IN THE SUPREME COURT OF FLORIDA

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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | CASE NO. SC10-1074 |
| | ) | |
| ANTHONY LENARD HANKERSON, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review of a Decision of the
Fourth District Court of Appeal

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## STATEMENT OF THE CASE AND FACTS

Respondent agrees with the statement in petitioner's brief except to note that:

Over a period of six months, Delray Beach Police Officer Lucas had heard at meetings and from informants that 234 Northwest 7th Avenue was the main problem area in the community, there were people selling and using drugs on the property. R3 93-94.

To investigate these reports, he went to the house around 4:50 p.m. and watched it with binoculars from a vehicle parked about 30 yards away. Around 5 p.m., respondent arrived and exchanged something for money with three persons. Respondent was looking up and down the street. The whole thing took seconds. Respondent put the money in his right pocket and drove away. R3 93-96.

Lucas radioed Officers Stevenson and Schmidt "to assist and investigate his activities, if they could do a traffic stop on him." Stevenson and Schmidt "took over the investigation at that point." R3 96.[1]

Schmidt testified that Lucas asked him to "assist him in further investigating it." Pursuant to this request, Schmidt and Stevenson pulled respondent's vehicle over by use of "[l]ights and siren." R3 104-06.

After respondent stopped, Schmidt saw him gesture toward the center console and then down towards the floor. Schmidt said that,

[1] Stevenson did not testify at the suppression hearing, but he did testify at trial about his role in the stop. R4 203-10.

based on Lucas's report of a narcotics transaction done, which is often associated with weapons, his suspicions were definitely heightened. Schmidt asked respondent to exit the vehicle. Respondent obeyed. Schmidt asked if he had anything on him, any drugs or weapons. Respondent said no, and he turned and lifted his shirt up to show he didn't have anything, and said he had been out of the game. R3 106-107.

Schmidt did not see any weapon on respondent. R3 111.

Asked what he did next, Schmidt said, "I conducted a search of him." Asked what he suspected that respondent had, he replied: "Drugs." Asked how he conducted the search, he said: "I patted him down and I asked him if he had anything in his shoes, and he said no. And he started taking off - he took off his shoe. He took off his left shoe -" Schmidt did not ask respondent to take off his shoes, but: "It was inferred. I would have asked him to take off his shoes, but I believe my exact thing was do you have anything in your shoe, and he was like no. And he started taking off his shoes." R3 107-08.

When respondent took off his right shoe, he took a bag of what Schmidt suspected was cocaine and put it in his hand. Schmidt grabbed his hand and it was small clear zip top bags in a larger clear zip top bag. He placed respondent under arrest. A field test was positive for cocaine. Respondent had $63 in his right front pocket. R3 109-10.

Schmidt did not see respondent commit any traffic infraction

before he stopped him. R3 111.

Petitioner's entire argument in the trial court as to the suppression issue was as follows:

> MR. CUNHA [ASA]: Your Honor, it's the State's position that the officers clearly had probable cause to search the Defendant. Officer Schmidt testified that he received a radio call or transmission from Officer Mark Lucas who was directly observing the Defendant. He suspected that the Defendant was conducting or involved in three drug transactions. The money that was found was consistent with Officer Lucas' observations. Furthermore, Officer Lucas had testified that he has been with the Delray Police Department for over eleven years. He has received numerous courses or training courses dealing with and identifying narcotics, street level narcotics transactions. He also testified that he clearly saw three individuals approaching the Defendant and taking something out of the Defendant's hand in exchange for money. He saw the Defendant receiving the money, physically receiving the money. He also saw - or Officer Schmidt - I believe it was Officer Lucas, actually, testified - I'm sorry, Officer Schmidt testified that the narcotics that were found on the Defendant, each bag the street value was about twenty dollars. He also found sixty dollars on the Defendant consistent with Officer Lucas' observations that three individuals approached the Defendant and purchased the narcotics from the Defendant.

R3 115-16.

Petitioner did not argue the search was consensual and the judge made no ruling on that issue. The judge denied the motion to suppress based on a finding that Officer Lucas "had probable cause to believe that he saw a narcotic transaction," and the facts and circumstances gave cause "for the subsequent search of Mr. Hankerson." R3 117-19.

After reversing the lower court decision, the Fourth District denied petitioner's motion for rehearing en banc.

## SUMMARY OF THE ARGUMENT

I. Petitioner has not shown that the Fourth District erred in finding an illegal search so that the resulting evidence had to be suppressed.

A. If the police have a reasonable suspicion that someone is engaged in criminal activity, they may make an "investigatory stop." But the police may not arrest or search the person without probable cause. *See Caldwell v. State*, 35 Fla. L. Weekly S425 (Fla. July 8, 2010). At bar, the police testified to an investigative detention in which respondent was searched for drugs. Since an investigative detention does not authorize such a search, the Fourth District correctly found that the evidence seized had to be suppressed.

Officer Lucas was investigating a house pursuant to reports of drug dealing. He saw respondent engage in a suspected drug deal and directed other officers to stop him for investigative purposes. Officer Schmidt searched respondent for drugs. As part of that search, respondent removed his shoes and Schmidt found cocaine. There was no evidence the officers knew respondent. In these circumstances, the police conducted a investigative detention in which respondent was illegally searched.

The facts at bar are like the facts in *Coney v. State*, 820 So.2d 1012 (Fla. 2d DCA 2002). As in *Coney*, the police saw a "single suspicious event" in which something was exchanged for money and the suspect was not a known drug dealer. Such sketchy facts

would not support an arrest. Pursuant to *Coney*, the Fourth District properly held the police may have had a founded suspicion such as to justify an investigative detention but did not have probable cause to arrest and search.

