IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-1102

G.M., a juvenile,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, G.M., a juvenile, was the appellant in the district court of appeal and the respondent in the Circuit Court. Respondent, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" designates the record on appeal in Case No. 3D06-3032; "R1" designates the record on appeal in Case No. 3D06-3033; and "T" designates the transcript of proceedings on September 12, 2006.

STATEMENT OF THE CASE AND FACTS

G.M., a juvenile, was charged with one count of misdemeanor possession of marijuana (R1. 3). G.M. was also charged with violating his probation based on his arrest for misdemeanor possession of marijuana (R. 35; T. 7). G.M. filed a motion to suppress (T. 7), and the following evidence was presented at the hearing on that motion.

Miami-Dade Police Officers Edward Smith and Elian Cuenca testified for the State at the hearing on the motion to suppress (T. 9-27, 27-40). Officer Smith and Officer Cuenca are undercover members of the crime suppression team, a squad unit that investigates street level narcotics activity (T. 9-10, 28). On August 8, 2006, at around 5:00 in the evening, the officers "were just driving around" and decided to go to a public park which had been the subject of narcotics complaints on several occasions (T. 10, 14). The officers were in an unmarked police car and were wearing plain clothes (T. 14).

When the officers arrived at the park, they conducted surveillance from a location across the street from the park (T. 10, 14, 28-29). The park was open to the public when the officers conducted their surveillance (T. 19). It was raining at the park (T. 16, 20, 22, 32). As the officers sat in their unmarked police car across the street from the park, their attention was drawn to a group of juveniles and adults in the park which included G.M. (T. 13). The police officers saw these

individuals talking and getting in and out of two cars parked alongside each other in the parking lot (T. 13-14). One of these cars was a black Lexus (T. 13). For approximately fifteen minutes, the police officers observed G.M. get in and out of the black Lexus and walk over and talk to the others standing outside of the two parked cars in the parking lot (T. 13). During this period of time, neither of the officers observed any drug activity or other criminal violations (T. 13, 19). The officers had not received any complaints about G.M. or the other individuals (T. 19). Nevertheless, the two police officers decided to approach the individuals (T. 13, 29).

Officer Smith testified that he approached the group because he was waiting to see if they were going to play basketball and "nobody did anything to actually do that." (T. 13). According to Officer Smith, "They weren't doing anything. They were in the parking lot loitering." (T. 13). Officer Cuenca testified that the officers approached the group because "[t]hey looked very suspicious. They weren't playing basketball. They weren't doing anything that has to do with the park." (T. 32).

The officers drove their unmarked vehicle into the parking lot and pulled up directly behind the parked Lexus in which G.M. was seated (T. 23, 25-26, 34). As the officers drove into the parking lot and approached the Lexus, they activated their flashing emergency police lights to identify themselves as police officers (T.

14, 23-24). The officers parked their vehicle about three feet directly behind the parked Lexus in which G.M. was seated at the time (T. 26).

The officers got out of their car and identified themselves with their police badges to the several people who were standing outside the vehicle in which G.M. was seated (T. 14, 24, 34). Both officers were armed with a handgun (T. 24, 34). The officers were concerned that some of the juveniles might run off as the officers approached the group, but the juveniles made no attempt to leave (T. 14, 24, 37). Officer Smith testified that the juveniles were not free to leave as the officers approached (T. 25). He further testified that the juveniles realized that he was an officer and that they were not free to leave because the officer wanted to talk to them (T. 25). Officer Cuenca testified that the juveniles were free to leave when he came into contact with them and tried to address the situation (T. 37-38). However, Officer Cuenca also testified that he would have attempted to apprehend anyone who tried to flee as the officers approached so that the investigation could continue (T. 38). Officer Cuenca stated that he detected a strong odor of marijuana coming from the Lexus as he got out of the unmarked police vehicle and started to approach the Lexus (T. 29, 31).

Once Officer Smith determined that none of the juveniles was going to attempt to leave the scene, he walked toward the driver's side of the Lexus and saw G.M. sitting in the back seat (T. 14). The other juveniles were standing next to the

vehicle (T. 15-16). As Officer Smith approached the car, Officer Cuenca stayed behind to watch these other juveniles for safety reasons (T. 30). Officer Smith testified that G.M. had his head down when he first saw G.M. inside the car (T. 17). Officer Smith speculated that G.M.'s head was down because he didn't see the officer coming from the rear (T. 17). Officer Cuenca testified that he was not sure if G.M. saw the officers approaching (T. 30).

