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**G.M. v. State of Florida**

**SC08-1102**

>> PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE, THE  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD,  
DRAW NEAR, GIVE ATTENTION, AND  
YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,  
THIS GREAT STATE OF FLORIDA,  
AND THIS HONORABLE COURT.  
LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO  
THIS ORAL ARGUMENT SESSION OF  
THE FLORIDA SUPREME COURT.

WE WANT TO WELCOME THE TEACHERS  
FROM AROUND THE STATE WHO ARE  
HERE AND PARTICIPATING IN OUR  
JUSTICE TEACHING INSTITUTE.

WELCOME TO THE SUPREME COURT.  
OUR FIRST ARGUMENT THIS MORNING  
WILL BE G.M., VERSUS STATE.  
ARE THE PARTIES READY?

MR.^BLUMBERG.

>> MAY IT PLEASE THE COURT,  
HOWARD BLUMBERG.

ASSISTANT PUBLIC DEFENDER ON  
BEHALF OF THE JUVENILE  
PETITIONER, G.M. THE ISSUE  
BEFORE THE COURT TODAY, IS  
WHETHER A PERSON IS CEASED  
WITHIN THE MEANING OF FOURTH  
AMENDMENT, WHEN POLICE OFFICERS  
ACTIVATE THEIR POLICE LIGHTS  
AND DRIVE UP TO WITHIN THREE  
FEET DIRECTLY BEHIND A PARKED  
CAR IN WHICH THAT PERSON IS  
SITTING.

>> MR.^BLUMBERG, WOULD YOU  
AGREE AS A CONDITION PRECEDENT  
TO A SEIZURE OCCURRING THE  
PERSON MUST HAVE SOME  
AWARENESS OF SOME RESTRICTION  
OR SOMETHING HAPPENING TO HIM  
OR HER?

>> THE CASE LAW IS NOT REALLY VERY WELL-ESTABLISHED ON THAT POINT.

THE ONLY TWO CASES THE STATE CITES ON THAT PROPOSITION ARE A STATE COURT CASE FROM WISCONSIN WHERE IT WAS CLEAR FROM THE RECORD THAT THE PERSON --

>> LET'S JUST WALK THROUGH IT THEN.

CAN A PERSON THAT IS ASLEEP BE SEIZED IF THEY'RE SITTING ON A PORCH OR SITTING IN A YARD WITH CONTRABAND IN THEIR LAP, CAN THEY BE SEIZED IF THEY'RE NOT AWARE OF IT?

>> I THINK IF IN HEARING ON A MOTION TO SUPPRESS THE STATE ESTABLISHES THAT THE PERSON WAS ASLEEP, THEN THAT PERSON PROBABLY WOULD NOT BE SEIZED --

>> SEEMS TO ME, IN CASES LIKE HODARI AND OTHERS REQUIRE, SOME SURRENDERING TO THAT AUTHORITY OR SOME CIRCUMSTANCES THAT WOULD INDICATE THAT THOUGH, DOESN'T IT?

>> HORADI, D. IS A SITUATION WHERE THE INDIVIDUAL TAKES AFFIRMATIVE ACTION TO NOT ACCEDE TO THE POLICE OFFICER.

>> AGREED.  
AGREED.

>> THE INDIVIDUAL ACTUALLY RUNS AWAY FROM WHEN THE POLICE OFFICER TELLS THEM TO STOP. WE HAVE MAYBE THE CONVERSE OF THAT SITUATION WHERE AN INDIVIDUAL JUST REMAINS IN A PARKED CAR WHERE THE INDIVIDUAL IS SEATED.

>> DON'T WE HAVE MORE THAN THAT?

SEEMS TO ME, LOOKING AT ALL THE TESTIMONY, I REVIEWED IT AGAIN THIS MORNING BEFORE COMING OVER, JUST SEEMS TO ME THAT WE HAVE A PERSON SITTING IN A CAR, AND THE QUESTION IS ASKED, WHEN WERE YOU FIRST AWARE OF THE PRESENCE?

THEY SAID WHEN SOMEBODY TOLD ME, I THEN PUT IT IN MY MOUTH.

THE OFFICERS WERE BY THE CAR  
ACCORDING TO THE EVIDENCE BY  
THE TIME THAT HAPPENED.  
WHETHER YOU ACCEPT IT OR NOT  
THEY SAID THEY SMELLED  
MARIJUANA BUT AT LEAST THEY SAW  
THE ACTUAL ACT OF PUTTING THE  
CONTRABAND IN THE MOUTH.  
SO WHY ARE WE EVEN TALKING  
ABOUT WITH WHAT'S HAPPENING  
BEFORE THAT POINT IN TIME  
BECAUSE IT DOESN'T APPEAR TO ME  
THERE IS ONE SENTENCE OF  
TESTIMONY THAT THIS INDIVIDUAL  
WAS AWARE OF ANYTHING AROUND  
HIM?

>> AND, JUSTICE LEWIS, THE  
REASON WHY THERE IS NOT ONE  
SENTENCE OF TESTIMONY ON THAT  
SPECIFIC FACTUAL QUESTION IS  
BECAUSE IT WAS NEVER AN ISSUE  
IN THE TRIAL COURT.

>> BUT IT HAS TO BE.  
TOTALITY OF THE CIRCUMSTANCES.  
THERE IS NO EVIDENCE THAT THIS  
INDIVIDUAL WAS EVEN AWARE THE  
POLICE WERE THERE UNTIL THEY  
WERE BESIDE THE CAR.

>> BUT IF THE STATE WANTS TO  
TAKE THE POSITION THIS IS NOT A  
SEIZURE, BECAUSE THIS  
PARTICULAR INDIVIDUAL NEVER WAS  
AWARE OF THOSE POLICE LIGHTS  
BEING ACTIVATED, IT WAS  
INCUMBENT ON THEM TO TAKE THAT  
POSITION AT THE HEARING ON THE  
MOTION TO SUPPRESS.  
THEY NEVER TOOK THAT POSITION  
AT THE HEARING.

>> WHAT WAS THEIR POSITION IN  
THE TRIAL COURT WITH REGARD TO  
WHY A SEIZURE DID NOT OCCUR?

>> THEIR POSITION IN THE TRIAL  
COURT WAS THAT POLICE OFFICERS  
HAD EVERY RIGHT TO ACTIVATE  
THEIR POLICE LIGHTS DRIVE UP TO  
A CAR AND GET OUT AND TO GO UP  
TO TALK TO PEOPLE.

AND THAT IS NOTHING MORE THAN A  
CONSENTUAL ENCOUNTER WHICH IS  
THE VERY ISSUE BEFORE THIS  
COURT TODAY.

>> SO IF WE, IF WE AGREE WITH  
YOU, THAT THE ACTIVATION OF THE

POLICE LIGHTS WOULD PUT A REASONABLE PERSON ON NOTICE THAT HE OR SHE IS NOT FREE TO TERMINATE THE ENCOUNTER, IN OTHER WORDS THE LIGHTS GO ON. WE ALL KNOW SITUATIONS WHERE, YOU'RE DRIVING AND, I DON'T THINK THE STATE WOULD SERIOUSLY CONTEND IF THE POLICE PUT THEIR LIGHTS ON, THAT THEY'RE FREE TO KEEP ON DRIVING.

SO, BUT IN THIS SITUATION, WE'VE GOT A PARKED CAR AND AS JUSTICE LEWIS SAID, WE'VE GOT OTHER FACTORS, WOULD THE APPROPRIATE REMEDY THEN BE, IF WE WERE TO DISAGREE WITH THE REASONING OF THE THIRD DISTRICT, TO SEND IT BACK TO THE TRIAL COURT TO FOR FURTHER PROCEEDINGS?

OR ARE YOU SAYING THAT SINCE IT'S THE STATE'S BURDEN TO PROVE THAT A SEIZURE DID NOT TAKE PLACE, THAT, IF THE EVIDENCE IS EQUIVOCAL, THEN THE DEFENDANT OUGHT TO PREVAIL?

>> THE SECOND, JUDGE.

>> I GUESS YOU WOULD LIKE THAT ALTERNATIVE BETTER BUT --

>> NOT ONLY DO I LIKE IT, I BELIEVE IT IS REQUIRED BASED ON THE RECORD IN THIS CASE AND BASED ON THE LAW.