B. With only minimal discussion of *Coney*, petitioner relies on cases which are unlike the case at bar. In those cases, the police had concrete knowledge of a suspect's criminal history and the location's use for drug activity, or directly observed repeated ongoing drug sales immediately before conducting a stop and search. These cases do not justify the police action at bar.

C. Petitioner has argued in its brief that the Fourth District refused to consider whether the cocaine was discovered as a result of a lawful investigative detention. In fact, the Fourth District held that, regardless whether there was a lawful investigative detention, there was an illegal search without probable cause.

So far as petitioner argues a consensual search, such argument is not borne out by the record. Officer Schmidt said he searched respondent because he suspected that respondent had drugs. Asked how he did this search, Schmidt said he patted respondent down and asked him if he had anything in his shoes. Respondent responded to the officer's apparent authority and intent to continue the search by taking off his shoes and the drugs were found.

In these circumstances, petitioner waived any claim of consent in the trial court for the obvious reason that the search was not consensual. Because petitioner abandoned this unsupportable theory

in the trial court, the Fourth District properly did not consider it on appeal. Appellate courts do not review decisions the trial court never made. Regardless, the record does not show a consensual search.

II. The decision of the lower court does not expressly and directly conflict with decisions of another District Court of Appeal or of this Court on the same point of law so that there is no jurisdiction at bar.

## ARGUMENT

### I. THE FOURTH DISTRICT DID NOT ERR IN FINDING THE SEARCH WAS ILLEGAL.

Petitioner has failed to show that the Fourth District erred in finding an illegal search and that the drugs had to be suppressed.

A. *The police did not have probable cause to search respondent*.

If the police have a reasonable suspicion that someone is engaged in criminal activity, they may make an "investigatory stop." But the police must have probable to cause to arrest or search a person. *See Caldwell v. State*, 35 Fla. L. Weekly S425 (Fla. July 8, 2010). At bar, the police testified respondent was detained for investigation and he was searched for drugs during this detention. Since an investigative detention does not authorize such a search, the Fourth District correctly found that the evidence seized had to be suppressed.

#### i. The police testified to an investigative detention in which respondent was searched for drugs.

Officer Lucas did not testify to seeing prior criminal activity at the house and he had only received past reports of drug dealing at the house. Pursuant to these reports, he investigated the house one afternoon and saw respondent exchange something for money on the porch. He did not claim to have probable cause. He only asked the other officers to stop and investigate respondent:

Q. What did you do at that point?

> A. Well, based on my surveillance and experience, I believed that he was involved in a narcotics transaction so I - since he was leaving the area, I quickly radioed to Officer Schmidt and Officer Stevenson to assist and investigate his activities, if they could do a traffic stop on him.

R3 96.

Officer Schmidt also did not testify to probable cause. He said Lucas asked for assistance in investigating further: "He said he just observed several drug transactions and if I could help - assist him in further investigating it." R3 104.

Thus, in their assessment of the facts before them, the officers had not developed probable cause to arrest and search – they were engaged in investigating suspicious activity. That is, "as understood by those versed in the field of law enforcement," *Illinois v. Gates*, 462 U.S. 213, 231 (1983), the facts did not support probable cause.

In fact, cash transactions are not illegal and are common among poor people who do not have checks or credit cards. Perhaps the man was merely collecting debts from some friends to whom he had lent money and they were taking back their IOU's. Maybe he had bought lottery tickets for some friends. One need not dwell on the broad variety of innocent everyday transactions that involve cash, as the state had the duty to affirmatively show probable cause.

Criminality was also not shown by the fact that the man was looking up and down the street. Maybe he was concerned about being robbed in this neighborhood. After all, someone was staring at him from a nearby parked car; for all the man might know, the man star-

ing at him could be planning to commit a robbery. Petitioner did not meet its burden to prove probable cause.

To support a warrantless search, the standard is at least as strong as the probable cause standard for a search warrant. *See Wong Sun v. U.S.*, 371 U.S. 471, 482 (1963) ("To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy [that probable cause must support an arrest warrant]."). The same standard applies for a search as for an arrest. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."); *State v. Wallace*, 812 A.2d 291, 297, n. 3 (Md. App. 2002) ("our discussion of probable cause generally and whether there was probable cause to search respondent in this case is based upon the same standard for probable cause to arrest"; citing to *Ybarra* and other cases).

At bar, petitioner did not show probable cause and the search violated respondent's rights under Article I, Section 12 of the state constitution and the Fourth and Fourteenth Amendments of the federal constitution.

ii. The police did not have probable cause under *Coney v. State*.

The case at bar presents facts similar to those in *Coney v.*

*State*, 820 So.2d 1012 (Fla. 2d DCA 2002).

In *Coney*, officers conducted surveillance in an area where many drug arrests had been made. They saw Coney approach on a bicycle and put his closed hand into a car. The officers could not see what was in Coney's hand, but as the car left they saw him holding money. The officers believed they had seen a drug transaction, and stopped Coney about a block away. He had an object in his mouth, and an officer directed him to spit it out. The object was found to be a small bag of marijuana. *Id*. at 1013.

The trial court denied Coney's motion to suppress, but the Second District reversed, holding the police did not have probable cause to search Coney's mouth. *Id*. at 1014.