As Officer Smith got closer to the vehicle, he saw that the window was down and he detected the odor of marijuana coming from inside the vehicle (T. 15). Officer Smith looked into the car and saw marijuana on G.M.'s lap (T. 16). It appeared to the officer that G.M. was rolling a marijuana cigarette (T. 17). G.M. looked at Officer Smith and Smith identified himself as a police officer (T. 16-17). G.M. placed the marijuana in his mouth, and then spit it out (T. 16-17). Officer Smith then placed G.M. under arrest (T. 16).

G.M. testified at the hearing on the motion to suppress that he had been sitting in the black Lexus for five to ten minutes rolling marijuana cigarettes on his lap (T. 42-44). He stated that someone alerted him to the presence of the police officers outside the car (T. 43). As the officers approached the car, he placed the marijuana inside his mouth (T. 44).

The trial court concluded that the police officers' action in activating their police lights and pulling up behind the car in which G.M. was seated was merely a

"citizen encounter" which did not require a reasonable suspicion of criminal activity.

> There was no evidence Counsel, no evidence that these folks were detained in this classic sense of a detention. Circumstances weren't there. The police weren't there in (unintelligible). They didn't pull out their guns. They hadn't surrounded anybody. As a matter of fact, the Respondent in this case was sitting in a car. Never even opened the door, according to the testimony. So, you know, he was there. He wasn't going anywhere anyway because he was sitting in the car.
>
> Based on the totality of these circumstances, the Court is going to deny the motion to suppress. Denied.

(T. 60).

Following the denial of the suppression motion, G.M. pled nolo contendere to possession of marijuana, reserving his right to appeal the court's denial of his dispositive motion to suppress (T. 60-62). G.M. also entered an admission to the pending affidavit of violation of probation based on the charge of possession of marijuana (T. 62-63). This admission was entered with the understanding that if the denial of the motion to suppress was reversed on appeal, G.M. would have the right to withdraw his admission to the affidavit of violation of probation (T. 62). The court adjudicated G.M. delinquent and committed him to the Department of Juvenile Justice in both cases (R. 10-12). G.M. filed a timely notice of appeal in each case (R. 13; R1. 68). The cases were subsequently consolidated for purposes of appellate review.

On appeal, in a majority decision written by Judge Rothenberg, with Judge Salter concurring, the district court of appeal affirmed the lower court's denial of the motion to suppress. *G.M. v. State*, 981 So. 2d 529 (Fla. 3d DCA 2008). The majority first noted the State's concession and its own conclusion that when the officers activated the emergency lights of their unmarked vehicle and pulled into the park, they had no reasonable suspicion that G.M. or any of the individuals in or around the two vehicles parked in the park had committed or were committing a crime. *Id*. at 531. The majority then determined that the police officers' action in activating their police lights and pulling up behind the car in which G.M. was seated did not constitute a Fourth Amendment seizure for two reasons. *Id*. at 533-36.

First, the majority concluded that a Fourth Amendment seizure did not take place because the record did not establish that G.M. was aware that the officers had activated their police lights.

> [T]here is no evidence in the record suggesting that G.M. saw the emergency lights of the officers' vehicle prior to the officers smelling the marijuana coming from the vehicle G.M. was seated in and Officer Smith seeing G.M. in possession of the marijuana. The record supports a finding that he did not. The lights the officers employed were not mounted on top of a marked police vehicle, but were, instead, mounted somewhere within the unmarked vehicle. It was daylight (approximately 5:00 p.m. in the middle of the summer on August 8). G.M. was seated in a vehicle with his back to the approaching officers, his head was down, and he was busy rolling a marijuana cigarette from the marijuana he had in his lap. G.M. admitted when he testified at the motion to suppress that he did not

> know the officers were there until they were outside the car and someone **told** him they were there. We, therefore, conclude 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 (emphasis in original).

Second, the majority concluded 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." *Id*. (emphasis in original). The majority cited two decisions from the Eleventh Circuit Court of Appeals[1] and one decision from the Minnesota Supreme Court[2] in support of this ruling. *Id*. at 534-535. The majority certified that this ruling was in direct conflict with seven decisions from other Florida district courts of appeal holding that the action of police officers in activating their police lights and pulling up behind a parked car constituted a Fourth Amendment seizure. *Id*. at 536. *See Armatage v. State*, 954 So. 2d 669 (Fla. 1st DCA 2007); *Koppelman v. State*, 876 So. 2d 618 (Fla. 4th DCA 2004); *Errickson v. State*, 855 So. 2d 700 (Fla. 4th DCA 2003); *Young v. State*, 803 So. 2d 880 (Fla. 5th DCA 2002); *Hrezo v. State*, 780 So. 2d 194 (Fla. 2d DCA 2001); *Siplin v. State*, 795 So. 2d 1010 (Fla. 2d DCA 2001); *Brooks v. State*, 745 So. 2d 1113 (Fla. 1st DCA 1999).