>> BECAUSE IT WOULD WILL BE, I WAS THINKING, AGAIN, I THINK THE SITUATION YOU CAN SEE WHERE SOMEONE'S ASLEEP, AWARENESS HAS TO PLAY SOME PART IN THE TOTALITY OF THE CIRCUMSTANCES. BUT WHAT I WAS CONCERNED WITH, IF AWARENESS, NORMALLY WOULD BE SOMETHING WITHIN THE KNOWLEDGE OF THE DEFENDANT, AND THE DEFENDANT DOESN'T HAVE, BEAR A BURDEN IN THESE KINDS OF CASES. IT'S THE STATE.

IN THIS CASE IT SO HAPPENS THAT THE DEFENDANT DID TESTIFY BUT THE DEFENDANT ISN'T OBLIGATED TO TESTIFY.

>> CORRECT.

>> SO HOW WOULD WE FRAME A RULE OF LAW WHERE AWARENESS IS

CERTAINLY A FACTOR BUT IT'S,  
IT'S STILL THE STATE'S BURDEN?  
HOW WOULD YOU FRAME THAT RULE  
OF LAW?

>> THE RULE OF LAW WOULD BE IF  
THE STATE IS TAKING THE  
POSITION AT A HEARING ON A  
MOTION TO SUPPRESS THAT A  
SEIZURE DID NOT TAKE PLACE THE  
PARTICULAR INDIVIDUAL WAS NOT  
AWARE OF THE POLICE ACTIVITY,  
THE STATE WOULD HAVE THE BURDEN  
TO ESTABLISH THAT.

>> WELL, ISN'T THERE PRETTY  
STRONG INFERENCE HERE BASED ON  
THE FACTS THAT WERE PRESENTED,  
THAT THE, G.M., WAS NOT AWARE  
OF THE POLICE BEING THERE  
BECAUSE HE CONTINUED TO ROLL  
THE MARIJUANA CIGARETTE?  
HE HAS GOT HIS HEAD DOWN.  
HE IS CONTINUING TO ROLL THE  
CIGARETTE WHILE THE OFFICER  
COMES UP TO THE WINDOW AND  
LOOKS IN.

I MEAN, ORDINARILY IF YOU'VE  
SEEN FLASHING LIGHTS AND YOU  
HAVE CONTRABAND, AN EFFORT WILL  
BE MADE TO CONCEAL IT.

SO IT SEEMS TO ME JUST KIND OF  
AN OVERWHELMINGLY STRONG  
INFERENCE FROM HIS CONTINUED  
DISPLAY, OPEN DISPLAY OF THE  
DRUGS THAT HE WAS UNAWARE OF  
THE APPROACHING POLICE OFFICERS  
UNTIL THEY WERE THERE AND SAW  
IT?

>> JUSTICE CANADY AS I TRIED TO  
DEMONSTRATE IN THE REPLY BRIEF  
THERE IS DISTINCTION WHETHER  
G.M. WAS AWARE OF THE POLICE  
PRESENCE AT THE TIME THEY  
PULLED UP BEHIND THE CAR, AND  
WHETHER G.M. WAS AWARE OF THE  
FACT THAT THIS PARTICULAR  
POLICE OFFICER WAS COMING UP  
NEXT TO THE CAR IN WHICH HE WAS  
SEATED.

NOW, I THINK IT'S NOT  
UNREASONABLE TO SAY THAT  
SOMEONE SEATED IN A CAR, EVEN  
THOUGH THEY KNEW THEY WERE NOT  
FREE TO LEAVE, AT THAT POINT HE  
DIDN'T KNOW, HE KNEW THE POLICE

OFFICERS HAD COME UP BEHIND HIM AND ACTIVATED THE POLICE LIGHTS AND HE COULDN'T GO ANYWHERE. HE DIDN'T KNOW WHETHER THAT PARTICULAR POLICE OFFICER WAS GOING TO WALK UP TO THE CAR WHERE HE WAS SEATED.

>> A POLICE CAR WITH FLASHING LIGHTS BEHIND HIM AND HE IS GOING TO SIT THERE CONTINUING THE PROCESS OF ROLLING HIS MARIJUANA CIGARETTE?

IS THAT THE KIND OF, DOES THAT COMPORT WITH ORDINARY HUMAN BEHAVIOR IN SUCH CIRCUMSTANCES? WHAT A JUDGE WOULD INFER?

>> IN ALL CANDOR, JUSTICE CANADY, HE SEES THE POLICE LIGHTS. HE HAS GOT MARIJUANA. HE KNOWS HE HAS TO GET RID OF IT SOMEHOW.

THAT'S WHAT HE'S DOING.

>> ROLLING A CIGARETTE?

>> HE KNOWS HE CAN'T, BUT THE POINT IS, THE POINT IS HE KNOWS HE CAN'T LEAVE.

AND THAT'S THE ISSUE BEFORE THE COURT TODAY.

WOULD A REASONABLE PERSON FEEL THEY WERE FREE TO LEAVE.

>> MAYBE THE MOST REASONABLE INFERENCE HE KNEW HE WASN'T LEAVING WHEN HE LOCKED EYES WITH THE POLICE OFFICER, WHO WAS PIERING IN AT HIM HOLD THE MARIJUANA?

>> HE CERTAINLY KNEW IT AT THAT POINT BUT HE ALSO KNEW IT AND ANY REASONABLE PERSON IN THAT SITUATION WOULD KNOW IT WHEN YOU'RE SITTING IN A PARKED POLICE CAR, I'M SORRY, SITTING IN A PARKED CAR AND THE POLICE PULL UP WITHIN THREE FEET DIRECTLY BEHIND YOU AND ACTIVATE THEIR POLICE LIGHTS, ANY REASONABLE PERSON IN THAT SITUATION WOULD KNOW THEY ARE NOT FREE TO END THE ENCOUNTER AND LEAVE.

>> LET ME ASK YOU THIS.

WAS THERE SOME ISSUE HERE WHETHER OR NOT THE WINDOWS WERE CLOSED AND OR OPEN AT THE TIME

THAT THE POLICE OFFICER APPROACHED? BECAUSE TO ME THERE IS A REAL ISSUE HERE AS TO WHETHER OR NOT THERE WAS THE SMELL OF MARIJUANA, WHICH WOULD HAVE GIVEN THE POLICE OF COURSE AT THAT POINT, SOME REASON TO FURTHER INVESTIGATE WHAT WAS GOING ON.

SO, IS THERE A QUESTION HERE, AND DID THE TRIAL COURT MAKE ANY FINDING ABOUT WHETHER OR NOT THE WINDOWS WERE ROLLED UP IN THE CAR THAT G.M. WAS SITTING IN?

>> THERE WAS AN ISSUE AS TO THAT, THAT WAS A MAJOR ISSUE WITH THE CASE AS TO WHETHER THE WINDOWS WERE ROLLED UP OR ROLLED DOWN.

>> WHAT DID THE TRIAL JUDGE SAY ABOUT THAT ISSUE?

>> THE TRIAL JUDGE DID NOT MAKE A SPECIFIC FACTUAL FINDING ON THAT ISSUE, BUT I BELIEVE THAT THE TRIAL JUDGE IS FINDING THAT THE OFFICERS SMELLED MARIJUANA BEFORE HE GOT TO THE POLICE CAR IS AN INHERENT FACTUAL FINDING THAT THE WINDOWS WERE ROLLED DOWN.

THAT CREDIBILITY DETERMINATION WAS MADE AGAINST THE JUVENILE IN THIS CASE.

BUT I DON'T BELIEVE THAT'S RELEVANT TO THE PARTICULAR ISSUE BEFORE THE COURT TODAY AS TO WHETHER A SEIZURE HAD OCCURRED.

BUT THAT WAS DEFINITELY AN ISSUE AT THE HEARING.

>> LET ME ASK YOU THIS.

THIS WAS AND YOU UNMARKED POLICE CAR, WASN'T IT?

>> YES.

>> IT WAS AN UNDERCOVER UNIT THAT PULLED IN TO PARK.

>> CORRECT.

>> UNMARKED PATROL UNITS, THAT MEANS LIGHTS WERE NOT ON TOP OF THE POLICE CAR.

AT BEST HE HAD A LIGHT ON THE DASH.

>> AGAIN, JUSTICE LABARGA,

BECAUSE THIS WAS NOT ISSUE BELOW, IT IS NOT FACTUALLY DEVELOPED AS -- SOMETIMES POLICE OFFICERS TAKE THE LIGHTS AND REACH UP AND PUT THEM ON TOP OF THE CAR.