The Second District distinguished cases in which the police had seen a single individual repeatedly engage in apparent drug sales at a place known for drug sales. It held the police did not have probable cause to search Coney when they saw a single suspicious incident in which he exchanged something for money in an area where many drug arrests had been made in the past:

> The State suggests that *D.A.H. v. State*, 718 So.2d 195 (Fla. 2d DCA 1998), and *Revels v. State*, 666 So.2d 213 (Fla. 2d DCA 1995), support the trial court's denial of the motion to suppress. In *D.A.H.*, the officer observed D.A.H. exchange small packages for money in several hand-to-hand transactions with persons in vehicles. *D.A.H.*, 718 So.2d at 195. Additionally, D.A.H. fled when he saw the officer. *Id*. In *Revels*, the officers were assigned to observe a house where the police had made numerous narcotics arrests. *Revels*, 666 So.2d at 214. The officers observed two separate hand-to-hand transactions in which a person sitting outside the house approached cars that pulled up to the curb. The officers saw money being ex-

> changed for unidentified objects. *Revels* then approached the house on foot with money in his hand. He gave the money to the person and received an unidentified small object in exchange for the money. *Id*.
>
> While we recognize that cases of this nature are often close, several factors are significant to our decision that the police officers did not have probable cause to search Coney: they did not see what was in Coney's hand when he reached into the car; they did not see what was in Coney's mouth before he spit out the object at the command of one of the officers; and they did not see Coney involved in more than one transaction.
>
> Unlike the situations in *D.A.H.* and *Revels*, the officers here observed a single suspicious event. They did not see Coney pass drugs or other contraband to the person in the car. *See Burnette*, 658 So.2d at 1171; *Messer v. State*, 609 So.2d 164, 165 (Fla. 2d DCA 1992). Both officers admitted that before Coney spit out the marijuana, they did not have probable cause to arrest him. One officer felt that he had a basis to search Coney. The second officer stated that he had reasonable suspicion to stop and investigate Coney but not probable cause to search him. He suspected that Coney might be carrying a weapon because he thought Coney was selling drugs in an area where the police frequently "get" guns. However, the officer acknowledged that Coney did not do anything to make him believe Coney might be armed, and he did not do a pat-down until after Coney spit out the marijuana. While the officers saw money in Coney's hand after the transaction, and while they had a suspicion that a crime might have occurred, they did not have probable cause to effect Coney's arrest before Coney was ordered to empty his mouth. *Cf. Curtis*, 748 So.2d at 372; *Cummo*, 581 So.2d at 968.

*Id*. at 1014-15.

Like the officers in *Coney*, Lucas did not see what respondent exchanged for the money and he observed only "a single suspicious event." He did not see respondent pass drugs or other contraband to the persons on the porch. Although he had heard from informants and community meetings that there was alleged drug dealing at the house, he had seen none there. He did not testify to any prior ar-

rests at the location. He did not testify that the transaction conformed in any way to what he had heard from his informants.

Further, probable cause could not be supplied by the fact that Lucas saw money being exchanged for something. It was obvious from the facts of *Coney* that Coney was involved in a monetary transaction.

iii. The police did not have probable cause under *Ramirez v. State* and other cases involving cash transactions.

In *Ramirez v. State*, 654 So.2d 1222 (Fla. 2d DCA 1995), officers saw Ramirez approach a man and give him money in exchange for a substance they suspected might be drugs. Ramirez then took a beer can into a restroom stall at a nearby market. Suspecting that he was smoking drugs, they entered the stall, found cocaine and arrested him. The Second District found that the trial judge erred in denying Ramirez's motion to suppress. It wrote that Ramirez's purchase of suspected drugs for money could only justify "temporarily detaining Ramirez for a brief investigation," and it did not support a finding of probable cause:

> The weight of authority runs counter to the trial court's ruling. As soon as Ramirez entered the closed toilet stall he had a legitimate expectation of privacy which was unlawfully invaded when the police, acting prematurely, seized him with no more than a suspicion that criminal activity was afoot. *See Ward v. State*, 636 So.2d 68 (Fla. 5th DCA 1994); Michael R. Flaherty, Jr., *Annotation, Search and Seizure: Reasonable Expectation of Privacy in Public Restroom*, 74 A.L.R.4th 508 (1989). Viewed in its entirety, the evidence shows that law enforcement witnessed Ramirez engage in a transaction which led the officers to believe Ramirez had just purchased drugs. Given the totality of the circumstances, the officers would have been justified in temporarily detaining Ramirez for a brief investigation. *See State v. Clark*, 605

> So.2d 595 (Fla. 2d DCA 1992). We cannot conclude, however, that the observance of an exchange, coupled with a hunch that the suspect intends to smoke cocaine through a beer can, are sufficient to reach a finding of probable cause. *See Doney v. State*, 648 So.2d 799 (Fla. 4th DCA 1994); *see also, Banks v. State*, 594 So.2d 833 (Fla. 4th DCA 1992) (observation of bent beverage can in motel room did not give officer probable cause to conduct warrantless search). Nor did matters of exigency provide the requisite probable cause; the officers here did not have the "fresh, direct, uncontradicted evidence" of a criminal event necessary to prevail upon the exigency exception. *Walker v. State*, 636 So.2d 583, 584 (Fla. 2d DCA 1994) (quoting *California v. Carney*, 471 U.S. 386, 395, 105 S.Ct. 2066, 2071, 85 L.Ed.2d 406, 414 (1985)).

*Id*. at 1223.

Other cases also involve facts similar to the case at bar.

In *Winters v. State*, 578 So.2d 5 (Fla. 2d DCA 1991), an officer saw Winters lean into a station wagon in an unpaved alley in an area known for drug activity. Winters took money from the driver. As officers pulled up, someone yelled there were police in the area. Winters looked at the officers and walked away, tying to conceal the money in his hand. An officer stopped him and directed him to put his hands on the hood of a car. At one point, Winters put his hand into his jacket pocket. An officer withdrew the hand from the pocket and searched the pocket to "see what he was after," pulling out what appeared to be cocaine. The court held that there was a valid investigative stop, but that the police did not have probable cause of search Winters.