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[1] *United States v. Chrispin*, 181 Fed.Appx. 935 (11th Cir. 2006); *United States v. Perez*, 443 F.3d 772 (11th Cir. 2006).

[2] *State v. Hanson*, 504 N.W. 2d 219 (Minn. 1993).

In her dissenting opinion, Judge Green found that the action of the police officers in activating their police lights and pulling up behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure:

> When the police officers in this case parked their unmarked vehicle directly behind a lawfully parked car in a parking lot in which G.M. was seated and announced their arrival by activating their police emergency lights, G.M. was unlawfully seized for purposes of the Fourth Amendment because the officers had no reasonable suspicion that G.M. had committed any crime. By virtue of the show of police authority presented under this factual scenario, it is both patently unreasonable and potentially dangerous for any citizen to believe that he or she was immediately free to drive, run, or walk away from these police officers. For the reasons that follow, I believe that the trial court erred in its determination that this initial stop was consensual in nature. Therefore, G.M.'s motion to suppress should have been granted.

G.M., 981 So.2d at 536 (Green, J., dissenting). Judge Green agreed with the majority's certification that its holding is in direct conflict with the seven district court of appeal decisions cited by the majority. *Id*. at 544.

G.M. filed a notice to invoke discretionary review on June 9, 2008. This Court accepted jurisdiction on September 9, 2008, with oral argument to be set by separate order. On October 17, 2008, this Court ordered that the merits briefs filed in this case be unsealed because the case has been selected as the subject of the Judicial Teaching Institute.

SUMMARY OF ARGUMENT

The overwhelming weight of authority in both Florida and other states across the nation establishes that the activation of police lights upon the approach to a parked vehicle ordinarily constitutes a Fourth Amendment seizure. Such police actions constitute a Fourth Amendment seizure because under most circumstances the use of the emergency lights leads a reasonable citizen to believe that he or she is not free to ignore the officers and leave the scene. Based on this overwhelming weight of authority, the actions of the police officers in this case in activating their emergency police lights as they drove their police vehicle to within three feet directly behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure, as the officers' actions would unambiguously convey to any reasonable person that he or she was not free to simply leave the scene.

The majority decision of the Third District Court of Appeal in this case refused to follow this overwhelming weight of authority and held that the use of emergency lights to identify officers as police officers when approaching an already stopped vehicle does not generally constitute a Fourth Amendment seizure. Under the rule established by the majority decision, vehicle occupants are free to leave the scene notwithstanding the fact that police officers have activated their police emergency lights and pulled up directly behind their vehicle. This rule is unreasonable and unnecessarily injects elements of potential dangerousness into

routine encounters between citizens and law enforcement officers which occur on a daily basis on the streets of this state.

The numerous cases which hold that the activation of police lights upon the approach to a parked vehicle constitutes a Fourth Amendment seizure are not based on any per se rule. Under certain limited circumstances, the activation of police lights upon approaching a parked vehicle might not constitute a Fourth Amendment seizure. However, the facts of this case do not involve any of these limited circumstances.

The record in this case fully supports the conclusion that G.M. was aware of the emergency police lights, either through his own perception of the lights on a rainy evening or based on information he received from other individuals standing next to the car in which he was seated. Accordingly, there is no basis in the record for the majority decision's conclusion that the activation of the emergency lights in this case should not be considered in determining whether G.M. was subjected to a Fourth Amendment seizure.

As the officers' activation of their emergency police lights as they pulled up behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure, and as that seizure was not based on a reasonable suspicion of criminal activity, the trial judge erred in denying G.M.'s motion to suppress, and the district court of appeal erred in affirming that denial.

ARGUMENT

THE POLICE OFFICERS' ACTIVATION OF THEIR EMERGENCY POLICE LIGHTS AS THEY DROVE THEIR POLICE VEHICLE TO WITHIN THREE FEET DIRECTLY BEHIND THE PARKED CAR IN WHICH THE JUVENILE WAS SEATED CONSTITUTED A FOURTH AMENDMENT SEIZURE.

The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures. *See* U.S. Const. amend. IV; art. I, § 12, Fla. Const. The Florida Constitution expressly provides that the right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *See* art. I, § 12, Fla. Const. Items obtained in violation of the rights guaranteed by section 12 of Florida's Declaration of Rights shall be excluded from evidence if the items would be excluded pursuant to the decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution. *See id.*[3]

[3] The standard of review for orders on motions to suppress is that appellate courts should 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 Amendment and Article I, section 12 of the Florida Constitution. *Fitzpatrick v. State*, 900 So. 2d 495, 510 (Fla. 2005); *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001).

