**No. 12-A392**

# In the
# Supreme Court of the United States

ADAM YOUNG,
*Petitioner,*

v.

WARDEN MIKE ADDISON, and
ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni Jr.*
Andrew B. Greenlee
Paetra T. Brownlee
Michael M. Brownlee
Matthew R. McLain
BROWNSTONE, P.A.
400 North New York Avenue
Suite 215
Winter Park, Florida 32789
(407) 388-1900
**Counsel of Record*

December 12, 2012

## QUESTION PRESENTED

1. If an officer lacks reasonable suspicion of legal wrongdoing and nonetheless orders a person to stop, and the person does in fact stop, but subsequently brandishes a box cutter as a group of five armed officers approaches, can brandishing of the box cutter be used to establish reasonable suspicion to justify the stop under the Fourth Amendment, pursuant to *California v. Hodari D.,* 499 U.S. 621 (1991)?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Adam Fletcher Young, respectfully petitions the Court for a writ of certiorari to review the order denying a certificate of appealability issued by the United States Court of Appeals for the Tenth Circuit.

## DECISIONS BELOW

The order denying Mr. Young's application for post-conviction relief, issued by the District Court of Garfield County, Oklahoma, is unpublished (App. F). So too is the affirmance of that order by the Oklahoma Court of Criminal Appeals. (App. E).

The Report and Recommendation (App. C) authored by the Honorable Bana Roberts, Magistrate Judge for the United States District Court for the Western District of Oklahoma, which recommended denial of Mr. Young's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, is unpublished, but available at 2011 WL 7272268 (W.D. Okla. 2011). The Honorable Timothy D. DeGiusti's Order adopting the Report and Recommendation (App. B), is unpublished, but available at 2012 WL 425268 (W.D. Okla. 2012).

The order of the United States Tenth Circuit Court of Appeals denying Mr. Young's request for a certificate of appealability is unpublished (App. A), but available at 2012 WL 3064836 (10th Cir. 2012). The Tenth Circuit's denial of Mr. Young's request for rehearing of the denial of the certificate of

appealability is unpublished (App. D).

## JURISDICTION

The Tenth Circuit denied Mr. Young's request for a certificate of appealability on July 30, 2012 (App. A). On August 17, 2012, the Tenth Circuit denied Mr. Young's request for rehearing (App. D). On October 19, 2012, this Court extended the time for filing the instant petition to December 12, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

On January 24, 2005, Mr. Young landed his plane on the tarmac of a sleepy airport in Enid, Oklahoma. No other planes were on the tarmac when he landed. Within 15 minutes, three U.S. Customs planes swarmed the tarmac. Five federal agents deplaned and approached Mr. Young while he was refueling his aircraft. The group of agents consisted of members of the FBI, ICE, and U.S. Customs. As they walked toward Mr. Young, an ICE agent whistled at him and yelled, "hey, can we talk to you for a minute." Mr. Young walked toward the agents, but when he was approximately 100 feet from the group, he turned away and proceeded back to his plane. As Mr. Young was walking back to his plane, the group of agents followed. Then, the same ICE agent either yelled, "hey, listen, can we talk to you for a minute, can you stop" or "hey, did you hear me? We want to talk to you for a minute, stop."

Mr. Young stopped and turned toward the agents. As they approached, he pulled a box-cutter

from his jacket and shouted: "I can't go back. I can't go back." The agents drew weapons immediately and arrested Mr. Young. The agents then contacted the Enid Police Department and requested a K-9. The canine alerted as it circled the plane and the Enid police officers conducted a search of the aircraft. Approximately 400 pounds of marijuana were found in the plane.

Following a jury trial, Mr. Young was convicted in state court of trafficking a controlled dangerous substance and was sentenced to ten years in prison. Prior to trial, Mr. Young twice moved to suppress the marijuana, arguing, *inter alia*, that the agents lacked reasonable suspicion when they approached Mr. Young and that Mr. Young was detained at the moment the agents asked him to stop. The State of Oklahoma (the "State") argued the officers did have reasonable suspicion to detain Mr. Young. At the motion to suppress hearings, the State elicited testimony from the agents to support the argument that they had reasonable suspicion to detain Mr. Young.