In *Howard v. State*, 623 So.2d 1240 (Fla. 2d DCA 1993), an officer conducted surveillance in a neighborhood because of numerous complaints of drug sales. The officer "saw Howard give another man

money and the other man bump his right hand against Howard's left hand. It appeared as if the man had given Howard a small object. As he walked away, Howard looked at the palm of his hand, but Officer Walker could not see what the hand contained." *Id*. at 1241. The officer radioed another officer who approached Howard and asked him to remove his hand from his pocket. The officer patted Howard down and felt a solid object about the size of an eraser on a pencil and a cylindrical object with an opening at one end and a wiry substance that felt like steel wool at the other end. Based on his experience, the officer believed the objects were drugs and paraphernalia. He removed rock cocaine, a cocaine pipe and a small razor knife from Howard's pocket. The court held that the police had a founded suspicion of illegal activity rather than probable cause and that the police illegally searched Walker's pocket after conducting a pat-down.

iv. Petitioner has not shown that the Fourth District erred in following *Coney*.

Petitioner has not shown this Court why *Coney* does not govern the case at bar.[2] It merely says *Coney* differs from our case because Officer Lucas observed "three transactions" at bar. Initial Brief on Merits, 15-16.

In fact, Officer Lucas saw only a single suspicious event in-

[2] Petitioner gave the Fourth District no argument in its answer brief as to why *Coney* did not govern the case. In fact, it did not even acknowledge the contrary authority *Coney* in its answer brief in the Fourth District despite the fact that it was the main case on which respondent's initial brief relied. *See* pages 7-10 of the initial brief (discussing and quoting *Coney* at length).

volving respondent. Respondent had contact with the three persons for only a very brief time, seconds:

> Q. What happened then?
>
> A. Very brief contact with three of the subjects.
>
> Q. How brief?
>
> A. Seconds. Mr. Hankerson had his hand open. He was looking up and down the street. Each individual took an item from the hand and then quickly handed him a paper currency.

R3 95.

The Fourth District was aware of this fact and saw that it presented no analytical difference from the facts of *Coney*. There is no reason to think the Second District would have reached a different result in *Coney* if Coney had been involved with more than one person in the car.

Further, Coney engaged in actions more consistent with a typical drug deal than did respondent. It is pretty common in drug dealing cases for a suspect to be on foot or on a bike and selling drugs to motorists. A drug dealer typically has a base of operations to which the buyers come, and not the other way around. At bar, however, respondent came to the home of the three persons and sold them something. Certainly such behavior may merit further investigation but it is not probable cause for an arrest and search.

B. *Petitioner's cases do not support probable cause as they are unlike the case at bar.*

Aside from its limited attempt to avoid *Coney*, petitioner relies on cases that are unlike the case at bar. Unlike at bar, the

police in those cases had concrete knowledge of a suspect's criminal history and the location's use for drug activity, or directly observed repeated ongoing drug sales immediately before the defendant was stopped and searched. These cases do not justify the police action at bar.

i. Petitioner relies on cases that are unlike the case at bar.

Petitioner relies on a number of DCA cases that are unlike the case at bar. These cases are:

- *D.A.H. v. State*, 718 So.2d 195 (Fla. 2d DCA 1998). The opinion in *D.A.H.* is remarkable for its complete lack of legal analysis. It is only three paragraphs long and simply concludes that the facts are like those in *Revels v. State*, 666 So.2d 213 (Fla. 2d DCA 1995), which is discussed below at page 18 of this brief. Regardless, the facts of *D.A.H.* are unlike the facts at bar.

An officer saw D.A.H. make a series of sales of small packages to people in different vehicles, and D.A.H. fled when he saw the officer. *D.A.H.* is distinguishable from the case at bar on the ground discussed in the extended quotation from *Coney* earlier in this brief: at bar, Officer Lucas saw only a single suspicious event and did not see what was in respondent's hand, and respondent did not flee from the police.

- *Knox v. State*, 689 So.2d 1224 (Fla. 5th DCA 1997). An officer watched Knox make repeated sales to persons in cars "for two hours." There was no such evidence at bar. As discussed in *Coney*,

evidence of such repeated transactions is significantly different from evidence of "a single suspicious event." *Coney*, 820 So.2d at 1014-15.

- *League v. State*, 778 So.2d 1086 (Fla. 4th DCA 2001). In *League*, unlike at bar, officers had a report from an undercover informant of specific drug dealing by a specific person: Peanut Horskins, a known drug dealer. Officers staked out Peanut's house and saw him sell something to League. They immediately seized League, and drugs fell from his hand. Although the Fourth District wrote that the officers had probable cause to search League, it actually did not have to decide that issue. The officers had a sufficient articulable suspicion to justify an investigative detention, and there was no search: the drugs fell from League's hand when he was detained. Regardless, the officers at bar did not have as much to go on at bar as the officers did in *League*.

In *League*, the informant specifically identified the drug dealer at the house as Peanut, and Peanut had a history of arrests for drug dealing. Officers saw this known drug dealer sell something to League. Such concrete evidence was not possessed by the police at bar. Officer Lucas did not testify to any knowledge as to respondent or the persons on the porch. The only information about drug dealing at the place came from reports not connected to the day in question. Further, Lucas did not say his information involved anyone driving ***to*** the house and giving something to people there in exchange for money. Hence, even if the police had probable

cause in *League*, that does not mean the police had probable cause at bar.

Plainly, the Fourth District thought *League* was unlike the case at bar because it denied petitioner's motion for rehearing en banc.