The Florida Supreme Court has explained that for Fourth Amendment purposes, there are three levels of police-citizen encounters:

> The first level is considered the consensual encounter and involves only minimal police contact. During a consensual encounter 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. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).
>
> The second level of police-citizen encounters involves an investigatory stop as enunciated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. § 901.151, Fla. Stat. (1991). In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop.
>
> [T]he third level of police-citizen encounter involves an arrest which must be supported by probable cause that a crime has been or is being committed. *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); § 901.15, Fla. Stat. (1991).

Popple v. State, 626 So. 2d 185, 186 (Fla.1993).

A person is seized within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would conclude that he or she is not free to end the encounter and depart. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion); *Baptiste v. State*, 33 Fla. L. Weekly S662, 2008 WL 4240489 at *7 (Fla. Sept. 18, 2008); *Popple*, 626 So. 2d at 188. The fact that a person makes no attempt to leave does not establish that the person has not been seized within the meaning of the Fourth Amendment.

> 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.

United States v. Mendenhall, 446 U.S. at 554 (emphasis added); *see also Baptiste*, 2008 WL 4240489 at *7.[4] Professor LaFave, in his Fourth Amendment treatise, sets forth several additional examples that may be indicative of a seizure of an individual who is approached by officers while seated in a parked vehicle:

> [P]olice action which one would not expect if the encounter was between two private citizens --- boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, *or the use of flashing lights as a show of authority* --- will likely convert the event into a Fourth Amendment seizure.

4 W. LaFave, Search & Seizure § 9.4(a), at 434-35 (4th ed. 2004)(footnotes omitted; emphasis added).

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[4] In denying the motion to suppress, the trial judge in this case erroneously focused on the fact that G.M. was seated in a car and made no attempt to get out of the car after the officers activated their emergency police lights:

> There was no evidence Counsel, no evidence that these folks were detained in this classic sense of a detention. Circumstances weren't there. The police weren't there in (unintelligible). They didn't pull out their guns. They hadn't surrounded anybody. As a matter of fact, the Respondent in this case was sitting in a car. Never even opened the door, according to the testimony. So, you know, he was there. He wasn't going anywhere anyway because he was sitting in the car.
>
> Based on the totality of these circumstances, the Court is going to deny the motion to suppress. Denied.

(T. 60).

Prior to the decision of the Third District Court of Appeal in this case, Florida courts have consistently held that an officer's use of his or her emergency lights usually evidences an investigatory stop rather than a consensual encounter. *See Newkirk v. State*, 964 So. 2d 861, 863 (Fla. 2d DCA 2007); *Armatage v. State*, 954 So. 2d 669, 670 (Fla. 1st DCA 2007); *Koppelman v. State*, 876 So. 2d 618, 620 (Fla. 4th DCA 2004); *Errickson v. State*, 855 So. 2d 700, 702 (Fla. 4th DCA 2003); *Young v. State*, 803 So. 2d 880, 882 (Fla. 5th DCA 2002); *Hrezo v. State*, 780 So. 2d 194, 195 (Fla. 2d DCA 2001); *Siplin v. State*, 795 So. 2d 1010, 1011 (Fla. 2d DCA 2001); *Brooks v. State*, 745 So. 2d 1113, 1114 (Fla. 1st DCA 1999). "The reason such encounters are investigatory stops rather than consensual encounters is that the use of the emergency lights leads a reasonable citizen to believe that he or she is not free to leave." *Newkirk*, 964 So.2d at 863-64.

Specifically, an officer's use of his or her emergency lights when approaching a parked car usually evidences an investigatory stop rather than a consensual encounter because when a police officer turns on his or her flashing police lights and approaches a parked car, a reasonable person would expect to be stopped, perhaps for the crime of fleeing and eluding, if he or she left the scene. *Hrezo*, 780 So. 2d at 195.[5] As pointed out by Judge Green in her dissenting

[5] Section 316.1935(1), Florida Statutes (2006) provides:

> It is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized

opinion in this case, "By virtue of the show of police authority presented under this factual scenario, it is both patently unreasonable and potentially dangerous for any citizen to believe that he or she was immediately free to drive, run, or walk away from these police officers." *G.M.*, 981 So. 2d at 536 (Green, J., dissenting).

