to see if the defendant needed help. *Id*. Upon contact, the officer detected the odor of alcohol. *Id*. The court found that "the mere approach and questioning of persons seated within parked vehicles does not constitute a seizure so as to require

reasonable suspicion." *Id*. at 478. Further, the court found that in the State of Ohio, the mere activation of overhead lights does did not create a seizure, and that the court must examine a totality of the circumstances. *Id*. at 479. Thus, the court found that there was no show of authority and that the police officers conduct did not constitute a seizure. *Id.*

In *United States v. Perez*, 443 F.3d 772 (11th Cir. 2006), a police officer was patrolling a marina after hours in an unmarked police vehicle. *Id*. at 775. While on patrol, he observed several men who appeared to be awkward on a boat. The officer went to investigate, and prior to exiting his vehicle, flashed his blue lights and left on his high beams to illuminate the scene. *Id.* Subsequently, it was discovered that the defendant was smuggling illegal aliens aboard the boat. *Id.*

The Eleventh Circuit Court of Appeals found that "the mere fact that a law enforcement officer approaches an individual and so identifies himself, without more, does not result in a seizure." *Id*. at 778 (citing *United States v. Baker*, 290 F.3d 1276, 1278 (11th Cir. 2002)). Therefore, examining the totality of the circumstances, the court found that the brief flashing of the blue lights to identify himself as a police officer, and the fact that he did not block the defendant's pathway demonstrated that there was "no 'show of authority that communicated to

the individual that his liberty was restrained.'" *Perez,* 443 F.3d at 778 (quotations omitted).

Thus, the use of the emergency lights alone does not result in a seizure, and the court must examine a totality of the circumstances to determine whether a seizure has occurred. Relevant factors to examine when determining whether there has been a seizure include "whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect; and the language and tone of voice of the police." *United States v. Chrispin,* 181 Fed. Appx. 935, 938 (11th Cir. 2006). *See also J.N. v. State,* 778 So. 2d 440, 441 (Fla. 3d DCA 2001) (holding that factors that implicate a seizure include the threatening presence of several officers, the display of weapons, physical touching, and the use of language or tone to indicate authority).

In the instant case, a review of the totality of the circumstances demonstrates that the encounter was not a Fourth Amendment seizure. First, while the emergency lights were activated, these lights were not overhead lights as the officers were in an undercover police vehicle. Second, the reason the lights were activated was for officer safety purposes, to identify themselves as police officers

to the approximately six to eight individuals located at the vehicles, since the police vehicle was unmarked and the officers were dressed in plain clothes.

Further, at the motion to suppress hearing, there was no testimony that supported or refuted the fact that Petitioner's vehicle was blocked in by the police officers' vehicle. The testimony was that the unmarked police vehicle pulled up behind the two vehicles parking approximately three feet away. (T. 25-6). However, there was not testimony as to whether the vehicles could have exited forwarded or could only exit the parking lot by backing up. Additionally, the testimony clearly established that Petitioner was located in the backseat of the vehicle, thus, he would have not been able to exit the park in the vehicle regardless of whether the vehicle was blocked in by the police vehicle.

Finally, only two officers approached approximately six individuals, the officers did not have their weapons drawn, and there was no testimony of any physical touching of Petitioner or any of the other individuals. (T. 39). While the officers identified themselves as police officers to the group through the display of badges worn on their necks, this was not done in an authoritative enough manner for Petitioner to even notice their presence. By his own admission, Petitioner testified that he became aware of the police presence only when informed by another person, not by the police officer's own actions. (T. 43).

The fact that the officers chose to turn on the emergency lights for the duration of the encounter, and not just briefly, does not turn the encounter into a seizure. To treat a brief use of the emergency lights differently from the use of them for the duration of a stop is to create a distinction without a difference. The purpose for briefly turning on emergency signals in *United States v. Perez* is the same purpose that the lights were utilized in the instant case; for officer safety purposes and to inform the civilians that the unmarked vehicle and the civilian attired individuals were actually police officers. *United States v. Perez,* 443 F.3d 772, 778 (11th Cir. 2006). In fact, as Petitioner's own testimony demonstrates that he did not see the emergency lights until Officer Smith approached his window, it is plausible that only a brief use of the lights would have not been noticed by the six to eight individuals that Officer Smith and Officer Cuenca were approaching. Thus, based on the totality of the circumstances examined above, a reasonable person in Petitioner's position, would have felt free to leave or terminate the encounter at any time.

Thus, the District Court properly applied the law in determining that for the purposes of the Fourth Amendment, the police officers did not seize Petitioner.

## CONCLUSION

WHEREFORE, the State of Florida respectfully requests an Order of this Court affirming the decision of the district court.

Respectfully Submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

and

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar Number 230987

ANSLEY B. PEACOCK
Florida Bar Number 0669253
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS was mailed this _____ day of January, 2009, to Howard Blumberg, Assistant Public Defender, Office of the Public Defender, 1329 NW 14th Street, Miami, Florida 33125.

_____
ANSLEY B. PEACOCK
Florida Bar Number 0669253
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
ANSLEY B. PEACOCK
Florida Bar Number 0669253
Assistant Attorney General