SOMETIMES THEY JUST PUT THEM ON THE DASHBOARD.

AGAIN, BECAUSE THE STATE NEVER MADE THIS ARGUMENT IN THE LOWER COURT THAT G.M. WAS UNAWARE OF THE LIGHTS THAT ISSUE WAS NOT FACTUALLY DEVELOPED.

>> WHAT I'M INTERESTED IN, AND I GUESS I'M GOING TO GIVE YOU A DIFFERENT SCENARIO OFF THE ONE THAT THE STATE CAN RESPOND TO, ALL THE CASES THAT I, WELL, A LOT OF THE CASES THAT I REVIEWED WE LOOK AT, WHETHER THE POLICE CONDUCT OBJECTIVE, WOULD OBJECTIVELY COMMUNICATE TO A PERSON THAT THEY'RE BEING SEIZED.

AND SO IT IS NOT REALLY WITH WHAT THE POLICE MOTIVATION IS IN DOING THE SPECIFIC ACT BUT WHAT THE OBJECTIVE EVIDENCE OR THE OBJECTIVE FACTS ARE.

SO THAT, AGAIN, HERE, WHETHER THEY PUT THE LIGHTS ON FOR THE SAFETY OR, THAT THEY WERE STOPPING, MOST PEOPLE WOULD THINK THE LIGHTS GO ON, IF THEY SAW IT, THAT IT'S A SEIZURE.

BUT WHAT ABOUT THE SITUATION WHERE IT'S CLEAR THAT THERE'S THAT WHAT THE POLICE ARE DOING, THEY ARE ABOUT TO HAVE AN INVESTIGATORY STOP, THAT IS THEY DRAW THEIR GUNS AND COME UP TO THE CAR?

BUT THE EVIDENCE AGAIN, AND SO THAT WOULD BE A SEIZURE.

I THINK THE STATE WOULD AGREE WITH THAT BUT I JUST WANT TO GO BACK TO WHERE THE FACTS ARE THAT AS THEY'RE APPROACHING THE CAR, BEFORE THEY GET TO THE CAR, THEY SMELL THE MARIJUANA, OR ON THE OTHER HAND, IT'S ESTABLISHED THAT THE, THAT THE PERSON IS ASLEEP.

DOES A SEIZURE -- BECAUSE

EVERYONE KNOWS THEN THEY'RE COMING WITH THEIR GUNS DRAWN. HOW DO YOU ANALYZE THAT, THOSE FACTS UNDER THE FOURTH AMENDMENT AS TO WHETHER THE OBJECTIVE PURPOSE FOR THE PRESS WAS TO COME TO THE CAR, THERE WAS NO REASONABLE SUSPICION, SO THE STATE CONCEDED IT, BUT THERE IS NO EFFECT ON THE PERSON?

SO, BECAUSE EITHER THEY WERE ASLEEP, OR BECAUSE WHATEVER OCCURRED, OCCURRED BEFORE THEY APPROACHED THE VEHICLE?

HOW DO WE ANALYZE THAT UNDER THE FOURTH AMENDMENT?

>> IF THE STATE CAN ESTABLISH A SITUATION WHERE THE, THAT THE PERSON INSIDE THE CAR DID NOT SEE THE POLICE OFFICERS APPROACHING WITH GUNS DRAWN, BEFORE THEY SMELLED THE MARIJUANA AND THEREFORE HAD PROBABLE CAUSE, THEN, THERE WOULD BE NO SEIZURE.

BUT THAT'S NOT THIS CASE.

AND TO GET BACK TO THE PARTICULAR FACTS OF THIS CASE, EVEN THOUGH IT WASN'T AN ISSUE IN THE TRIAL COURT, IT'S OUR POSITION THAT THE RECORD IN THIS COURT, I'M SORRY, THE RECORD IN THIS CASE FULLY SUPPORTS A CONCLUSION THAT G.M. WAS AWARE OF THE POLICE LIGHTS. THIS WAS 5:00 --

>> WHAT EVIDENCE?

>> THIS HAPPENED AT 5:00 IN THE EVENING, ON A RAINY DAY. THOSE FLASHING POLICE LIGHTS WERE VERY BRIGHT.

THEY SWIRL AROUND, AND, IF, WHEN A CAR PULLS UP TO WITHIN THREE FEET BEHIND YOU, AND --

>> DOES THAT, I MEAN, IS THERE SOME EVIDENCE IN THE RECORD THAT SUPPORTS WHAT YOU'RE SAYING?

OR IS THIS JUST YOUR GENERAL KNOWLEDGE OF POLICE LIGHTS?

>> I THINK IT IS COMMON SENSE, JUDGE, JUSTICE.

AND AGAIN, I'VE SAID THIS A

NUMBER OF TIMES, THE RECORD IS NOT DEVELOPED ON THIS ISSUE, BUT I THINK AS A MATTER OF COMMON SENSE WE'VE ALL SEEN POLICE LIGHTS. WE KNOW HOW BRIGHT THEY ARE. THEY SWIRL AROUND. AND, IT IS ONE THING IF THIS HAPPENS AT NOON ON A SUNNY DAY. BUT THIS WAS RAINY --

>> THAT WAS 5:00 IN AUGUST, YOU'RE NOT SUGGESTING THAT IT WAS DARK?

>> BUT IT WAS RAINING.

>> IT DIDN'T SAY RAINING. THE BEST YOU CAN DRAW FROM THIS THERE IS OFF AND ON DRIZZLE. THAT IS A FAIR READING.

>> RIGHT.

>> THIS IS NOT ONE OF THOSE SOUTH FLORIDA BLACKOUT THUNDERSTORMS.

>> RIGHT.

>> IT IS A DRIZZLE, FAIR READING OF THE TRANSCRIPT.

>> ON AND OFF DRIZZLING OF A CLOUDY DAY.

>> RIGHT.

>> AGAIN I DON'T THINK THE CASE TURNS ON THAT.

>> WHAT DO YOU DO WITH THE 278, THE DIRECT TESTIMONY IN THIS RECORD, I WAS LOOKING DOWN AND I WAS NOT AWARE THEY WERE THERE UNTIL I LOOK UP AND I'M STILL ROLLING, ROLLING MY DOPE AND I PUT IT IN MY MOUTH AS SOON AS I SEE THEM TO GET RID OF IT?

>> AGAIN, JUSTICE LEWIS, THE TESTIMONY IS NOT THAT I WAS NOT AWARE OF THE POLICE OFFICER --

>> NO, NO, IT WAS, I WAS LOOKING DOWN.

>> YES, HE WAS LOOKING DOWN BUT HE IS TALKING AT THAT POINT, THE TESTIMONY AT THAT POINT IS WITH REFERENCE TO THE PARTICULAR OFFICER.

>> RIGHT.

>> THAT IS APPROACHING THE CAR ON FOOT AND HIS AWARENESS OF THAT POLICE OFFICER. HE IS NEVER ASKED, WERE YOU AWARE OF THE POLICE LIGHTS?

WERE YOU AWARE --

>> I AGREE WITH THAT BUT,  
AGAIN, I THINK THAT WHEN YOU'RE  
LOOKING AT, YOU AGREE THAT THE  
TEST OF TOTALITY OF THE  
CIRCUMSTANCES IS WHICH WE'RE  
REVIEWING THESE FACTS.

>> ABSOLUTELY.

IT IS A TOTALITY OF THE  
CIRCUMSTANCES TEST.

>> YES.

>> UNDER THE TOTALITY OF THE  
CIRCUMSTANCES WHEN A POLICE  
OFFICER PULLS TO WITHIN THREE  
FEET BEHIND YOUR CAR AND  
ACTIVATES THE POLICE LIGHTS --

>> WELL THE RECORD ACTUALLY  
SHOWS IT WAS ACTIVATED ACROSS  
THE STREET BECAUSE THEY WENT  
ACROSS THE STREET, ACCORDING TO  
THE TESTIMONY, TO ENTER THE  
PARK.

>> AS THEY DROVE FROM ACROSS  
THE STREET --

>> WITH THE LIGHTS ON.

>> TO BEHIND THE CAR THEY  
ACTIVATED POLICE LIGHTS.

>> WOULD YOU, IF THE TRIAL  
COURT HAD MADE A FINDING THAT  
G.M. WAS NOT AWARE, OF THE  
LIGHTS, WOULD THIS BE A  
DIFFERENT CASE?