Accordingly, Florida courts have repeatedly held that a consensual encounter was elevated to the level of an investigatory stop when a police officer approached a parked car and activated the patrol car's flashing lights. *See Young*, 803 So. 2d at 882-83 (consensual encounter was elevated into an investigatory stop when officer approached Young's vehicle, blocked it from the rear and then activated the patrol car's emergency lights as under these circumstances a reasonable person would not feel free to leave); *Hrezo*, 780 So. 2d at 195-96 (contact with Hrezo was a stop and not a consensual encounter where sheriff's deputy parked his patrol car behind Hrezo's vehicle and turned on his patrol car's emergency lights and takedown lights for his own safety and so he could see inside the vehicle); *Siplin*, 795 So. 2d at 1011 (officer's sounding of air horn on his cruiser transformed encounter into an investigatory stop as use of air horn closely resembles use of police lights and when an officer uses police lights a reasonable

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> law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a felony of the third degree . . . .

person would not feel free to leave); *Brooks*, 745 So. 2d at 1113-14 (trial court's finding of a consensual encounter found clearly erroneous where officer activated his flashing blue lights when he pulled up behind Brooks' stopped vehicle, and as Brooks was driving the vehicle onto the roadway she stopped when she saw the flashing lights and uniformed police officer approaching the car, as a reasonable person under such circumstances would not have believed he or she was free to leave and terminate the encounter).

Courts around the country have also reached some consensus that the activation of police lights upon the approach to a parked vehicle ordinarily constitutes a Fourth Amendment seizure. *See, e.g.*, *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424, 427-28 (1997)(defendant sitting in parked automobile was seized when police activated blue light; light was display of authority that would indicate to reasonable person he was not free to leave); *People v. Bailey*, 176 Cal.App.3d 402, 405-06, 222 Cal.Rptr. 235 (Ct.App.1985)(where officer pulled in behind parked car and activated emergency lights defendant was seized as a reasonable person would not have felt free to leave); *State v. Donahue*, 251 Conn. 636, 742 A.2d 775, 779-80 (1999) (defendant was seized when officer pulled up behind parked vehicle and activated red, yellow, and blue flashing lights); *State v. Mireles*, 133 Idaho 690, 692, 991 P.2d 878, 880 (Ct.App.1999) (officer's act of turning on the overhead police lights, "although not necessarily intended to create a

detention, did constitute a technical, de facto detention commanding Mireles to remain stopped"); *State v. Morris*, 72 P.3d 570, 578 (Kan. 2003)("Under the facts of this case, Morris was seized at the moment when officers pulled up behind him and activated their emergency lights. No reasonable person would have felt free to terminate the encounter by driving away. . ."); *Lawson v. State*, 120 Md.App. 610, 707 A.2d 947, 949-50 (1998)(activation of the emergency lights was a show of authority that constituted a seizure because it communicated to a reasonable person in the parked car that there was an intent to intrude upon the defendant's freedom to move away); *Commonwealth v. Smigliano*, 427 Mass. 490, 491-92, 694 N.E.2d 341, 343 (1998)(where defendant stopped his automobile and then "the officer pulled up behind it, activated his blue lights, and got out of his cruiser to approach the car," this was a seizure, as "a reasonable person, on the activation of a police car's blue lights, would believe that he or she is not free to leave"); *State v. Walp*, 65 Or.App. 781, 672 P.2d 374, 375 (1983)(use of emergency lights after defendant had voluntarily stopped was sufficient show of authority and reasonable person would not have felt free to leave); *State v. Williams*, 185 S.W.3d 311, 318 (Tenn. 2006)("The defendant in this case was seized at the time the officer pulled up behind him and activated his emergency lights."); *Wallace v. Commonwealth*, 32 Va.App. 497, 528 S.E.2d 739, 741-42 (2000)(driver of parked vehicle seized because a reasonable person with a police cruiser parked behind him with its

emergency lights flashing would not have felt free to leave); *State v. Burgess*, 163 Vt. 259, 657 A.2d 202, 203 (1995)(even if officer subjectively intends to activate his blue lights for safety reasons, the use of the lights on the defendant served as a restraint to prevent his departure from the pull-off area of the road); *State v. Stroud*, 30 Wash.App. 392, 634 P.2d 316, 318-19 (1981)("Stroud was 'seized' for Fourth Amendment purposes, at the moment the officers pulled up behind the parked vehicle and switched on the flashing light"; the officers' actions "constituted a show of authority sufficient to convey to any reasonable person that voluntary departure from the scene was not a realistic alternative").

Thus, the overwhelming weight of authority in both Florida and other states across the nation establishes that the activation of police lights upon the approach to a parked vehicle ordinarily constitutes a Fourth Amendment seizure. That is precisely what occurred in the present case. Officer Smith and Officer Cuenca drove their unmarked vehicle into the parking lot and pulled up directly behind the parked car in which G.M. was seated (T. 23, 25-26, 34). As the officers drove into the parking lot and approached the car, they activated their emergency police lights to identify themselves as police officers (T. 14, 23-24). The officers parked their vehicle about three feet directly behind the parked car in which G.M. was seated at the time (T. 26). These actions would unambiguously convey to any reasonable person that he or she was not free to simply leave the scene. Accordingly, under

the circumstances of this case, the officers' activation of their emergency police lights as they pulled up behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure.