Agents testified that they began investigating Mr. Young two weeks before his arrest. The impetus for the investigation was a discovery that Mr. Young was renting aircrafts in Houston and flying to cities along the southwestern border of the United States, "and then to points elsewhere in the United States, such as Tennessee, Illinois, and such." Based on that information, the agents "thought perhaps that he was smuggling narcotics from the border cities up to those areas." The agents ran a background check and ascertained that Mr. Young was not currently

employed and had a prior criminal record for fraud. In fact, Mr. Young was self-employed, but considering his supposed lack of employment, the agents grew "more suspicious" of Mr. Young because they could not "figure out" how he was paying to rent and fuel the planes.

An agent also testified that as part of their background investigation they "ran a few wanted checks, records checks, financial checks, and data base checks" to see if Mr. Young was linked to any criminal investigations or criminal groups. They also ran his cellular phone records to see if his number and any incoming numbers were associated with other suspected criminals. Those efforts were not fruitful. Mr. Young had no discernable affiliation with any criminal activity or criminal organizations. Nonetheless, the agents decided to place Mr. Young under surveillance. When the agents discovered Mr. Young was flying from to Chicago to El Paso, a city the agents classified as a "source city" for drugs, the agents decided to travel to El Paso to monitor Mr. Young's activities.

Agents testified that Mr. Young arrived in El Paso in the evening and went straight to his hotel to check in for the night. The next morning, Mr. Young went to breakfast and then to WalMart, where he bought plastic bags. The agents testified that plastic bags are associated with drug transport. While he was away from his room, agents observed two "Hispanic" males knock on his door. After the trip to WalMart, Mr. Young proceeded to the airport where he met the same two Hispanic males. Agents observed Mr. Young and the Hispanic males at the

airport. Mr. Young and the Hispanic males commiserated, but no items were loaded or unloaded from the plane, and nothing was exchanged between Mr. Young and the Hispanic males. The Hispanic males were unknown to the agents and no evidence suggested they were connected to illegal activity. Based on this information, the agents decided to fly to Enid to confront Mr. Young while he fueled his plane.

The agents testified that, when they approached Mr. Young on the tarmac, their intent was simply to ask him "a few questions to make sure he wasn't engaged in any type of illegal activity." One agent admitted that, as he approached, he was not sure what type of illegal activity Mr. Young might be engaged in, but thought Mr. Young "might be smuggling aliens or narcotics." The agents testified that they lacked probable cause for arrest but "maybe" had reasonable suspicion for a detention as they approached. However, as they approached, the agents testified that Mr. Young appeared nervous, "like he suspected we were law enforcement." One agent testified that Mr. Young "ran his fingers through his hair" and that while walking around his plane, his pace quickened. At that point, as described above, an ICE agent yelled to Mr. Young, who began walking toward the group, then turned around and walked back toward his plane. After he turned away, the ICE agent ordered Mr. Young to stop; he complied, turned back toward the group, and brandished a box cutter as the agents approached.

Both of Mr. Young's motions to suppress the

marijuana were denied. The first motion to suppress was denied because the court found that regardless of reasonable suspicion issues, the agents had probable cause to search the plane once the box cutter was pulled and especially when Mr. Young made inculpatory statements after being Mirandized. The second motion was denied because the court found that Mr. Young was not detained prior to pulling the box cutter, and that once he did so, arrest was appropriate.

On direct appeal, counsel for Mr. Young failed to challenge the denial of Mr. Young's motions to suppress by arguing that there was no reasonable suspicion and that the ICE agent's order for Mr. Young to stop constituted a seizure under the Fourth Amendment. Consequently, Mr. Young moved for post-conviction relief, alleging ineffective assistance of appellate counsel for counsel's failure to make that argument. Mr. Young's motion for post-conviction relief was denied. That denial was affirmed on appeal. The Court of Criminal Appeals held that Mr. Young's claim of ineffective assistance of appellate counsel was unavailing, because appellate counsel was not required to raise meritless issues.

Next, Mr. Young sought a writ of habeas corpus from the Western District of Oklahoma, again alleging ineffective assistance of appellate counsel for failure to argue that there was a lack of reasonable suspicion to support his detention, which Mr. Young argued occurred the moment the ICE agent ordered him to stop. In her Report and Recommendation, the magistrate judge denied Mr. Young's claim, relying on the rationale espoused by this Court in *California*

*v. Hodari D.,* 499 U.S. 621 (1999). Specifically, the magistrate found that Mr. Young's brandishing of the box cutter constituted an overt act of declining the agent's attempt at a consensual encounter. Thus, appellate counsel was not ineffective for failing to raise the claim. The magistrate judge's ruling on this issue was adopted by the district court, and the Tenth Circuit denied Mr. Young's certificate of appealability.