>> ABSOLUTELY IT WOULD BE A  
DIFFERENT CASE.

IF THIS ISSUE HAD BEEN  
LITIGATED IN THE TRIAL COURT,  
AND EVIDENCE HAD BEEN  
PRESENTED, NOT THIS EVIDENCE,  
BECAUSE THIS EVIDENCE THAT WE  
HAVE DOES NOT ESTABLISH HE WAS  
UNAWARE OF THE POLICE LIGHTS.

BUT IF THERE HAD BEEN  
QUESTIONING, AGAIN, G.M. DID  
TESTIFY, IF THE STATE HAD ASKED  
HIM ON CROSS-EXAMINATION, DID  
YOU KNOW THAT THE POLICE  
OFFICERS WERE BEHIND YOU?  
DID YOU SEE THE LIGHTS WHEN  
THEY CAME UP BEHIND YOUR CAR,  
WE HAVE A FAR DIFFERENT  
SITUATION.

AND HE HAD TESTIFIED, NO, I  
DIDN'T, WE HAVE A DIFFERENT  
SITUATION BUT THAT IS NOT THE

CASE BEFORE THE COURT TODAY.  
AND ADDITIONALLY I THINK IT IS  
IMPORTANT TO NOTE WE'RE HERE ON  
A CERTIFIED CONFLICT.

THE THIRD DISTRICT COURT OF  
APPEAL, JUDGE ROTHENBERG IN HER  
MAJORITY DECISION HAD  
ALTERNATIVE HOLDINGS.

FIRST SHE SAID IT WAS NOT A  
SEIZURE BECAUSE G.M. WAS NOT  
AWARE.

BUT THEN SHE WENT FURTHER, EVEN  
IF WE ASSUME THAT G.M. WAS  
AWARE, THAT'S STILL NOT A  
SEIZURE.

AND IT IS VERY IMPORTANT, AND  
THE MAJOR REASON, MAJOR ISSUE  
BEFORE THIS COURT TODAY TO  
RESOLVE THE CONFLICT BETWEEN  
THAT DECISION AND THE FOUR  
OTHER DISTRICT COURTS OF APPEAL  
IN FLORIDA THAT HAVE HELD TO  
THE CONTRARY.

>> TELL ME HOW IN THE WORLD WE  
CAN, HADARI SEEMS TO SAY THAT  
THE DEFENDANT HAS TO SUBMIT,  
EVEN IF THE, IF WE ASSUME THAT  
THIS WAS A SEIZURE, THAT THE  
DEFENDANT HAS TO SUBMIT TO THE  
AUTHORITY OF THE OFFICERS,  
WHERE IN THIS RECORD IS THERE  
SOME EVIDENCE THAT JM SUBMITTED  
TO THE AUTHORITY OF THE  
OFFICERS?

>> JUSTICE QUINCE, HODARI IS A  
SITUATION WHERE YOU HAVE  
AFFIRMATIVE EVIDENCE WHERE THE  
PERSON DOES NOT SUBMIT.

WHERE THE PERSON RUNS AWAY.  
THE CASE LAW IS CLEAR AND  
MENDENHALL SPECIFICALLY  
ESTABLISHES JUST BECAUSE YOU  
DON'T TRY TO AVOID A POLICE  
OFFICER WHEN A POLICE OFFICER  
IS SEIZING YOU, THAT DOESN'T  
MEAN YOU HAVEN'T BEEN SEIZED.

>> BUT DOES THAT MEAN, DOES  
THAT MEAN IF YOU DON'T TRY TO  
RUN AWAY, THAT YOU HAVE  
SUBMITTED?

>> YES.

>> IF WE ASSUME THAT JM, NEVER  
KNEW THAT THE OFFICER, THAT  
THIS WAS THE POLICE BEHIND HIM,

HOW IN THE WORLD DO WE EVER GET TO HE SUBMITTED?

I MEAN I CAN GET TO THE POINT WHERE THE OFFICER ACTUALLY, PROBABLY SEEMS THE OTHER PEOPLE WHO WERE AWARE, THAT, THE OFFICERS WERE THERE, BUT WOULD JM, HOW DO WE GET TO THE POINT, IF HE IS UNAWARE THAT THE OFFICERS ARE THERE, THAT HE SUBMITTED?

>> IF YOU DETERMINE THAT THIS RECORD ESTABLISHES THAT G.M. WAS UNAWARE OF THE POLICE LIGHTS, THEN, THERE HAS BEEN NO SEIZURE.

BUT, I STRONGLY MAINTAIN THAT THE RECORD DOES SUPPORT THAT, AND, THAT YOU DON'T HAVE TO, G.M., AND THAT'S WHAT THE TRIAL JUDGE RULED.

AGAIN THE TRIAL JUDGE DIDN'T MAKE ANY KIND OF FINDING ON THIS.

THE TRIAL JUDGE RULED HE HADN'T BEEN SEIZED BECAUSE OFFICERS DIDN'T COME UP WITH GUNS. DIDN'T TELL HIM NOT TO MOVE AND BECAUSE HE DIDN'T TRY TO GET OUT OF A PARKED CAR.

AND THE CASE LAW IS ABSOLUTELY CLEAR FROM THE UNITED STATES SUPREME COURT IN THE MENDENHALL CASE THAT, AND ALL THESE OTHER CASES, THERE IS NO EVIDENCE IN ANY OF THESE OTHER CASES FROM THE FLORIDA DISTRICTS COURTS OF APPEAL THAT THE INDIVIDUAL IN THE PARKED CAR EVER MADE ANY KIND OF AN ATTEMPT TO GET OUT OF THE PARKED CAR.

HODARI IS A SITUATION WHERE THE POLICE OFFICER COMES UP AND TELLS YOU TO STOP AND YOU RUN.

>> YOU'RE SAYING THERE IS NO FINDING WITH REGARD TO, LET ME READ TO YOU FROM THE THIRD DISTRICT OPINION.

MAY I?

IT IS UNDISPUTED BASED UPON THE TESTIMONY OF THE OFFICERS AND G.M. HIMSELF THAT G.M. DID NOT SEE THE OFFICERS PULL UP BEHIND THE LEXUS WITH THEIR LIGHTS

ACTIVATED AND DID NOT SEE THE OFFICERS UNTIL HE WAS ALERTED BY SOMEONE TO THEIR PRESENCE AND LOOKED UP AND SAW OFFICER SMITH WHO WAS ALREADY OUTSIDE THE LEXUS, AND THEN THEY GIVE, THEY QUOTE THE TESTIMONY.

>> THAT, THAT'S A FACTUAL FINDING MADE BY THE THIRD DISTRICT COURT OF APPEAL.

>> WITH NO BASIS.

>> NOT IN A POSITION TO MAKE FACTUAL FINDINGS.

THAT IS FINDING THAT SHOULD HAVE BEEN MADE BY THE TRIAL COURT.

>> YOU'RE WELL INTO YOUR REBUTTAL IF YOU WANT TO SAVE A MINUTE FOR REBUTTAL.

>> THANK YOU, I WILL.

>> MISS PEACOCK.

>> MAY IT PLEASE THE COURT.

ANSLEY PEACOCK ON BEHALF OF THE RESPONDENT THE STATE OF FLORIDA.

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT G.M. WAS NOT SEIZED FOR PURPOSES OF THE FOURTH AMENDMENT DUE TO THE FACT HE DID NOT SEE THE EMERGENCY LIGHTS OR IN THE ALTERNATIVE EVEN IF HE DID SEE THE EMERGENCY LIGHTS, THAT A REVIEW OF THE TOTALITY OF THE CIRCUMSTANCES WOULD DEMONSTRATE THAT A REASONABLE PERSON IN G.M.'S POSITION WOULD NOT.

>> LET ME --

>> GO AHEAD.

>> LET ME ASK YOU A QUESTION.

YOUNG PEOPLE IN A PARK, OLD PEOPLE, I'M SITTING IN A PARK. AND A VEHICLE, EMERGENCY LIGHTS COMES ACROSS TRAFFIC, COMES OVER, BEHIND MY VEHICLE WITHIN THREE FEET.

I HOPE I'M A REASONABLE PERSON.

WHAT AM I TO THINK?

THAT I CAN JUST BACK UP AND GET OUT OF THERE?