Contrary to the overwhelming weight of authority in both the Florida district courts of appeal and state courts across the nation, the majority decision of the Third District Court of Appeal in this case held that the use of emergency lights to identify officers as police officers when approaching an already stopped vehicle does not generally constitute a Fourth Amendment seizure. *G.M.*, 981 So. 2d at 536. Under the rule established by the Third District Court of Appeal, vehicle occupants are free to leave the scene notwithstanding the fact that police officers have activated their police emergency lights and pulled up directly behind their vehicle. As noted by Judge Green in her dissenting opinion in this case, under most circumstances when police officers activate their police emergency lights and pull up directly behind a parked vehicle, "it is both patently unreasonable and potentially dangerous for any citizen to believe that he or she was immediately free to drive, run, or walk away from" the police officers. *G.M.*, 981 So. 2d at 536 (Green, J., dissenting). Under most circumstances, the activation use of police emergency lights by police officers pulling behind a parked vehicle unambiguously signals to occupants to stay where they are. The contrary rule established by the majority decision of the Third District Court of Appeal is unreasonable and

unnecessarily injects elements of potential dangerousness into routine encounters between citizens and law enforcement officers which occur on a daily basis on the streets of this state.

The majority decision of the district court of appeal in the case at bar engages in a lengthy dissertation concerning how Florida courts are obligated to follow decisions of the United States Supreme Court on the Fourth Amendment and how those decisions eschew the adoption of any per se rules in the context of the Fourth Amendment. *G.M.*, 981 So. 2d at 531-33. However, as recognized by the dissenting opinion in this case, *id*. at 540, the overwhelming weight of authority in both Florida and other state courts which holds that the activation of police lights upon the approach to a parked vehicle constitutes a Fourth Amendment seizure is not based on any such per se rule that the activation of police emergency lights always converts a consensual encounter into a Fourth Amendment seizure.

Under certain limited circumstances, the activation of police lights upon approaching a parked vehicle might not constitute a Fourth Amendment seizure. This might be the case when an officer turns his police lights on for a second or two at night to signal a citizen that the approaching person is a police officer in an unmarked car. *See, e.g., United States v. Perez*, 443 F.3d 772, 778 (11th Cir. 2006)(no seizure where officer patrolling a marina at 1:00 a.m. in an unmarked

police cruiser briefly flashed his blue lights and left his car's high-beams on to illuminate the scene as he approached men standing next to a truck). Similarly, the activation of police lights might not constitute a Fourth Amendment seizure where an officer is merely checking to see if a driver needs assistance, *see*, *e.g.*, *Commonwealth v. Evans*, 436 Mass. 369, 372-373, 764 N.E.2d 841, 844 (2002)(no seizure for police officer to park behind car parked in breakdown lane of highway and then turn on police car's blue lights where defendant's vehicle was pulled over with its right blinker flashing at approximately 11:30 P.M. on a rural road); *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993)(no seizure where police car parked behind car parked on shoulder of highway, as a "reasonable person would have assumed that the officer was not doing anything other than checking to see what was going on and to offer help if needed"); *State v. Baldonado*, 115 N.M. 106, 109, 847 P.2d 751, 754 (Ct.App.1992)("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"), or where an officer activates the emergency police lights for traffic safety reasons, *see*, *e.g.*, *Hanson*, 504 N.W.2d at 220 (no seizure where police car parked behind car parked on shoulder of highway as it was dark out and the cars were on the shoulder of the highway far from any town and therefore a reasonable person would know that flashing lights were serving the

purpose of warning oncoming motorists in such a situation to be careful); *Baldonado,* 115 N.M. at 109, 847 P.2d at 754 ("depending on the facts, the officers may well activate their emergency lights for reasons of highway safety"). Finally, the mere use of a police flashlight or spotlight to illuminate a scene in darkness does not constitute a Fourth Amendment seizure, *see*, *e.g.*, *State v. Baez*, 894 So. 2d 115, 115-16 (Fla. 2004)(officer engaged in consensual encounter where he came upon defendant's vehicle and used flashlight to look inside observing defendant slumped over the wheel of his parked van); *Hrezo*, 780 So. 2d at 195 ("We emphasize that an officer's use of a spotlight is not the same as the use of emergency lights."); *State v. Wimbush*, 668 So. 2d 280, 282 (Fla. 2d DCA 1996)(initial encounter held consensual, not a stop, where officers pulled alongside parked car and illuminated interior of car with a spotlight, seeing cocaine on driver's and passenger's faces) *State v. Hughes*, 562 So.2d 795, 797-98 (Fla. 1st DCA 1990)(action of officers in approaching defendant's parked vehicle and shining flashlight inside was not the functional equivalent of a stop).