## REASONS FOR GRANTING THE WRIT

This Petition presents an opportunity for this Court to provide lower courts with much-needed direction for purposes of analyzing whether a person submitted to a show of authority, such that a seizure was effectuated under *Hodari*. Specifically, the federal circuit courts of appeals are divided on whether a seizure occurs when an individual initially complies with a show of authority, but subsequently resists. In addition, courts are struggling to ascertain the degree of submission necessary to satisfy the *Hodari* seizure test in the context of show of authority cases. Currently, courts are employing a patchwork approach to analyzing these issues, which is yielding inconsistent results. This case is the ideal vehicle for clarification of these issues, because it features a partial submission to a show of authority, accompanied by an act which, while pathetic as compared to the show of force against him, can be classified as resistance. Therefore, it offers this Court the opportunity to resolve the very ambiguities that are the source of disagreement between the lower courts.

## I. THE COURTS NEED GUIDANCE ON HOW TO ANALYZE WHETHER A SEIZURE HAS OCCURRED IF A DEFENDANT COMPLIES WITH AN ORDER TO STOP, BUT SUBSEQUENTLY, RESISTS.

### A. The Circuit Courts' Use Of Different Standards To Analyze The Effect Of A Defendant's Actions After He Is Stopped And Whether Those Actions May Be Used to Validate The Stop.

Across the United States, federal circuit courts are reaching inconsistent results when reviewing the propriety of a police seizure of a person. *See* Darby G. Sullivan., "*Continuing Seizure and the Fourth Amendment: Conceptual Discord and Evidentiary Uncertainty in United States v. Dupree"*, 55 Vill. L. Rev. 235 (2010). In 1991, this Court narrowed the definition of a seizure, as previously defined by the Court, in the case of *California v. Hodari*, 499 U.S. 621 (1991). In *Hodari*, the Court held a seizure does not occur until a person actually yields or submits to authority. *Hodari*, however, featured a defendant who was "seized" at only one point during the police encounter - the moment he was apprehended after fleeing. Since *Hodari*, the circuit courts have had significant difficulty applying its holding to situations where a defendant submits to a show of authority initially, but then resists or flees. The question is: under *Hodari*, does a person submit when he complies with the show of authority, or

has no seizure occurred until he is re-apprehended?

The resolution of this issue is critical since the police may take a subject's flight or resistance into account when determining whether there is reasonable suspicion to support a seizure. If the seizure does not happen until a person is ultimately apprehended, then an initial seizure of the subject, which gave rise to his flight or resistance, need not have been supported by reasonable suspicion. This is critical to the admissibility of any evidence eventually obtained from the seizure.

The majority of circuits have held that, even if a stop is unsupported by reasonable suspicion, if a subject does not submit to the initial show of authority, but submits momentarily and then flees or resists, a subsequent seizure nullifies any impermissible aspect of the initial seizure. Sullivan, *supra* at 251. In that regard, the subject's flight may be used to establish reasonable suspicion to support the subsequent seizure of that person, assuming he is re-apprehended. This rationale is based on the majority's interpretation of *Hodari*, as rejecting the notion that a person is "continually seized" once the initial, momentary seizure takes place.

The Second, D.C. and Ninth Circuits have adopted this majority view. For example, in *United States v. Baldwin*, 496 F.3d 215, 218-19 (2d Cir. 2007), the defendant argued his "seizure was unlawful when made" because he "pulled to a stop in response to the patrol car's overhead lights and siren." *Id.* at 218. Therefore, the defendant argued, "his subsequent flight did not render the seizure lawful

retroactively." *Id.* The Second Circuit rejected this argument. "We hold that, to comply with an order to stop—and thus to become seized—a suspect must do more than halt temporarily; he must submit to police authority, for 'there is no seizure without actual submission[.]'" *Id.* (emphasis added). The Second Circuit also noted that its decision was aligned with the majority view. "Several circuits have held as much." *Id.* The court then relied on the holding of the D.C. Circuit in *United States v. Washington*, quoting, "[Defendant] initially stopped, but he drove off quickly before Officer Hemphill even reached the car. Because [defendant] did not submit to Hemphill's order, he was not seized…" *Id.* (emphasis added) (citing *United States v. Washington,* 12 F.3d 1128, 1132 (D.C.Cir.1994)).