>> AND COMES ACROSS TRAFFIC.

>> COMES ACROSS THE STREET.

DOESN'T MENTION TRAFFIC.

>> NO.  
>> MENTIONS COMING ACROSS THE STREET.  
THEY WERE PARKED ACROSS THE STREET.  
>> RIGHT.  
>> CAME ACROSS THE STREET, INDICATING THE LIGHTS WERE ON.  
>> CORRECT.  
IT WOULD STILL REQUIRE REVIEW OF THE TOTALITY OF THE CIRCUMSTANCES AND THE FACT IS, THERE WERE TWO VEHICLE, THE BLACK LEXUS AND THE VEHICLE THAT WAS NOT, THERE WAS NO MENTION OF WHAT KIND OF VEHICLE IT WAS.

ALSO THAT THERE WERE SIX TO EIGHT INDIVIDUALS STANDING OUTSIDE THOSE TWO VEHICLES.  
>> WHAT DOES THAT HAVE TO DO WITH THE QUESTION?  
I'M REALLY TRYING TO UNDERSTAND, IF THIS COURT IS TO TELL THE PEOPLE OF FLORIDA, TO TELL THE PEOPLE OF FLORIDA, WHEN A POLICE VEHICLE CROSSES THE ROADWAY, COMES INTO WHERE YOU ARE WITH THEIR LIGHTS FLASHING AND PULLS WITHIN THREE FEET OF YOUR VEHICLE, YOU DON'T HAVE TO STICK AROUND?  
IS THAT WHAT WE'RE SUPPOSED TO TELL THE PEOPLE OF FLORIDA?

>> NO. THAT IS NOT WHAT YOU'RE SUPPOSED TO TELL THE PEOPLE OF FLORIDA.  
HOWEVER, BECAUSE, MENDENHALL AND THEN ALSO RESTATED, AND MICHIGAN V. CHESTERNUT IT IS ALWAYS REVIEW OF TOTALITY OF THE CIRCUMSTANCES AND YOU'RE SUPPOSED TO LOOK AT IT ON A CASE-BY-CASE BASIS.

>> WE WILL IN THIS CASE.  
>> RIGHT.  
>> WE'RE LOOKING UP TO THAT POINT BECAUSE WHAT HAPPENS AFTER THAT WITH REGARD TO THE VEHICLE AND THE LIGHTS IS TOTALLY IRRELEVANT.  
>> CORRECT.  
>> SO WE'RE LOOKING INTO THAT POINT.

HOW ABOUT THE JACKSONVILLE  
AUTHORITY CASE?

HOW ABOUT THE OTHER CASES OUT  
OF THE 11th CIRCUIT WHERE  
PULLING UP BEHIND A VEHICLE IN  
A CUL-DE-SAC WITH THE LIGHTS ON  
CONSTITUTES, I MEAN --

>> IF YOU LOOK AT THE 11th  
CIRCUIT CASE UNITED STATES v.  
PEREZ, THAT CASE IS FROM 2006,  
THAT WAS IN A MARINA IN --  
>> THAT WAS IN MADISON HAMMOCK.  
THEY FLASHED THEIR LIGHTS  
ONLY.

>> EXACTLY.

>> DOESN'T SAY THEY TURNED ON  
THEIR LIGHTS AND DROVE UP  
WITHIN THREE FEET OF THE  
VEHICLE, DID IT?

>> NO. IT DID SAY THEY DROVE UP  
BEHIND THE VEHICLE BUT THAT CASE --

>> THEY COULDN'T DRIVE UP BEHIND IT  
BECAUSE THEY WERE DRAGGING A  
BOAT.

SO THAT IS IMPOSSIBLE.

>> IT WAS BEHIND THE VEHICLE  
AND THE TRAILER.

IN THAT CASE AND IN THIS CASE,  
IN THIS CASE THE TRIAL COURT  
MADE A SPECIFIC FINDING THERE  
WAS NO TESTIMONY THAT, EXCUSE  
ME, G.M.'S VEHICLE COULD NOT  
MOVE FORWARD.

>> HE HAS GOT THREE FEET.  
THE TESTIMONY IS WITHIN THREE  
FEET.

>> THE TESTIMONY IS WITHIN  
THREE FEET.

>> CAN YOU MOVE ANY VEHICLE  
WITHIN A THREE-FOOT RADIUS?

>> THE TRIAL COURT MADE THE  
FINDING THAT HE COULD MOVE  
FORWARD.

>> BUT YOU SEE THE PROBLEM WITH  
THAT, AND, AGAIN YOU MIGHT WIN  
ON THE FACTS OF THIS CASE, IF  
THE FACTS OF THIS CASE ARE THAT  
G.M. WASN'T AWARE, AND YOU HAVE  
ESTABLISHED THAT.

BUT AS A GENERAL PROPOSITION,  
WE, POLICE, IF THIS WAS A  
MOVING VEHICLE, POLICE LIGHTS  
GO ON, ANY REASONABLE PERSON  
WOULD UNDERSTAND THEY NEED TO

STOP. IS THAT CORRECT?

>> YES.

>> OKAY.

SO WE START WITH THAT ONE, THAT POLICE LIGHTS, I MEAN, GEES, WHATEVER AGE I AM AND BEEN ON THE COURT.

YOU SEE THOSE POLICE LIGHTS GO ON AND IT PUTS FEAR IN YOU, UH-OH, WHAT DID I DO WRONG? IF IT'S A TRAFFIC STOP.

NOW WE TALK ABOUT SOMEONE IS PARKED AND POLICE LIGHTS GO ON, I, AGAIN, IT SEEMS LIKE IT WOULD BE A LAWLESS THING TO STATE THAT A REASONABLE PERSON MIGHT FEEL FREE TO LEAVE IF THEY HAVE ROOM TO GET AROUND THE POLICE VEHICLE.

WE DON'T, THAT WOULDN'T BE SOMETHING, A MESSAGE, GOING BACK TO A JUSTICE LEWIS SAID WE WANT TO COMMUNICATE.

DON'T WE WANT TO START WITH THE PROPOSITION THAT GENERALLY, THE FLASHING OF THE POLICE LIGHTS WOULD COMMUNICATE TO A REASONABLE PERSON THAT THAT PERSON IS NOT FREE TO TERMINATE THAT ENCOUNTER, IS NOT FREE TO LEAVE?

THAT THAT'S THE RULE OF LAW? THEN YOU GO BACK, WELL, ARE THERE SOME CIRCUMSTANCES HERE THAT SHOW IT'S DIFFERENT THAN THE GENERAL RULE OF LAW, WITH THE BURDEN BEING ON THE STATE TO SHOW WHY IT'S DIFFERENT. THAT THEY WERE FLASHING IT BECAUSE THEY GOT REALLY, THEY WERE WORRIED THAT, YOU KNOW, THE VEHICLE NEEDED AID.

IT WAS PARKED AND THEY WERE, DOING IT FOR THE PURPOSE OF OBJECTIVELY OF, MAKING SURE THAT OTHER VEHICLES COULD SEE THEM AND SO THEY WOULDN'T, YOU KNOW, CREATE A TRAFFIC HAZARD. THE GENERAL PROPOSITION, I THINK TO START THE OTHER WAY WHICH IS WHAT THE THIRD DISTRICT HAS DONE, AND WHAT YOU'RE ADVOCATING IT WOULD SEEM TO SHIFT THE BURDEN TO THE

DEFENDANT, TO SHOW THINGS LIKE, WELL, I WAS AWARE, AS OPPOSED TO THAT THE STATE SHOWING THAT THERE WAS SOME REASON THAT THE GENERAL RULE, THAT A FLASHING LIGHTS WOULD COMMUNICATE TO A REASONABLE PERSON THAT THEY HAVE TO STOP, IS NOT APPLICABLE.

WHY ISN'T THAT A BETTER RULE OF LAW FOR BOTH POLICE SAFETY, FOR, YOU KNOW, THE RULE, THE LAWS OF FLORIDA AND FOR THE FOURTH AMENDMENT?

>> AS THE U.S. SUPREME COURT HAS FOUND IN MICHIGAN VERSUS CHESTERNUT THEY STATED THIS TEST OF THE TOTALITY OF CIRCUMSTANCES IS NECESSARILY IMPRECISE BECAUSE IT IS DESIGNED TO ASSESS CONDUCT AS A WHOLE, RATHER THAN --

>> LET ME GIVE YOU, IT IS NOT FLASHING LIGHTS.