The facts of the case at bar do not involve any of these limited circumstances in which the activation of police emergency lights would not constitute a Fourth Amendment seizure. There would be no reason for police officers to activate their police lights and approach a car parked in a parking lot of a public park at 5:00 in the evening to check to see if the driver needed help. There would be no reason for

police officers to activate their police lights and approach a car parked in a parking lot of a public park at 5:00 in the evening for traffic safety reasons. The officers in this case did not simply turn on their police lights for a second or two to signal that they were police officers in an unmarked car. The officers in this case did not simply use a flashlight or a spotlight to illuminate the scene. Accordingly, under the circumstances of this particular case, and not pursuant to any per se rule, the officers' activation of their emergency police lights as they pulled up behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure because the activation of the emergency lights would lead a reasonable person to conclude that he or she was not free to end the encounter and leave the scene. [6]

[6] *United States v. Chrispin*, 181 Fed.Appx. 935 (11th Cir. 2006), cited by the majority decision of the district court of appeal in support of its holding, does not involve police officers activating their police emergency lights as they pull directly behind a parked automobile. The officer in that case pulled into a poorly lit parking lot at approximately 10:30 p.m., stopped his cruiser about fifteen to twenty feet from Chrispin who was walking in the parking lot, and turned on the flashing lights on the cruiser's roof. *Id*. at 936-37. Chrispin's path was not blocked by the police vehicle. *Id*. at 937. The officer then exited his car and asked Chrispin "to please come to him." *Id*. Chrispin complied. *Id*. The officer did not retain Chrispin's identification and questioned Chrispin only briefly. *Id*. The officer was by himself and he did not unholster his firearm. *Id*. Based on the totality of these circumstances the court concluded that the encounter between the officer and Chrispin was consensual and that a reasonable person would have felt free to terminate it. *Id*. at 938. The totality of the circumstances in *Chrispin* do not remotely resemble the totality of the circumstances in this case where two officers activated their police emergency lights as they drove their police vehicle to within three feet directly behind the parked car in which G.M. was seated.

The majority decision of the district court of appeal also relies very heavily on the absence of any evidence in the record that G.M. was aware that the officers had activated their emergency police lights as they drove to within three feet of the vehicle in which G.M. was seated. *Id*. at 534. While G.M. did not specifically testify that he was aware that the officers had activated their emergency police lights, the record in this case supports a finding that he would have been aware of those lights.[7] When the officers activated their emergency police lights and drove to within three feet of the car in which G.M. was seated, it was approximately 5:00 in the evening and it was raining (T. 10, 16, 20, 22, 32). Under these conditions, it is reasonable to assume that anyone seated in the car would be aware that the police emergency lights had been activated.[8]

Additionally, when the officers activated the emergency police lights and drove behind the car in which G.M. was seated, a number of individuals were standing right next to that car (T. 14, 24, 34). Those individuals must have been aware of the emergency police lights. Indeed, while the officers were concerned

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[7] The trial judge made no factual finding as to whether G.M. was aware that the officers had activated their emergency police lights.

[8] The majority decision of the district court of appeal notes that when the officers activated the emergency police lights and pulled up behind the car in which G.M. was seated it was "daylight" as it was "approximately 5:00 p.m. in the middle of the summer on August 8." *G.M.*, 981 So. 2d at 534. However, the majority decision completely ignores the evidence in the record which establishes that it was raining at the park at the time the officers drove up behind the car in the parking lot (T. 10, 16, 20, 22, 32), thereby greatly increasing the visibility of the emergency police lights even at 5:00 p.m. on a summer day.

that some of these individuals might run off as they approached the group, none of the individuals made any attempt to leave once the officers activated the police lights and approached the group (T. 14, 24, 37). Officer Smith specifically testified that the juveniles were not free to leave as the officers approached, and he further testified that the juveniles realized that he was an officer and that they were not free to leave because the officer wanted to talk to them (T. 25). Officer Cuenca testified that he would have attempted to apprehend anyone who tried to flee as the officers approached so that the investigation could continue (T. 38).

G.M. testified at the hearing on the motion to suppress that one of these individuals, who must have been aware of the emergency police lights and who realized that the individuals were not to free to leave, alerted G.M. to the presence of the police officers outside the car (T. 43). Nothing in the record contradicts this testimony. Thus, the record in this case fully supports the conclusion that G.M. was aware of the emergency police lights, either through his own perception of the lights on a rainy evening or based on information he received from other individuals standing next to the car in which he was seated. Accordingly, there is no basis in the record for the majority's conclusion 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. Based on the circumstances of this case, the officers' activation

of their emergency police lights as they pulled up behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure.

