

IN THE SUPREME COURT  
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 77,684

RUFUS CHARLES CURRY,

Respondent.

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Discretionary Review of Decision of  
the Second District Court of Appeal

REPLY BRIEF OF PETITIONER

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### SUMMARY OF THE ARGUMENT

The Hodari analysis should be applied in this case in spite of the State's failure to emphasize the "seizure" issue in the lower courts. The Hodari opinion was rendered subsequent to the decision of the Second District Court of Appeal; moreover, decisions of the United States Supreme Court construing the Fourth Amendment are controlling in this State. There was no evidence that Respondent acquiesced in the law enforcement officer's order to stop, so Respondent was not seized. Even if this Court finds that the seizure issue has been waived, or that Respondent was seized prior to abandoning the cocaine, the State submits that there was no Fourth Amendment violation based on the rationale set out in Petitioner's initial brief.

## ARGUMENT

WHETHER THE SEIZURE OF THE COCAINE  
WAS PROPER WHERE THE DEFENDANT  
ABANDONED THE EVIDENCE IN AN AREA  
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Respondent contends that the issue of whether Curry was "seized" under the standard recently announced by the United States Supreme Court in California v. Hodari D., \_\_\_ U.S. \_\_\_, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), has been waived by the State's failure to raise this issue in the lower courts. Petitioner acknowledges that the seizure question was not the focus of the arguments below, because prior to Hodari the parties correctly assumed an attempted police stop had the same effect as a completed stop for Fourth Amendment purposes. However, Petitioner submits this issue is properly before this Court for review and, pursuant to Constitutional mandate, must be considered in the overall analysis.

Article I, section 12, of the Florida Constitution, relating to search and seizure, as amended in 1982, effective January 3, 1983, states in relevant part:

[The right of the people to be free from unreasonable searches and seizures] shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

As this Court noted in Bernie v. State, 524 So.2d 988, 990-91 (Fla. 1988), with the above amendment, "we are bound to follow the interpretations of the United States Supreme Court with

relation to the fourth amendment, and provide no greater protection than those interpretations." In effect, then, the Hodari decision constitutes state law, and is the controlling precedent in this case. Further, because Hodari sets out new law or, at the least, puts a new emphasis on prior Fourth Amendment holdings, no procedural bar should be applied.

Curry next contends that even if the seizure issue has not been waived by the State, Hodari does not apply because the defendant in this case acquiesced in the police officer's command to stop and was therefore seized. Petitioner disagrees. The evidence adduced at the suppression hearing shows that Curry did not stop walking when the law enforcement officer called out to him nor did Curry respond in any way prior to discarding the rock cocaine. (R 12-15, 20). Compare, In the Interest of J.K., 581 So.2d 940 (Fla. 4th DCA 1991)(Defendant turned around and responded "What?" to officer who ordered him to stop).

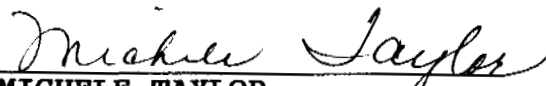
If this Court should determine that the seizure issue has been waived, or that Curry was seized under a Hodari analysis, Petitioner still maintains that the contraband was properly retrieved after having been abandoned in a place where Respondent had no expectation of privacy and under circumstances where no search was conducted or was about to be conducted. For this position, Petitioner relies on the argument and authorities set out in Petitioner's initial brief on the merits.

CONCLUSION

Based upon the foregoing reasons, Petitioner respectfully requests this Honorable Court to reverse the decision of the Second District Court of Appeal, and resolve the conflict of decisions by approving the rationale of the Third, Fourth, and Fifth District Courts of Appeal.

Respectfully submitted,

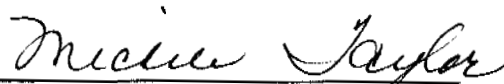
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Timothy A. Hickey, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, on this 5<sup>th</sup> day of December, 1991.

  
**OF COUNSEL FOR PETITIONER**