- *Elliott v. State*, 597 So.2d 916 (Fla. 4th DCA 1992). Two weeks after seizing "a quantity of cocaine" from Elliott, an officer saw Elliott engage in an apparent drug deal at "the most heavily trafficked area in regards to crack cocaine" in that part of town. *Id*. at 916. When the officer stopped his vehicle, the person involved with Elliott left "in a hurry," and the officer saw that Elliott had a plastic baggie. *Id*. The Fourth District found probable cause "given the experience of the officer at the very location in question and with the recent experience with the appellant in question". *Id*. at 918. *Elliott* does not apply at bar. Officer Lucas did not have prior experience at the location and had no experience with respondent.

Again, the Fourth District plainly thought *Elliott* was unlike the case at bar since it denied petitioner's motion for rehearing en banc.

- *Revels v. State*, 666 So.2d 213 (Fla. 2d DCA 1995). In *Revels*, officers staked out a house known for cocaine sales. "This knowledge was not based on rumor or hearsay, but on the fact that the police had made numerous narcotics arrests for transactions occurring at the house." *Id*. at 214. They saw a man make two separate

apparent sales. They then saw the man make an apparent sale to Revels about ***10 minutes later***. In finding probable cause, the Second District relied on the specific evidence of prior narcotics activity at the location, and wrote: "Rumor and reputation are no substitute for fact." Id. at 216.

Like *D.A.H., Revels* differs from the case at bar on the grounds discussed in the quotation from *Coney* earlier in this brief: there had been numerous narcotics arrests at the house in *Revels* and the officers saw someone make two separate prior sales within 10 minutes of when Revels arrived and apparently bought something from the same person. There was no such evidence at bar.

Petitioner argues that the police saw respondent make three transactions, but it ignores that everything happened at the same time, not over an extended period as in *Revels*. Officer Lucas testified that respondent drove up and had "[v]ery brief contact" with three persons in which "[e]ach individual took an item from the hand and then quickly handed him a paper currency." R3 95. The entire episode took "[s]econds." *Id*.

Further, *Revels* distinguished its facts from those of *Walker v. State*, 636 So.2d 583 (Fla. 2d DCA 1994). *Walker* involves facts similar to those at bar, and the court found no probable cause to justify a search. Walker sold suspected drugs and then was stopped and searched, like respondent at bar, after leaving the scene: "His act of leaving the scene of the sales suggests that he was no longer in possession of drugs. If the police had lawfully obtained co-

caine from one of Mr. Walker's customers prior to his arrest, then the police presumably would have had probable cause to arrest him for sale of cocaine." *Revels*, 666 So.2d at 216 (discussing *Walker*). The same is true at bar.

Thus, the case at bar is not like *Revels.* It is like *Walker*, in which the court found no probable cause.

ii. A person is not subject to arrest merely for engaging a cash transaction in a "high crime area."

Petitioner also relies on the Chief Justice's dissent from the denial of certiorari in *Pennsylvania v. Dunlap*, 129 S.Ct. 448 (2008), in which the Chief Justice would have held that the mere fact of "experienced police officers observing hand-to-hand exchanges of cash for small, unknown objects in high-crime neighborhoods." *Id*. at 449 (Roberts, C.J., dissenting).

A dissent from denial of certiorari is a pretty weak basis for any legal argument. Regardless, that case involved more evidence going to probable cause than at bar.

An officer saw Dunlap alone in the early morning hours in an area where the officer had made prior drug arrests. A man approached and sold small objects to Dunlap for cash. *Id*. at 448 (Roberts, C.J., dissenting). At bar, the transaction occurred on a front porch during the afternoon. In these circumstances, a minor cash transaction is not so likely to be a drug deal. Further, Officer Lucas had never made any arrests at the house. He was merely investigating it pursuant to complaints. *Cf*. *Revels* ("Rumor and reputation are no substitute for fact.").

Moreover, the Chief Justice would require a finding of probable cause based on nothing more than the mere fact that an experienced officer saw observing hand-to-hand exchanges of cash for small, unknown objects in high-crime neighborhoods. *Id*. at 449 (Roberts, C.J., dissenting). This is an astonishing idea, and it is understandable that the majority of the Court did not agree with the Chief Justice.

As Judge Letts once observed, "the phrase 'high-crime area' might apply to all of South Florida." *Gillion v. State*, 547 So.2d 719, 720 (Fla. 4th DCA 1989) *approved*, 573 So.2d 810 (Fla. 1991). Likewise, after the notorious crimes of Bernard Madoff and Scott Rothstein, one might consider Palm Beach and other wealthy places "high crime areas." Do all the people of South Florida therefore lose the right to conduct cash transactions for small objects without police interference?

C. *The Fourth District made no error as to any issue of reasonable suspicion to detain, and the record does not support a theory of a lawful pat-down followed by a separate consensual search*.

Petitioner also argues in its brief that "the seizure of the drugs would be permissible on the basis of reasonable suspicion," citing to *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999). It further says the Fourth District "refused to analyze whether the seizure was justified by reasonable suspicion because the State did not make this argument in the trial

court." Petitioner argues that Schmidt properly stopped respondent, and conducted a lawful pat-down followed by a separate consensual search.

Respondent submits that petitioner has garbled several concepts here. First, contrary to petitioner's argument, the Fourth District did consider the question of reasonable suspicion. Second, the record does not show a consensual search. Third, the *Dade County School Board* case has no bearing on the case at bar.

i. The Fourth District did not refuse to consider the question of whether the police had a reasonable suspicion of criminal activity.