THE POLICE ARE COMING WITH THEIR GUNS DRAWN.

DO WE, NOW THERE MAY BE OTHER CIRCUMSTANCES, BUT JUST STARTING WITH THAT, WOULD YOU AGREE THAT GENERALLY, THAT WOULD COMMUNICATE TO A REASONABLE PERSON THEY'RE NOT FREE TO LEAVE?

>> I WOULD AGREE THAT GUNS DRAWN ARE, BUT GUNS DRAWN ARE A VERY DIFFERENT CIRCUMSTANCE THAN FLASHING LIGHTS.

>> BUT WOULDN'T THE STATE THEN, HAVE TO, STARTING WITH THAT PROPOSITION, IF THEY'RE GOING TO TRY TO SHOW WHY A SEIZURE HADN'T OCCURRED, WOULDN'T IT BE THE STATE'S BURDEN, I SEE THIS IS A LOT ABOUT WHOSE BURDEN WAS AND WHAT WAS BEING ARGUED BELOW, WOULDN'T IT BE THE STATE'S BURDEN TO SAY, WELL, WE DID THIS BUT THE GUY WAS, DRUNK AND, YOU KNOW, ASLEEP IN THE BACK OF HIS VEHICLE, SO NO SEIZURE OCCURRED?

WOULDN'T THAT BE THE STATE'S OBLIGATION TO SHOW SOME REASON, THAT UNDER THOSE

CIRCUMSTANCES, THAT, SOMEBODY WOULD NOT BE, WOULD HAVE BEEN FREE TO LEAVE OR, WASN'T AWARE THE SEIZURE OCCURRED?

>> THE STATE IN THE TESTIMONY AT THE MOTION TO SUPPRESS HEARING, THE STATE DID ESTABLISH THAT THE POLICE OFFICERS WERE IN, UNDERCOVER VEHICLE.

THEY WERE WEARING, THEY WERE NOT WEARING UNIFORMS. THAT THE ONLY TYPE OF SYMBOLISM THAT WAS ON THEM TO SHOW THEY WERE POLICE OFFICERS WERE WEARING THEIR POLICE BADGES ON LANYARDS.

>> THEIR GUNS WERE VISIBLE?

>> THE TESTIMONY DID NOT STATE WHETHER THEY WERE VISIBLE OR NOT VISIBLE.

THEY DID STATE THEY WERE WEARING THEM.

I AM ASSUMING THEY WOULD BE VISIBLE BUT THEY BOTH STATED THAT THE SIDEARMS THEY DID NOT HAVE THEIR HANDS ANYWHERE NEAR THEIR SIDE ARMS.

>> SO WOULD A REASONABLE PERSON, BECAUSE THEY WERE IN PLAIN CLOTHING, THINK THESE WERE NOT POLICEMEN THEN?

>> THAT WAS THE TESTIMONY AT THE MOTION TO SUPPRESS HEARING WAS THEY TURNED ON THE LIGHTS TO LET THE SIX TO EIGHT INDIVIDUALS AND THE TWO VEHICLES KNOW THEY WERE POLICE OFFICERS, BECAUSE OTHERWISE THERE WOULD HAVE BEEN NO WAY FOR THEM TO KNOW THAT THESE WERE POLICE OFFICERS.

>> LOGICALLY, BECAUSE THESE KIDS, NONE OF THEM EVEN RAN, THEY ALL WERE AWARE THEY HAD TO STAY WHERE THEY WERE.

THERE WAS TESTIMONY EVEN FROM ONE OF THE POLICE OFFICERS THAT THEY WERE NOT FREE TO LEAVE.

SO I'M HAVING TROUBLE, AFTER THE FACT, WHEN IT IS PRETTY CLEAR THAT THE POLICE, WANTED TO CONTAIN THIS SITUATION, AND QUESTION THESE YOUNG PEOPLE,

WITHOUT ANY REASONABLE  
SUSPICION, THAT ANY CRIMINAL  
ACTIVITY OCCURRED, THAT A  
SEIZURE DID OCCUR, UNLESS THE  
STATE, HAS ESTABLISHED, BELOW,  
THAT AS TO G.M., HE WAS NOT  
AWARE.

I THINK THAT REALLY GOES BACK  
TO THE SPECIFIC, THE FACTS THAT  
WE SPENT A LOT OF TIME ON, YOU  
KNOW WITH, PETITIONER ON.  
BUT AS A GENERAL PROPOSITION,  
IT SEEMS THAT THE TOTALITY OF  
THE CIRCUMSTANCE, AT LEAST  
SHOWED THAT OTHER THAN G.M., NO  
ONE THOUGHT THEY WERE FREE TO  
LEAVE, INCLUDING THE POLICE  
OFFICER MAKING, YOU KNOW, THE  
APPROACHING THE VEHICLES?

>> WELL, THE SUBJECTIVE  
INTENTIONS OF A POLICE OFFICER  
ARE IRRELEVANT UNLESS IT IS  
CONVEYED TO THE PEOPLE THAT ARE  
BEING STOPPED.

THE POLICE OFFICERS STATED, THE  
TESTIMONY DOES NOT STATE  
WHETHER OR NOT ANY TYPE OF  
WORDS WERE SPOKEN TO THE  
INDIVIDUALS EXCEPT, OFFICER  
CUENCA STATED HE DID NOT STATE  
ANYTHING AND OFFICER SMITH  
MAYBE IDENTIFIED THEMSELVES AS  
POLICE.

THERE WERE --

>> THE OTHER PEOPLE I ASSUME  
WERE NOT CHARGED WITH ANYTHING  
IN THIS CASE.

WERE THOSE PEOPLE SEIZED?

>> NO.

THOSE PEOPLE WERE NOT SEIZED  
BASED ON REVIEW OF THE TOTALITY  
OF THE CIRCUMSTANCE.

>> YOU MEAN TO TELL ME, THESE  
PEOPLE WHO WERE STANDING IN THE  
PARK, TALKING TO SOMEONE IN A  
CAR, AND THE POLICE COME UP  
BEHIND THEM, WITH ACTIVATED  
LIGHTS, WALKING UP, SHOWING  
THEIR BADGES, AND THESE PEOPLE  
WERE NOT SEIZED?

I MEAN, THIS SEEMS TO ME THAT  
THE STATE REALLY NEEDS TO TAKE,  
YOU KNOW, COME TO GRIPS WITH  
THE FACT THAT, UNDER THESE

CIRCUMSTANTIALS, THOSE PEOPLE, AT LEAST WERE SEIZED WHO WERE AWARE THAT THE POLICE OFFICER WAS THERE.

>> THE ONLY CIRCUMSTANCE -->> SO TELL ME, IF YOU MAINTAIN THEY WERE NOT, THEN TELL ME WHY THEY WERE NOT.

THE ONES WHO WERE AWARE, THAT THESE WERE POLICE OFFICERS, AND, LIGHTS WERE GOING, TELL ME WHY THOSE PEOPLE WERE NOT SEIZED?

>> WELL, IN COLI VERSUS INS, D.C. CIRCUIT CASE IN 1991, SEIZURE MUST HAVE KNOWLEDGE OF BEING SEIZURE ON BOTH THE PROTAGONIST AND ANTAGONIST. IF ONE OF THE PARTIES IS NOT AWARE IT IS A SEIZURE, THEN IT CAN NOT BE A SEIZURE.

>> WHO WAS NOT AWARE IN THIS CASE?

>> THE SIX TO EIGHT INDIVIDUALS.

THEY'RE STANDING OUTSIDE. THERE ARE TWO POLICE CARS. THERE ARE QUITE A FEW PEOPLE THERE AND THE POLICE OFFICERS COME UP.

EACH INDIVIDUAL, THE POLICE OFFICERS ALSO STATED, ONE STATED THAT IT WAS A CONSENSUAL ENCOUNTER AND THEY HAD TAKEN FLIGHT IT WOULD BE UNPROVOKED FLIGHT AND IT WOULD NOT BE RESISTING WITHOUT VIOLENCE. SO, THE OTHER OFFICER DID --

>> WHAT DOES THAT MEAN? THAT THESE PEOPLE WERE NOT FREE TO LEAVE?

>> NO. THAT WOULD MEAN THEY WERE FREE TO LEAVE BECAUSE HE STATED IT WAS UNPROVOKED FLIGHT AND IT WAS A CONSENSUAL ENCOUNTER.