The *Baldwin* court likewise noted that the Ninth Circuit has interpreted *Hodari* as requiring more than a temporary submission to a show of authority. *See United States v. Hernandez,* 27 F.3d 1403, 1407 (9th Cir.1994) ("Hernandez requests we find he submitted to authority and was seized, despite his subsequent flight, merely because he hesitated for a moment and made direct eye contact with Sadar. We decline to hold these actions sufficient to constitute submission to authority.").

In contrast, the minority view recognizes the concept of a "continuous seizure." Sullivan, *supra* at 251. Under this approach, when an officer orders a person to stop, and that person pauses or submits to the show of authority, even if only momentarily, he has been seized. Thus, the police must have had reasonable suspicion prior to that initial order to

stop, regardless of the person's eventual flight or resistance. Indeed, the stop must have been proper at its inception.

The minority view is grounded in its belief that *Hodari* explained a seizure occurs the moment a person yields to a show of force or authority. Thus, it logically follows that, even when a person yields for only a second, he has been seized. Critically, the minority holds this is true regardless of what actions the person takes after that seizure occurs.

Immediately following *Hodari*, the Tenth Circuit adopted the minority view in the case of *United States v. Morgan,* 936 F.2d 1561, 1567 (10th Cir.1991). In *Morgan*, dispatch notified a police officer of a robbery, and two officers, suspecting Morgan' participation in the crime, parked their cars at separate locations near Morgan's residence. *Id.* at 1565. When Morgan later left his residence with two other males, one officer pulled behind Morgan's car. *Id.* Morgan exited the vehicle, carrying a tan bag, and the officer told the men to "hold up." *Id.* Morgan responded, "[w]hat do you want[,]" began backing away and then fled. *Id.* While fleeing, Morgan discarded the tan bag. *Id.* The officer eventually apprehended Morgan after a struggle. *Id.*

On review of the trial court's denial of Morgan's motion to suppress, the Tenth Circuit found Morgan was seized the moment he responded to the officer's order to "hold up." *Id.* at 1567. "[S]ince Defendant, at least momentarily, *yielded* to the Officer's apparent show of authority, we find Mr. Morgan was seized for purposes of the Fourth

Amendment during the initial portion of the encounter." *Id.* (emphasis added) (citing *Hodari D.,* 111 S.Ct. at 1550) ("[On] [t]he narrow question ... [of] whether, with respect to a show of authority ... a seizure occurs even though the subject *does not yield.* We hold that it does not." (Emphasis added.)). The Tenth Circuit has recited its holding in *Morgan* with approval as recently as 2010. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1224-25, n.9 (10th Cir. 2010) *cert. denied*, 131 S. Ct. 1045, 178 L. Ed. 2d 864 (U.S. 2011) ("But in that case, as well as in *United States v. Morgan,* we dealt with momentary termination of the suspect's movement, and not pained or slowed movement, as argued here […]"); *see also United States v. Salazar*, 609 F.3d 1059, 1068 (10th Cir. 2010) ("As *Morgan* suggests, a reasonable officer may well view an attempt at conversation, even if brief, as yielding to a show of authority.").

To further illustrate the confusion in the wake of *Hodari*, the Third Circuit has rejected both the majority and minority views. Ignoring the bright line tests finding a seizure occurs either the moment a person ultimately submits or the moment the defendant first submits to a show of authority, the Third Circuit considers the duration and circumstances surrounding the subject's initial submission. For example, in *United States v. Coggins*, the Third Circuit found Coggin's initial stop amounted to a seizure notwithstanding that Coggins was only seized temporarily and later fled from the police. *See United States v. Coggins*, 986 F.2d 651 (3d Cir. 1993). Coggins and three other males boarded a plane from St. Thomas to St. Croix in the U.S. Virgin Islands. *Id.* A DEA agent, who was also

on the flight, recognized one of the four men as being involved in drug trafficking. *Id.* at 652. When the plane landed, the agent conferred with a local police officer, who recognized another of the four men as being involved in drug trafficking. *Id.* The officers eventually approached the men, the DEA agent identified himself, and they asked to see identification and plane tickets. *Id.* While the agent was questioning one of the other men, Coggins stood up and asked to go to the bathroom. *Id.* The agent told Coggins he could not go, Coggins sat back down, but then stood up again and stated he needed to go to the bathroom immediately. *Id.* When the agent refused the request, Coggins walked off and then began to run. *Id.* Coggins discarded several small plastic bags containing crack coacaine while he fled. *Id.* at 653. Coggins was eventually apprehended and moved to suppress the crack cocaine at trial. *Id.*