Contrary to petitioner's argument, the Fourth District did not "refuse[ ] to analyze whether the seizure was justified by reasonable suspicion because the State did not make this argument in the trial court." Instead, it held that the issue of reasonable suspicion was irrelevant to the question of whether there was probable cause to search. The Fourth District wrote that the police may have had justification for a stop, but they did not have probable cause to support a search:

> Similarly, in this case Lucas did not see what defendant exchanged for money. Schmidt did not see what was in his shoe. They did not see him similarly involved in more than one occasion. These patterns on which they rely also occur in innocent public transactions and are not unique to narcotics violations. These patterns may be enough to inform a suspicion for further investigation-perhaps even enough for a *Terry* FN1 stop or a stop under the Florida Stop and Frisk Law FN2-but they fall short of the requirements for probable cause. As in *Coney*, police did not have probable cause to search him without his consent. *See also Robinson v. State*, 976 So.2d 1229, 1233 (Fla. 2d DCA 2008) (mere suspicion person is carrying illegal drugs insufficient for probable cause).

> FN1. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
>
> FN2. § 901.151, Fla. Stat. (2009).

*Hankerson v. State*, 32 So.3d 175, 177 (Fla. 4th DCA 2010).

> ii. The record shows a non-consensual search: Officer Schmidt said he searched respondent for drugs and, as part of that search, he patted respondent down and respondent removed his shoes and the drugs were found.

Petitioner argued in the trial court that there was probable cause for a search. Respondent disagreed. Hence, the judge ruled only on that issue, concluding that there was a search supported by probable cause. Accordingly, the Fourth District refused to consider for the first time on appeal whether there was a consensual search: "Conspicuously, the state made no attempt to argue in the trial court-as it now does on appeal-that defendant consented to the search. We thus proceed to analyze the propriety of the seizure and search solely on the basis of probable cause without consent." *Hankerson*, 32 So.2d at 176-77.

Further, contrary to petitioner's appellate argument, the record shows the evidence was obtained during a non-consensual search, a fact about which there was no dispute in the trial court.

Officer Lucas "radioed to Officer Schmidt and Officer Stevenson to assist and investigate his activities, if they could do a traffic stop on him." R3 96. Asked how he stopped respoondent, Schmidt replied: "Lights and sirens." R3 106. Schmidt "asked him to exit the vehicle." R3 107.

Schmidt said that after the stop "I conducted a search of

him.” R3 108. Schmidt was asked how he conducted the search, and he replied: “I patted him down and I asked him if he had anything in his shoes, and he said no. And he started taking off - he took off his shoe. He took off his left shoe -” *Id*. He did not specifically order respondent to take off his shoe, but: “It was inferred. I would have asked him to take off his shoes, but I believe my exact thing was do you have anything in your shoe, and he was like no. And he started taking off his shoes.” Id. Respondent was “a little bit hesitant.” Id.

Thus, respondent was detained in a traffic stop and Officer Schmidt searched him. When respondent hesitantly took off his shoe in response to the inferred command, he acquiesced in the officer’s apparent authority when Schmidt showed an unambiguous intent to search him.

Traffic stops involve “a societal expectation of unquestioned police command” because the “risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.” *Brendlin v. California*, 551 U.S. 249, 258 (2007). In *Arizona v. Johnson*, 129 S.Ct. 781, 787-88 (U.S. 2009), the Court found that the state court erred in finding a passenger acted voluntary when he got out of a car and submitted to a pat-down during a traffic stop even though the officer testified the passenger could have refused to do so. At bar, respondent was detained and searched involuntarily and acquiesced in the apparent authority of the officer.

The record does not support petitioner's suggestion that Schmidt conducted a pat-down for weapons based on a suspicion that respondent was armed and dangerous, and that he then terminated the search before the shoes came off.

As already noted, Schmidt testified that, after respondent got out of the car and lifted his shirt, "I conducted a search of him." R3 108. He did not say he conducted this search as a pat-down for weapons:

> Q. What did you proceed to do then?
>
> A. I conducted a search of him.
>
> Q. And why did you conduct a search?
>
> A. From my observations and Officer Lucas' observations.
>
> Q. What did you suspect the Defendant to have on him or on his person?
>
> A. Drugs.
>
> Q. How did you search the Defendant?
>
> A. I patted him down and I asked him if he had anything in his shoes, and he said no. And he started taking off - he took off his shoe. He took off his left shoe –

*Id*.

Thus, at this point Schmidt was searching respondent for drugs. There was no break in the action between the pat-down and respondent removing his shoe. Respondent merely acquiesced in the apparent authority of the police when he took off his shoes. *See Smith v. State*, 997 So.2d 499 (Fla. 4th DCA 2008), *Sizemore v. State*, 939 So.2d 209 (Fla. 1st DCA 2006), and *Howell v. State*, 725 So.2d 429 (Fla. 2d DCA 1999). It would be ridiculous to assert that

respondent would have taken off his shoes if he did not feel compelled to do so.

Although petitioner points to Schmidt's testimony that he had heightened suspicions because respondent gestured to the console and toward the floor, and that drug transactions are "often" associated with weapons, R3 106-07,[3] Schmidt did not testify to an articulable suspicion that respondent had a weapon after he got out of the car and lifted his shirt. The prosecutor directly asked him what he suspected respondent had, and he replied: "Drugs." R3 108.

In these circumstances, the able trial prosecutor did not pursue any theory of a lawful pat-down followed by a consensual search. Petitioner quite sensibly abandoned such a claim in the trial court and pursued what it considered a more viable theory.

iii. The *Dade County School Board* case has no bearing on the case at bar.

There is no basis for petitioner's reliance on the *Dade County School Board* case at bar.

That case involved a pleading issue in a personal injury suit in which the school board and Three Kings were co-defendants. After the defendants settled with the plaintiffs, there was a trial to assess fault. The jury found the school board at fault and found Three Kings not at fault. Based on this finding, Three Kings claimed in a post-trial motion that the school board was liable to

[3] This Court has considerable experience with search and seizure cases involving minor drug sales. It is not particularly common for the suspects in such cases to have weapons.

it for equitable subrogation. Three Kings had not raised this claim in the pleadings, and the judge denied it.