Since the officers' activation of the emergency police lights did constitute a Fourth Amendment seizure, the officers were required to have a reasonable suspicion that G.M. was engaged in criminal activity. *See Terry v. Ohio* 392 U.S. 1 (1968); *Popple*, 626 So.2d at 186; *see also* § 901.151, Fla. Stat. (2006). As noted by the majority decision of the district court of appeal, the State has conceded in this case that the officers did not have the required reasonable suspicion of criminal activity when they activated their emergency lights. *G.M.*, 981 So. 2d at 531. The district court of appeal independently concluded that the officers did not have a reasonable suspicion of criminal activity. *Id.*

The State's concession and the district court of appeal's conclusion that no reasonable suspicion of criminal activity existed are fully supported by the record in this case. The officers observed nothing more than individuals in the parking lot of a public park talking and getting in and out of two cars parked alongside each other in the parking lot at a time when the park was open to the public. Neither of the officers observed any drug activity or other criminal violations (T. 13, 19). The officers had not received any complaints about G.M. or the other individuals (T. 19). Officer Smith testified that he approached the group because he was waiting to see if they were going to play basketball and "nobody did anything to

actually do that." (T. 13). According to Officer Smith, "They weren't doing anything. They were in the parking lot loitering." (T. 13). Officer Cuenca testified that the officers approached the group because "[t]hey looked very suspicious. They weren't playing basketball. They weren't doing anything that has to do with the park." (T. 32).

As explained by Judge Green in her opinion dissenting from the majority's holding that no Fourth Amendment seizure occurred, the officers did not have reasonable suspicion for the crime of loitering.

> Although the officers testified that G.M. and the others were "loitering" in the park, the officers never testified to facts sufficient to show a reasonable suspicion for the crime of loitering. Under Florida law, G.M. and the others could only be guilty of the crime of loitering if (1) they were loitering or congregating in a) at a time, or in a manner not usual for law-abiding individuals; and (2) under circumstances that warranted a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. § 856.021, Fla. Stat. (2007). G.M. and the others were observed by the police engaging only in totally innocuous activities (i.e., talking, and getting in and out of two lawfully parked cars in a parking lot of a public park during normal park hours). The officers did not observe any activities by G.M. or the others that might endanger the safety of other park patrons or property in the vicinity. Although G.M. and his friends were not engaging in traditional "park activities" such as playing basketball, they were not required to do so in order to insulate themselves from an unlawful police encounter. Thus, the Florida loitering statute cannot be utilized to supply the missing reasonable suspicion needed to justify the stop in this case. *See Rinehart v. State*, 778 So.2d 331, 335 (Fla. 2d DCA 2000) (Alternbernd, J., concurring) ("Loitering has long been an offense that occasionally tempts good police officers to exercise power in a manner that is inconsistent with the standards of our free society"); *E.C. v. State*, 724 So.2d 1243, 1245 (Fla. 4th DCA 1999) (loitering

> statute is not directed at mere idling); *see T.L.F. v. State*, 536 So.2d 371 (Fla. 2d DCA 1988)(no probable cause to arrest appellant for loitering and prowling where officers observed shirtless appellant conversing with two other individuals during business hours, where appellant made no attempt to flee, and where shirtless attire was not unusual or unlawful).

Id. at 544 (Green, J., dissenting). Thus, the police officers in this case did not have a reasonable suspicion of criminal activity when they activated their police lights and pulled up behind the parked car in which G.M. was seated.

In conclusion, the majority decision of the district court of appeal in this case holding that the emergency lights activated by the officers did not convert the police encounter into a Fourth Amendment seizure conflicts with every other Florida district court of appeal decision on this issue, as well as the consensus of the decisions from courts of other jurisdictions. The two federal decisions and the one decision from another state cited by the majority decision do not support the conclusion reached by the majority decision. While there is no per se rule that the activation of police lights always constitutes a Fourth Amendment seizure, none of the limited circumstances under which the activation of police emergency lights might not constitute a Fourth Amendment seizure are present in this case. Accordingly, under the circumstances of this case, the officers' activation of their emergency police lights as they pulled up behind the parked car in which G.M. was seated constituted a Fourth Amendment seizure. As that seizure was not based on

a reasonable suspicion of criminal activity, the trial judge erred in denying G.M.'s motion to suppress, and the district court of appeal erred in affirming that denial.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and remand this case with instructions that the juvenile's motion to suppress be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 5th day of November, 2008.

_____
HOWARD K. BLUMBERG
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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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HOWARD K. BLUMBERG
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