In finding the district court erred in holding Coggins was not seized for purposes of the Fourth Amendment, until ultimately apprehended, the Tenth Circuit reasoned that Coggins initially yielded to a show of authority. *Id.* at 654. "Even though he fled soon thereafter, the combination of Coggins' expressed desire to leave, Agent Inouye's order that he stay, and Coggins' yielding to police authority resulted in a seizure for purposes of the Fourth Amendment." *Id.* (emphasis added).

In contrast, the Third Circuit held that a defendant's momentary compliance with an order to stop did not constitute a seizure in the case of *United States v. Valentine,* 232 F.3d 350 (3d Cir. 2000). In *Valentine*, the officers approached the defendant and

two other men after receiving a tip about a man carrying a gun in the area. *Id.* at 353. Valentine met the informant's description. *Id.* When the police approached, they ordered the young male with Valentine to stop. *Id.* He obeyed and walked to the police car with his hands up. *Id.* The officer then told Valentine to "come over and place his hands on the car," and Valentine responded, "Who, me?" and fled the scene. *Id.* The officers eventually wrestled Valentine to the ground, and Valentine dropped a handgun during the scuffle. *Id.*

Arguing the handgun should have been suppressed, Valentine maintained he was seized the moment he responded to the officer's order to come over and place his hands on the car, since he momentarily complied with that order. *Id.* at 359. The Third Circuit found no evidence that Valentine had complied but determined that, even had he complied, such compliance would not have been sufficient to give rise to a seizure. *Id.* "Under some circumstances we have held that a defendant was seized despite his subsequent flight…But Valentine's case is easily distinguishable, for his momentary "compliance" is a far cry from the lengthy detention in *Coggins*." *Id.* (emphasis added) (citing *Coggins*, 986 F.2d at 653–54). The court added "[e]ven if Valentine paused for a few moments and gave his name, he did not submit in any realistic sense to the officers' show of authority, and therefore there was no seizure until Officer Woodard grabbed him." *Id.*

Thus, when *Coggins* is considered in conjunction with *Valentine*, it is clear the Third Circuit has rejected either of the bright-line

standards adopted by the majority and minority views. Instead, the Third Circuit will consider the duration of the stop and the manner in which the subject submits, to determine whether a seizure has occurred.

The inconsistency of the circuit courts' analyses, while hinging on events which may transpire in a matter of seconds, has far reaching implications. Regardless of whether the police have reasonable suspicion, any evidence discarded by a person who first submitted to a show of authority and thereafter fled or resisted, will either be subject to the exclusionary rule or not. Because of the inconsistent approaches of the federal courts, the dispositive factor in this determination is the circuit court in which the defendant's case is reviewed.

Therefore, this Court should offer guidance to circuit courts reviewing whether a defendant is considered seized when he yields to some degree, but later flees from the show of authority. *Hodari* did not address this specific issue, since the subject in *Hodari* only submitted to a show of authority at one point throughout his police encounter - the moment he was ultimately apprehended. The federal court system requires guidance to ensure that it interprets the Fourth Amendment rights of the United States citizens in a uniform manner.