On appeal, the Third District held Three Kings could recover on its claim.

On discretionary review, this Court held that an appellate court has discretion to rule on an issue not timely plead in the lower court.[4]

This Court noted: "Generally, if a claim is not raised in the trial court, it ***will not*** be considered on appeal." *Dade County School Board*, 731 So.2d at 644 (e.s.).[5] To allow a losing party "to amend his initial pleading to assert matters not previously raised renders a mockery of the 'finality' concept in our system of justice." *Id*. Nonetheless: "***In some circumstances***, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record

[4] *See also Heuss v. State*, 687 So.2d 823 (Fla. 1996) (appellate courts have discretion to apply harmless error rule even if not argued by appellee).

[5] *See also Baker v. American General Life & Accident Ins. Co.*, 686 So.2d 731 (Fla. 1st DCA 1997) ("Appellees request us to uphold the dismissal based on arguments not addressed by the trial court. We decline to do so."); *Hayes v. State*, 581 So. 2d 121, 124 (Fla. 1991) (appellee could not argue new theory for admissibility of hearsay on defendant's appeal); *Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State. As such, we find that it would be inappropriate, and possibly a violation of due process principles, to remand this cause for resentencing. To do so would allow the State an opportunity to present an additional aggravating circumstance when the State did not initially seek its application, object to its non-inclusion, or seek a cross-appeal on this issue.").

which would support the ruling." *Id*. at 644 (e.s.). Under this exception to the general rule, an appellee "can present any argument supported by the record even if not expressly asserted in the lower court." *Id*. at 645. This is the "tipsy coachman rule." *Id*.

Thus, *Dade County School Board* involved a ***pure question of law*** concerning a ***pleading issue*** that ***was raised in the trial court***, albeit in an allegedly untimely manner. By contrast, at bar petitioner completely failed to argue to the fact-finder the fact-bound issue of whether there was consent to the search. Hence, the Fourth District did not act contrary to *Dade County School Board* at bar.

This Court discussed the "tipsy coachman" rule at length in *Robertson v. State*, 829 So.2d 901, 906-907 (Fla. 2002). In that case, the Third District had held evidence admissible on a theory of collateral-crime evidence even though that theory had not been presented to the trial court.

This Court reversed. It found that the that Third District erred in using the rule to support the admission of evidence based on the fact-bound issue of collateral crimes evidence because the record did not reflect an evidentiary basis sufficient to permit determination of the issue.

In *Robertson*, this Court again noted the general rule that "if a claim is not raised in the trial court, it will not be considered on appeal," but said there is an exception that applies in "some circumstances," namely the "tipsy coachman" rule. *Id*. at 906.

This Court noted that this rule cannot apply if the "the

record ***does not reflect an evidentiary basis*** sufficient to permit" a determination of an issue not raised in the trial court. *Id*. at 907 (quoting with approval *State Dept. of Revenue ex rel. Rochell v. Morris*, 736 So.2d 41, 42 (Fla. 1st DCA 1999); emphasis in *Robertson*.).

At bar, there is an insufficient evidentiary basis for petitioner's belated claim. Schmidt did not testify that he had a particularized suspicion that respondent was armed and dangerous after getting out of the car and lifting his shirt. He said he "searched" respondent because he thought he had "[d]rugs." He patted respondent down looking for these drugs. As a continuing part of that search, in response to the officer's apparent authority and intent, respondent removed his shoes.

Further, the record suggests that the evidence would have turned out even more unfavorable for petitioner's argument had it pursued a claim of a consensual search in the trial court. Officer Stevenson testified at trial that Schmidt obtained respondent's consent to a search of the car. R4 210. On the other hand, there was no evidence that Schmidt sought or obtained a consent to search respondent's shoes. When relying on a consent to justify a search, an officer has "no more authority than that reasonably conferred by the terms of [the] consent." *Crawford v. State*, 980 So.2d 521, 523 (Fla. 2d DCA 2007).

The Fourth District was correct in not deciding an issue never presented to the judge and not supported by the record. Appellate

courts do not review rulings never made by the trial court.

## II. PETITIONER HAS NOT SHOWN THAT THIS COURT HAS JURISDICTION.

Petitioner has sought review claiming that the decision below expressly and directly conflicts with *D.A.H.*, *Knox*, and *Dade County School Board* on the same question of law. The Fourth District's decision does not expressly and directly conflict with those decisions.

### i. The decision below does not expressly and directly conflict with *D.A.H. v. State* on the same question of law.

Petitioner has not identified the "question of law" that supposedly supports its claim of conflict jurisdiction regarding *D.A.H.* Instead, it says the facts in *D.A.H.* are comparable to the facts at bar.

*D.A.H.* is so terse that it is hard to make much of it. There is no legal analysis, so that it is impossible to say that it stands for any proposition as to any "question of law." Regardless, its facts are unlike the facts at bar.

In *D.A.H.*, an officer saw D.A.H. make several sales of small packages to persons in vehicles (plural). Further, D.A.H. fled when he saw the officer.

At bar, Officer Lucas watched the house in question from an unmarked car and saw the following:

> Defendant arrived at the address late one afternoon and walked up to 3 or 4 people on the front porch. Defendant's contact with them was very brief. According to Lucas, defendant opened his hand and looked up and down the street. Lucas could not see what was in his hand. Each one of the porch people took something from his hand and handed him money. Defendant pocketed what he received

from them and drove away.

*Hankerson*, 32 So.3d at 176. There was no evidence of flight.