>> I'M SORRY, I REALLY DON'T UNDERSTAND THAT. IF THEY WERE FREE TO LEAVE AND HAD LEFT, THE OFFICER CLEARLY SAID HE WOULD HAVE GONE AFTER THEM, CORRECT?

>> YES.

>> SO, HOW WAS IT JUST AN

ENCOUNTER THEN?

IF IT IS JUST A POLICE

ENCOUNTER, I AM FREE TO LEAVE,

IS THAT CORRECT?

>> CORRECT.

IT IS.

>> SO IF I'M NOT FREE TO LEAVE,

WHAT IS IT?

>> IT IS A CONSENSUAL

ENCOUNTER.

>> YOU SEEM TO RELY QUITE

HEAVILY ON CHESTERNUT.

AND I CAN SEE SUPERFICIALLY WHY

YOU MAY ATTEMPT TO DO SO, BUT

SEEMS TO ME THAT IN CHESTERNUT

THERE WAS NO SIREN, CORRECT.

>> THERE WAS NOT.

>> THERE WAS NO FLASHING

LIGHTS, CORRECT.

>> NO.

>> THERE WAS NO, NO, ORDERS TO

HALT?

THERE WERE NO DISPLAY OF ANY

WEAPONS.

AND THERE WAS NO ATTEMPT TO

BLOCK THE MOVEMENT IN THAT

CASE, DO YOU AGREE.

>> I AGREE.

>> THAT TO ME, SEEMS TO SAY IT

ALL.

THIS IS NOT A CHESTERNUTCASE.

>> IN THIS CASE THERE IS NO

SIREN.

>> WELL THERE'S LIGHTS.

>> NO DISPLAY OF FIREARM.

THE TRIAL COURT AND TESTIMONY

AND EVIDENCE FOUND BY THE TRIAL

COURT ALL REASONABLE INFERENCES

MUST BE LOOKED AT TO THE

PREVAILING PARTY AND THE TRIAL

COURT SPECIFICALLY FOUND THAT

THE VEHICLE WAS NOT BLOCKED

BECAUSE THE VEHICLE COULD MOVE

FORWARD.

>> I'M JUST STILL, I THINK I'M

STILL HAVING TROUBLE, I'M

LOOKING AT FLORIDA STATUTE WHAT

IS UNLAWFUL TO DO.

THAT AS A GENERAL PROPOSITION,

AND MAYBE, WANT TO GO BACK TO

THIS, THAT POLICE, THE

ACTIVATION OF THE BLUE LIGHTS

ARE THE SIGNAL, MAYBE NOT AS

MUCH OF A SHOW OF AUTHORITY AS

DRAWING THE GUN, BUT FOR THOSE THAT OPERATE MOTOR VEHICLES, THAT PEOPLE ARE NOT FREE TO LEAVE WHEN THOSE LIGHTS GO ON, JUST LIKE, A, JUST LIKE WHEN GUNS ARE DRAWN.

THAT IN A CIVILIZED SOCIETY IS TELLING A CITIZEN, A REASONABLE PERSON, THAT THEY MUST STAY WHERE THEY ARE. NOW, THE SUBJECTIVE POSSIBILITY THAT, AGAIN IN THIS CASE THE POLICE OFFICER MAY HAVE DONE IT BECAUSE THEY WANT TO SAY, HEY, WE'RE POLICE, WE'RE THE GOOD GUYS, WE'RE NOT DRUG DEALERS COMING TO GET YOU, THAT'S A POSSIBILITY.

BUT, OBJECTIVELY, ISN'T THAT THE WHAT IS COMMUNICATED AS THE MAIN PART OF WHY THE, IN MOST CASES COURTS AROUND THE COUNTRY, IN THIS STATE, HAVE REALLY LOOKED AT THAT ONE FACTOR AS BEING A VERY CRITICAL FACTOR IN WHETHER A SEIZURE HAS TAKEN PLACE?

>> IT IS, BUT, THE FOURTH AMENDMENT IS NOT FOR PER SE RULE.

THAT WOULD BE A PER SE RULE IF YOU FOUND THAT THE LIGHT BEING TURNED ON SUBJECT A PERSON TO A SEIZURE.

AND --

>> BUT IF THE BASIS OF IT IS, WHETHER YOU CAN ONLY HAVE AN INVESTIGATORY STOP, IF THERE IS REASONABLE SUSPICION?

I THINK AGAIN THE STATE IS AGREEING AGAIN HERE THERE WAS NO REASONABLE SUSPICION. WE APPRECIATE THAT CONCESSION. THEREFORE THE ISSUE IS THE SOLE, MAIN ISSUE UNDER TOTALITY OF THE CIRCUMSTANCE WHAT A WOULD A REASONABLE PERSON FEEL FREE TO LEAVE?

AND IF THE LAW OF THE STATE WHEN LIGHTS ARE ACTIVATED REASONABLE PEOPLE SHOULD NOT LEAVE, WHY ISN'T THAT THE RULE OF LAW THAT WE SHOULD BE PROMOTING?

>> AS YOU LOOK AT THE CASE THAT IS THE CONFLICT WAS CERTIFIED, THOSE CASES, NONE OF THE CASES FROM MY READING OF IT CONDUCT ANY TYPE OF TOTALITY OF THE CIRCUMSTANCES TEST.

FURTHER IN THOSE CASES THE MAJORITY OF THEM, TAKE PLACE WITH WHEN THE PERSON IS IN THE CAR, AND IS EITHER ON THE SIDE OF THE ROAD, AND IS IN THE DRIVER'S SEAT OF THE CAR.

HERE, THE G.M. WAS NOT IN THE DRIVER'S SEAT.

HE WAS IN THE REAR PASSENGER SEAT OF THE VEHICLE.

THE ONLY CASE OF THE CONFLICT CASES WHERE THERE IS THE, THE CAR IS PARKED IN A PARKING LOT AND NOT ON THE ROADSIDE IS HREZO v. STATE.

IN THAT CASE THE OFFICER ALSO ASKED FOR IDENTIFICATION AND SHOWN HIS SPOTLIGHT OR FLASHLIGHT INTO THE VEHICLE.

HERE THERE WAS NO QUESTIONING OF ANY OF THE INDIVIDUALS BECAUSE AS SOON AS THEY GOT OUT OF VEHICLE THEY SMELLED THE MARIJUANA.

SO THERE IS NO QUESTIONING.

ALSO NO REQUEST FOR IDENTIFICATION AND THE POLICE OFFICER WENT UP TO THE WINDOW AND IMMEDIATELY SAW THE MARIJUANA BEFORE EVEN SAID ANY WORDS TO G.M..

>> THAT WOULD BE ALTERNATIVE FINDING.

IF THE FINDING IS THAT BEFORE ANY SEIZURE TOOK PLACE, IT, PROBABLE CAUSE DEVELOPED, I THINK THAT, THE MR.^BLUMBERG HAS CONCEDED THAT WOULD BE A DIFFERENT CASE.

>> RIGHT.

>> BUT I DIDN'T, MY UNDERSTANDING WAS, IS THAT THE GIST OF WHAT THE STATE SAID AT THE MOTION TO SUPPRESS HEARING THAT GENERATED THE TESTIMONY THAT THE DEFENSE HAS CHOSE TO RESPOND TO WAS THAT, THEY EMPHASIZED THAT THE LIGHTS WERE

NOT BEING ACTIVATED FOR THE PURPOSE OF EFFECTING A STOP. AND THAT WAS REALLY THE GIST OF WHAT WAS BEING ARGUED AS OPPOSED TO THE PROBABLE CAUSE DEVELOPED BEFORE ANYONE WAS AWARE THAT THEY WERE THERE. AND, THAT IS, THOSE WOULD BE TWO DIFFERENT CASES; CORRECT?

>> CORRECT.

AND THERE ARE TWO THE FINDINGS BY THE TRIAL OR BY THE THIRD DISTRICT WHERE G.M. DID NOT SEE THE LIGHTS AND THEREFORE THEY SHOULDN'T PLAY IN THE ANALYSIS.

>> BUT THE THIRD DISTRICT, JUST LIKE WE CAN'T MAKE FACTUAL FINDINGS.

>> RIGHT.