### B. The Minority View Is More Aligned With Fourth Amendment Precedent, As Articulated In *Terry* And Its Progeny.

While *Hodari* made clear that a person is seized the moment he *yields* to a show of authority or physical force, its holding proves problematic in application when a subject yields temporarily, but then resists. Unlike the majority view or even that of the Third Circuit, prior Fourth Amendment precedent, as set forth in the seminal cases of *Terry v. Ohio,* 392 U.S. 1 (1968), *United States v. Mendenhall,* 446 U.S. 544, (1980) and *Florida v. Royer,* 460 U.S. 491 (1983) unanimously require the police to have reasonable suspicion of criminal activity, *prior to* a subject ever submitting to a show of authority, without regard for how long that submission lasts. As the Second Circuit stated, "[a] *Terry* stop must be 'justified at its inception.'" *United States v. Simmons*, 560 F.3d 98, 105 (2d Cir. 2009) (emphasis added) (citing *Terry*, 392 U.S. at 20). The majority view that the *subsequent* resistance or flight of a suspect can eliminate the taint of an initial illegal seizure, focusing the issue instead only on whether the second seizure was supported by reasonable suspicion, is contrary to the teachings of *Terry*, *Mendenhall*, *Royer*, and even *Hodari* itself.

In *Terry*, the Court rejected the notion that a person must be ultimately apprehended to be seized. "There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or

'seizure' within the meaning of the Constitution." We emphatically reject this notion." *Terry*, 392 U.S. at 16. The Court continued, "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime… whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.*

Further, in *Mendenhall*, the Court explained that a person can be seized for purposes of the Fourth Amendment even where he attempts to leave the police encounter. Indeed, such an unsuccessful attempt to terminate the police encounter itself serves as evidence that the person has been seized. "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers […]." *Mendenhall*, 446 U.S. at 554 (emphasis added).

Having defined the moment a seizure occurs, the Court next articulated the bounds of a legal seizure in *Royer*, relying on its prior holding in *Mendenhall*. Specifically, the Court explained that a person approached by the police, "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. *Royer*, 460 U.S. at 498 (emphasis added) (citing *Mendenhall,* 446 U.S. at 556). This statement in *Royer* is consistent with the Court's long standing instruction that the actual duration of the seizure is of no consequence. If the seizure is to occur at all, it must be supported by reasonable

suspicion. *See Brown v. Texas*, 443 U.S. 47, 51 (1979) (We have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause'…However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.").

To be sure, the holding of *Hodari* was not a departure from these principals. *Hodari* did not omit the requirement that a police officer have reasonable suspicion before invading one's constitutional rights. It did not hold that one is not seized until ultimately apprehended. Rather, *Hodari* simply narrowed the exact moment that a subject's constitutional rights are implicated and explained that this occurs the moment one submits to a show of authority. *Hodari D.,* 499 U.S. at 626. "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.* Thus, *Hodari* does not hold that a person is not seized until the police are ultimately successful in apprehending him. *Hodari* only lends itself to this interpretation because the subject in that case never actually submitted to the show of authority prior to being apprehended. *Id.* at 629.

Quite clearly, the Court has rejected any notion that one is not seized, for purposes of the Fourth Amendment, if he is only seized for a moment. Rather, the Court has consistently held that one can be seized regardless of the duration of the seizure and that even a momentary seizure must be supported by reasonable suspicion. Accordingly,

the view of the majority and, to a certain extent, that of the Third Circuit, finding the Fourth Amendment is not implicated where one is only momentarily seized, constitutes a departure from Court precedent.

### C. The Majority View Exacerbates The Public Policy Concerns Implicated By Unlawful Seizures, as Previously Articulated By The Court.

Finally, public policy dictates that the majority view should be rejected. In the first place, it flies in the face of the purpose of the exclusionary rule. "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct…it's major thrust is a deterrent one […]" *Terry,* 392 U.S. at 12 (emphasis added) (citations omitted). With that in mind, the majority view, permitting the police to seize a citizen, without requiring that seizure to be supported by reasonable suspicion, would eviscerate the "only effective deterrent to police misconduct in the criminal context." *Id.* Indeed, an otherwise unconstitutional police intrusion would be pardoned as long as the subject eventually flees. Stated another way, the police may infringe on anyone's constitutional rights, as long as they are not immediately successful in doing so. The view that a defendant's flight from an illegal seizure can somehow be used to absolve the sins of the police officer - in stopping a citizen without reasonable suspicion - disincentivizes the police from ensuring they have reasonable suspicion before making an

initial stop. As long as the police can get a subject to run, they may use whatever evidence is gained during the flight. This is true regardless of the legality of the initial encounter.