Thus, *D.A.H.* is unlike the case at bar because:

(1) The officer saw several transactions involving different vehicles in *D.A.H.* At bar, Lucas saw only one "[v]ery brief" encounter between respondent and the persons on the porch.

(2) The officer saw "small packages" being exchanged for money in *D.A.H.* At bar, Lucas did not see what was exchanged for money.

(3) D.A.H. fled when he saw the officer. Such did not occur at bar.

The Fourth District found the facts at bar indistinguishable from those in *Coney v. State*, 820 So.2d 1012 (Fla. 2d DCA 2002). *Coney* specifically pointed out the differences between the facts of *D.A.H.* and a situation such as at bar:

> The State suggests that *D.A.H. v. State*, 718 So.2d 195 (Fla. 2d DCA 1998), and *Revels v. State*, 666 So.2d 213 (Fla. 2d DCA 1995), support the trial court's denial of the motion to suppress. In *D.A.H.*, the officer observed D.A.H. exchange ***small packages*** for money in several hand-to-hand transactions with persons in ***vehicles***. *D.A.H.*, 718 So.2d at 195. Additionally, D.A.H. ***fled when he saw the officer***. *Id*. In *Revels*, the officers were assigned to observe a house where the police had made numerous narcotics arrests. *Revels*, 666 So.2d at 214. The officers observed two separate hand-to-hand transactions in which a person sitting outside the house approached cars that pulled up to the curb. The officers saw money being exchanged for unidentified objects. Revels then approached the house on foot with money in his hand. He gave the money to the person and received an unidentified small object in exchange for the money. *Id*.
>
> While we recognize that cases of this nature are often close, several factors are significant to our decision that the police officers did not have probable cause to

> search Coney: they did not see what was in Coney's hand when he reached into the car; they did not see what was in Coney's mouth before he spit out the object at the command of one of the officers; and they did not see Coney involved in more than one transaction.
>
> ***Unlike the situations in D.A.H. and Revels, the officers here observed a single suspicious event***. They did not see Coney pass drugs or other contraband to the person in the car. *See Burnette*, 658 So.2d at 1171; *Messer v. State*, 609 So.2d 164, 165 (Fla. 2d DCA 1992). Both officers admitted that before Coney spit out the marijuana, they did not have probable cause to arrest him. One officer felt that he had a basis to search Coney. The second officer stated that he had reasonable suspicion to stop and investigate Coney but not probable cause to search him. He suspected that Coney might be carrying a weapon because he thought Coney was selling drugs in an area where the police frequently "get" guns. However, the officer acknowledged that Coney did not do anything to make him believe Coney might be armed, and he did not do a pat-down until after Coney spit out the marijuana. While the officers saw money in Coney's hand after the transaction, and while they had a suspicion that a crime might have occurred, they did not have probable cause to effect Coney's arrest before Coney was ordered to empty his mouth. *Cf. Curtis*, 748 So.2d at 372; *Cummo*, 581 So.2d at 968.

*Coney*, 820 So.2d at 1014-15 (e.s.).

Thus, *D.A.H.* involved facts unlike *Coney* and the case at bar. *D.A.H.* does not expressly and directly conflict with the decision at bar as to the same question of law.

> ii. The decision below does not expressly and directly conflict with *Knox v. State* on the same question of law.

Petitioner has also claimed an express and direct conflict with *Knox* on the same question of law. In *Knox*, "***for two hours*** [officers] observed Knox approach vehicles that would pull up, lean into the vehicle and pass something to the occupants of the vehicle" in exchange for cash. *Id*. at 1225 (e.s.). At bar, by con-

trast, Lucas saw only a single brief incident of suspicious behavior.

In comparing the case at bar to *Coney*, the Fourth District wrote:

> Similarly, in this case Lucas did not see what defendant exchanged for money. Schmidt did not see what was in his shoe. ***They did not see him similarly involved in more than one occasion***. These patterns on which they rely also occur in innocent public transactions and are not unique to narcotics violations. These patterns may be enough to inform a suspicion for further investigation-perhaps even enough for a Terry[FN 1] stop or a stop under the Florida Stop and Frisk Law [FN 2]-but they fall short of the requirements for probable cause. As in *Coney*, police did not have probable cause to search him without his consent. *See also Robinson v. State*, 976 So.2d 1229, 1233 (Fla. 2d DCA 2008) (mere suspicion person is carrying illegal drugs insufficient for probable cause).
>
> 1 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
>
> 2 § 901.151, Fla. Stat. (2009).

*Hankerson*, 32 So.3d at 177 (e.s.).

Thus, the facts of *Knox* are unlike the facts at bar. *Knox* does not expressly and directly conflict with the decision at bar as to the same question of law.

> iii. The decision below does not expressly and directly conflict with *Dade County School Board* on the same question of law.

Finally, petitioner has claimed an express and direct conflict with *Dade County School Board*. But as already noted, that case involved a pure question of law concerning a pleading issue that was raised in the trial court, albeit in an allegedly untimely manner. It simply had nothing to do with the fact-bound issue of whether

there was consent to the search. Hence, the Fourth District's decision does not directly and expressly conflict with *Dade County School Board* on the same question of law.

## CONCLUSION

The Fourth District did not err in ordering the evidence suppressed. Its decision should be affirmed. Further, the Court should discharge jurisdiction and dismiss review on the ground that jurisdiction was improvidently granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify a copy of this filing has been furnished by first class US Mail on Mark Hamel, Esq., Assistant Attorney General, Counsel for Petitioner, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299, on 13 August 2010.

_____
Attorney for Respondent

## CERTIFICATE OF FONT SIZE

I certify that this brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

_____
Attorney for Respondent