IN THE SUPREME COURT OF FLORIDA

ADAM LUCAS JACOBY, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC05-1482

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The opinion of the Second District Court of Appeal, a copy of which is appended to Petitioner's Brief on Jurisdiction, outlines the relevant facts. Respondent objects to Petitioner's incomplete and one-sided statement of facts but will not take up this Court's time with its own lengthy statement of facts in this answer brief limited to the issue of whether or not this Court has jurisdiction to review the instant case.

SUMMARY OF THE ARGUMENT

Ippolito v. State, 80 So. 2d 332 (Fla. 1955), is factually distinguishable from the instant case for multiple reasons. Accordingly, there is no conflict between the decision of the Second District Court of Appeal below and the decision of this Court in *Ippolito*.

ARGUMENT

WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION AND THE DECISION OF THIS COURT IN *IPPOLITO V. STATE*, 80 So. 2D 332 (FLA. 1955).

Petitioner took the position below, as he does here, that *Ippolito v. State*, 80 So. 2d 332 (Fla. 1955), is controlling here and mandates suppression of all evidence of the crash of Petitioner's car, including the two halves of the car itself and the dead body of Petitioner's passenger, which was ejected from

the car during the crash and came to rest on the ground by the side of the road.

However, as the Second District correctly points out in its opinion, *Ippolito* is factually distinguishable from the instant case for multiple reasons. Respondent will not discuss these reasons at length, as they are well elucidated in the Second District's opinion; however, they include: ① In this case, Lawson merely followed Petitioner's vehicle; he did not shout at him, shoot at him, or seize his person or any of his property after the crash, as the police did in *Ippolito*, i.e., Lawson committed no act of violence against Petitioner. ② Lawson never attempted to exercise any police authority, unlike in *Ippolito*. ③ Lawson never seized either Petitioner or any of the items in question, either literally—by physically taking possession of Petitioner's person or any of the items in question—or figuratively—as a result of Petitioner's acquiescence to the exercise of authority by a law enforcement officer; Petitioner did not acquiesce to either the exercise of authority by a law enforcement officer or to a show of force (there was no such show of force here). As the Second District correctly held, under *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), there must be one or the other—and there *was* a literal seizure in *Ippolito*. Given all of these factual differ-

ences, there is no conflict with *Ippolito*.

Petitioner also complains that the Second District "refused to follow [*Ippolito*], finding it superseded by California v. Hodari D." (Petitioner's jurisdictional brief at p. 7). However, the Second District's majority opinion says no such thing. Rather, it simply notes that, since *Ippolito*, was decided, Florida law was changed in that our state constitution was amended to require the Florida courts to follow the United States Supreme Court's decisions on search and seizure issues, and *Hodari D.* was decided by the United States Supreme Court. Both of these observations by the Second District are indisputably correct. Although the concurring opinion does state that *Ippolito* is no longer valid and that the majority opinion points this out, the majority opinion does not actually say that *Ippolito* has no validity here and now, and Respondent did not take that position below and does not take it now. Indeed, it appears to undersigned counsel that, if the very same factual scenario found in *Ippolito* were before this Court today, this Court could reach the same result it did 50 years ago (although it is doubtful that this Court would now maintain that "[t]he practice of officers patrolling the streets 'in disguise' in unofficial cars" is inappropriate). The point is, however, that the statement in the concurring opinion that *Ippolito* is no longer valid

is obiter dicta at best: Only if the Second District had found *Ippolito* to be factually on point would it have needed to address the issue of whether *Ippolito* remains good law in the present day; since it concluded that *Ippolito* was factually distinguishable and not controlling in the instant case for that reason, any comments in its decision regarding the continuing validity of *Ippolito* do not create a direct conflict with *Ippolito*. *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976).

Petitioner also claims that the Second District's decision in the instant case conflicts with *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), and *Perez v. State*, 620 So. 2d 1256 (Fla. 1993). This contention is both factually incorrect and, as to *Hodari D.*, irrelevant with regard to the jurisdictional issue presently before this Court.

In the first place, Article V, Section 3(b)(3), Florida Constitution provides, regarding this Court's conflict jurisdiction, only that this Court "[m]ay review any decision of a district court of appeal...that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Because this provision does not capitalize the phrase "supreme court," as is done in Article V, Section 3(b)(6) when reference to the Supreme Court of the United States is made, and because this provision

refers to "the supreme court" in the singular, not in the plural, it should be obvious that the phrase "the supreme court" in this provision refers to this Court and not to the United States Supreme Court but does not conflict with a decision of another district court. And this Court has so indicated. *E.g.*, *Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988). Accordingly, even if the Second District's decision sub judice *were* in conflict with *Hodari D.*, such a conflict would not give this Court jurisdiction under Article V, Section 3(b)(3) to review it.

In the second place, as the Second District correctly concluded, "Lawson, the officer accused of misconduct, never physically seized either Jacoby or the items in question," so there was no seizure. This holding is in accord with *Hodari D.*, not in conflict with it.

In the third place, the issue in *Perez* was whether a law enforcement officer's improper order to the defendant to stop rendered the gun the defendant threw down during the ensuing chase inadmissible as the fruit of an illegal seizure. This Court followed *Hodari D.* in holding that no seizure occurred until the defendant either submitted to the authority of the police or was caught and that, since Perez had not been caught when he jettisoned the gun and, in fleeing, was clearly *not* submitting to the authority of the officer, the gun was abandoned and was there-

fore admissible in evidence.

In the instant case, Petitioner neither submitted to the authority of the police, which authority was not exercised by Lawson, nor abandoned anything. Furthermore, at no time did Lawson seize anything from Petitioner, from Petitioner's vehicle, or from the vicinity of the accident scene. The Second District mentioned these facts in its opinion in this case. Accordingly, to the extent that *Hodari D.* and *Perez* are applicable to the instant case, the Second District followed both opinions.

Petitioner concludes that "no opinion of either this Court or the United States Supreme Court has ever authorized extension of Hodari D. to cover cases where the police chase without self-identification or a 'show of authority'" (Petitioner's jurisdictional brief at p. 10). It appears that opposing counsel is confused as to the meaning of "directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." This phrase does not mean that conflict exists when there is no other Florida appellate case law on point. On the contrary, when there is no other Florida appellate case law on point, there can be no conflict.

Because Petitioner has failed to establish that the Second District's opinion in this case conflicts with any other Florida appellate decision, this Court should deny review in this case.

CONCLUSION

Respondent respectfully requests that this Honorable Court deny review in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert E. Puterbaugh, Esq., P.O. Box 24628, Lakeland, Florida 33802-4628, and J. Davis Connor, Esq., P.O. Drawer 7608, Winter Haven, Florida 33883-7608, this 6th day of September 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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