Moreover, the clear precedent of this Court permits a person to refuse to speak to the police, and to walk away, during a consensual encounter. *See Mendenhall*, 446 U.S. at 544 ("As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification."). Under *Hodari*, an encounter is consensual as long the subject does not actually submit to the show of authority. Pursuant to the majority view, however, a consensual encounter, during which a subject refuses to speak to the police, and leaves, would give rise to reasonable suspicion sufficient to effectuate a lawful seizure of that person. This idea eliminates any meaningful distinction between a consensual police encounter and a seizure, for the former could always provide fodder to validate the latter.

The case at bar perfectly illustrates the public policy concerns implicated by the majority and Third Circuit views. Not only did five, armed federal agents and three United States Customs planes descend upon Mr. Young on a vacant tarmac at dusk, the agents admitted that their doing so was only intended to effectuate a consensual encounter. Agent Davis, of the Federal Bureau of Investigation, testified, "I was just going to approach him and ask for consent to search his plane as well as just asking

him a few questions to make sure he wasn't engaged in any type of illegal activity…I wasn't planning on stopping and detaining him." This testimony is aligned with the evidence in this case, since a background check of Mr. Young revealed no connection to other criminals or drug traffickers, and the agents saw neither Mr. Young nor the Hispanic males transfer anything to and from his airplane.

Even assuming *arguendo* that the approach of five, armed federal agents on a vacant tarmac at dusk did not amount to a show of authority, the subsequent events reveal the impropriety of Mr. Young's stop. When the federal agents approached Mr. Young to engage in a "consensual encounter," one agent asked, "hey, can we talk to you for a minute?" It is undisputed that Mr. Young responded in the affirmative and began walking toward the officers. But Mr. Young then had a change of heart, turned and began walking back toward his plane. Although Mr. Young's action was wholly permissible under *Mendenhall*, when he turned from the officers, one agent ordered Mr. Young to "stop." Mr. Young stopped and turned toward the agents. As they approached, he pulled a box-cutter from his jacket and shouted: "I can't go back. I can't go back." The agents drew weapons immediately, arrested Mr. Young, and eventually searched his aircraft.

Mr. Young was seized when he was ordered to stop and did so. Mr. Young tried to refuse the agents' request to speak with them, but the agents made it apparent that he was not free to leave when they ordered Mr. Young to stop. *See Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) ("The test

provides that the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"). That Mr. Young was not free to leave is further evidenced by his decision to confront the authority, rather than to board his plane and leave the tarmac.

Furthermore, the agents used Mr. Young's response to their attempt at a *consensual* encounter as a basis for the order to stop. Nothing changed between the agents' attempt at a consensual encounter and their subsequent order to stop, other than Mr. Young's decision to turn and walk back toward his plane. In order for there to be a meaningful distinction between a consensual encounter and a stop, which requires reasonable suspicion, the police must not be permitted to rely on a person's refusal to participate in that encounter as a basis for the stop. Any finding to the contrary would render the term, "consensual," meaningless.

Finally, the agents used Mr. Young's *subsequent* act of pulling the box cutter to justify the stop. Worse still, the Oklahoma state courts, as well as the federal district court, found this subsequent act was sufficient to justify the prior stop. Neither court gave any weight to Mr. Young's initial compliance with the order to stop. Mr. Young did not run to his plane upon hearing the word, "stop." Instead, Mr. Young realized he was not free to leave, he stopped, turned, and drew the weapon. Under *Terry* and its progeny, the order to stop, which clearly led Mr. Young to believe he was not free to leave, must have been supported by reasonable

suspicion *at its inception*. The lower court's finding to the contrary should be reviewed by this Court.

## CONCLUSION

This Petition presents an opportunity for the Court to provide lower courts with much-needed guidance concerning their interpretations of *Hodari*. Currently, courts are employing different tests to analyze whether a seizure has occurred. Not surprisingly, their inconsistency is yielding inconsistent results. Confusion in this area of the law is particularly problematic since a person's Fourth Amendment's rights are implicated the moment he is seized by the police. Whether a person is found to be seized will dictate whether incriminating evidence can be admitted against him at trial. This Court should hold as it has in the past and find that a stop, no matter how brief, must be supported by reasonable suspicion at its inception.

Respectfully Submitted on this 12th day of December, 2012.

Robert L. Sirianni Jr., ESQ.
Counsel of Record
BROWNSTONE, P.A.
400 N. NEW YORK AVE.
SUITE 215
WINTER PARK, FLORIDA 32789
(800) 215-1839