>> I'M STILL TROUBLED ON ONE HAND I HEAR WHAT MY COLLEAGUES ARE SAYING ISN'T IT REASONABLE TO ASSUME G.M. WASN'T AWARE? BUT ON THE OTHER HAND, IF THAT WASN'T WHAT THE STATE WAS PROVING, THAT IS A LACK OF AWARENESS, THEN, I'M NOT SURE THAT THE RECORD, WHAT JUDGE GREEN SAID IS RECORD IS REALLY EQUIVOCAL ON THAT AND WHY SHOULD BENEFIT OF THAT EQUIVOCATION GO TO THE STATE AS OPPOSED TO THE DEFENDANT.

>> RIGHT.

>> WELL, WITH REASONABLE INFERENCES TAKEN TO THE PREVAILING PARTY, THE TESTIMONY FROM OFFICER SMITH WAS THAT HE WAS OBSERVING G.M. WHILE HE WAS APPROACHING THE VEHICLE. G.M.'S HEAD WAS DOWN DURING THAT TIME.

OFFICER CUENCA HE DID NOT KNOW WHETHER OR NOT G.M. SAW HIM. AND G.M.'S OWN TESTIMONY, AS JUSTICE LEWIS POINTED OUT, HE DID NOT, HE DID NOT, THE TESTIMONY WAS THAT HE DID NOT SEE THE SIREN.

THE TESTIMONY WAS HOW HE KNEW OF THE OFFICERS BEING PRESENT WAS BECAUSE SOMEONE TOLD HIM. AND THEN HE LOOKED UP AND SAW --

>> YOU JUST SAID SOMETHING ABOUT THE STANDARD REVIEW BEING BECAUSE THE STATE PREVAILED IN THE TRIAL COURT THEY GET BENEFIT OF ANY OTHER INFERENCES.

I THINK THAT MIGHT BE TRUE IN A CASE WHICH HAS GONE TO A JURY TRIAL WHERE WE'RE REVIEWING IT. BUT HERE WHERE WE HAVE A MIXED QUESTION OF LAW AND FACT AND DE NOVO REVIEW OF FOURTH AMENDMENT ISSUE --

>> RIGHT.

>> -- MY CONCERN UNDER, AND THE CASE OF ROBINSON TALKS ABOUT THE TIPSY COACHMAN RULE, IF YOU'RE GOING TO AFFIRM ON ALTERNATIVE BASIS THAT'S GOT TO BE THERE IN THE RECORD, AND THE STATE HAS TO HAVE ESTABLISHED THAT OR, HAVE ARGUED IT. AND, I DON'T, SO WE GO BACK TO THAT, MY QUESTION IS, SHOULDN'T, NORMAL SITUATION, THE STATE NEEDS TO, HAVE THE BURDEN TO HAVE TO ESTABLISH A, THAT A SEIZURE DID NOT OCCUR, WHEN TO A REASONABLE PERSON THE INDICATION IS THAT A SEIZURE WOULD HAVE OCCURRED?

>> WELL, AS, YOU, IF YOU DETERMINE THERE ISN'T REASONABLE INFERENCE, THEN AS YOU SUGGESTED TO MR. BLUMBERG, THERE IS ALSO THE POSSIBILITY OF REMANDING IT FOR THE TRIAL COURT TO MAKE THAT DETERMINATION.

HOWEVER, THE OTHER SIDE WHICH IS THE TOTALITY OF THE CIRCUMSTANCES THE STATE WOULD ARGUE THAT G.M. WAS NOT SEIZED BECAUSE OF A REVIEW OF THE TOTALITY OF THE CIRCUMSTANCES AND THE ONLY CIRCUMSTANCE THAT WOULD DEMONSTRATE ANY SHOW OF AUTHORITY WAS THE ACTIVATION OF THE EMERGENCY LIGHTS.

>> SEEMS LIKE THE THIRD DISTRICT PUT NEWS THIS POSITION BECAUSE THEY COULD HAVE DECIDED THIS IN A VERY NARROW GROUND. THIS IS DISTINGUISHABLE FROM

ALL THE OTHER CASES BECAUSE.

>> RIGHT.

>> THEY CHOSE NOT TO DO THAT. THEY CHOSE TO GO AND, ARGUABLY, IN DICTA, THE CERTIFIED CONFLICT, ALL THE OTHER DISTRICT COURT CASES THAT HAVE HELD TO THE CONTRARY, BASED ON, AS YOU'RE SUGGESTING MAY BE DIFFERENT FACTUAL CIRCUMSTANCES.

WE'RE HERE REALLY BECAUSE OF THE THIRD DISTRICT'S, THE BREADTH OF THEIR DECISION.

>> CORRECT.

IN FACT IN OUR JURISDICTIONAL BRIEF WE ARGUE THERE WAS NOT CONFLICT BETWEEN THIS CASE AND ALL THE OTHER DISTRICTS AND THAT JURISDICTION SHOULD NOT BE ACCEPTED SO YOU STILL COULD FIND THAT THE CASE IS DIFFERENT AND DISTINGUISHABLE FROM THE OTHER DISTRICTS AND THAT THIS IS NOT A CERTIFIED CONFLICT.

IF THERE ARE ANY OTHER QUESTIONS, THANK YOU.

>> ON THE UNAWARENESS ISSUE THE STATE HAS ONLY FOUND TWO CASES CITED IN THEIR BRIEF.

1969 CASE FROM THE D.C. CIRCUIT AND INTERMEDIATE APPELLATE COURT CASE FROM WISCONSIN WHERE THE HOLDING OF THE CASE WAS THERE IS NO SEIZURE BECAUSE THE DEFENDANT WAS UNAWARE.

IN THAT, IN THE WISCONSIN CASE, THE FACTS ESTABLISH THAT THE DEFENDANT WAS ASLEEP.

IN THE D.C. CIRCUIT CASE THE FACTS ESTABLISH THAT IMMIGRATION AGENTS SURROUNDED A BUILDING AND HELD THE PEOPLE INSIDE THE BUILDING DIDN'T KNOW THEY WERE OUT THERE HADN'T BEEN SEIZED.

>> DOESN'T THAT POINT ABOUT UNAWARENESS FLOW IRRESISTABLY OUT OF WHAT COURT SAID IN HODARI?

IF THERE HAS TO BE SUBMISSION TO AUTHORITY, YOU CAN'T SUBMIT TO AUTHORITY, TO A SHOW OF AUTHORITY OF WHICH YOU'RE

UNAWARE.

THE LAWS OF LOGIC COMPEL THAT  
RESULT, DON'T THEY?

>> BUT NEED THE FACTUAL  
PREDICATE FOR THAT LOGICAL TO  
APPLY.

>> I UNDERSTAND.

>> YOU HAVE THE FACTS.

>> ABSOLUTELY.

ASSUMING THE FACTS, THAT THE  
POINT ABOUT THE NUMBER OF CASES  
AND ALL THAT, SEEMS LIKE HODARI  
IS WHAT WE'VE GOT TO CONTEND  
WITH ON THAT THE LEGAL QUESTION  
OF WHETHER AWARENESS OF A SHOW  
OF AUTHORITY IS NECESSARY FOR  
THERE TO BE A SEIZURE, UNLESS  
THERE IS A PHYSICAL TOUCHING.

>> AGAIN, HODARI IS A DIFFERENT  
SITUATION BECAUSE YOU HAVE AN  
AFFIRMATIVE ACTIVE OF  
NON-SUBMISSION.

>> HODARI CONTAINS REASONING.  
I UNDERSTAND THERE IS A FACTUAL  
DIFFERENCE THERE.

THERE IS REASONING THERE THAT  
REPRESENTS THE HOLDING OF THE  
CASE, A PART OF THE HOLDING  
OF THE CASE, WOULDN'T YOU  
AGREE?

WE JUST CAN'T IGNORE THE  
REASONING.

>> ABSOLUTELY.

BUT APPLYING THAT REASONING TO  
THE FACTS OF THIS CASE, AGAIN  
IT IS OUR POSITION THE FACTS OF  
THIS CASE IS NOT THAT HE WAS  
UNAWARE.

IF HE AWARE OF THE POLICE  
LIGHTS THE FACT THAT HE MADE NO  
ATTEMPT TO GET OUT THAT CAR  
DOESN'T ESTABLISH A SEIZURE  
DIDN'T TAKE PLACE UNDER  
PRINCIPLES HODARI.

>> THANK YOU VERY MUCH.

>> THANK YOU.

>> THANK YOU

BOTH FOR YOUR ARGUMENTS.