

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )  
 )  
 Petitioner/Appellee, )  
 )  
 v. ) CASE NO. SC07-1835  
 ) DCA CASE NO. 4D06-1261  
 KENNETH NELSON HEBERT, )  
 )  
 Respondent/Appellant. )  
 \_\_\_\_\_ )

RESPONDENT'S BRIEF ON JURISDICTION

CAREY HAUGHWOUT  
Public Defender

DEA ABRAMSCHMITT  
Assistant Public Defender  
Florida Bar No. 084506  
15<sup>TH</sup> Judicial Circuit of Florida  
The Criminal Justice Building  
421 3<sup>RD</sup> Street/6<sup>TH</sup> Floor  
West Palm Beach, Florida 33401  
(561) 355-7600  
appeals@pd15.state.fl.us

**TABLE OF CONTENTS**

<b>CONTENTS</b>	<b>PAGE</b>
TABLE OF CONTENTS .....	i
AUTHORITIES CITED .....	ii
STATEMENT OF THE CASE AND FACTS .....	1
SUMMARY OF THE ARGUMENT .....	2

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH EITHER STATE V. RAMSEY, 475 SO. 2D 671 (FLA. 1985) OR BEY V. STATE, 355 SO. 2D 850 (FLA. 3D DCA 1978). .....	3
CONCLUSION .....	8
CERTIFICATE OF SERVICE .....	8
CERTIFICATE OF FONT SIZE .....	9

AUTHORITIES CITED

CASES

PAGE(S)

Bey v. State, 355 So. 2d 850  
(Fla. 3d DCA 1978) ..... 2, 4

Brown v. State, 623 So. 2d 800  
(Fla. 4<sup>th</sup> DCA 1993) ..... 5

California v. Hodari D., 499 U.S. 621  
(1991) ..... 4

Hebert v. State, 962 So. 2d 1068  
(Fla. 4<sup>th</sup> DCA 2007) ..... 3, 5

Nielson v. City of Sarasota, 117 So. 2d 731  
(Fla. 1960) ..... 3

Ortiz v. State, 963 So. 2d 226  
(Fla. 2007) ..... 4

Perez v. State, 620 So. 2d 1256  
(Fla. 1993) ..... 5

Reaves v. State, 485 So. 2d 829  
(Fla. 1986) ..... 6

State v. Battis, 926 So. 2d 427  
(Fla. 2d DCA 2006) ..... 5

State v. Ramsey, 475 So. 2d 671  
(Fla. 1985) ..... 2, 3

Sweeney v. State, 633 So. 2d 66  
(Fla. 4<sup>th</sup> DCA 1994) ..... 5

**STATEMENT OF THE CASE AND FACTS**

Pursuant to Fla. R. App. P. 9.120(d) & 9.210(c), Respondent omits the Statement of the Case and Facts.

## SUMMARY OF THE ARGUMENT

The State argues that the Fourth District Court of Appeal's decision in this case expressly and directly conflicts with State v. Ramsey, 475 So. 2d 671 (Fla. 1985) and Bey v. State, 355 So. 2d 850 (Fla. 3d DCA 1978). The Ramsey Court was deciding whether the escape statute encompassed situations where a suspect was not already a prisoner, but had been arrested. The Ramsey Court found that a person becomes a prisoner under the statute when placed under arrest and in custody. The Hebert decision does not conflict with Ramsey because the issue in Hebert was whether or not Hebert was in custody.

Bey was charged with resisting arrest with violence, not escape. The Fourth District Court of Appeal considered the state's argument that Bey controlled and found it neither persuasive nor in conflict because it had been superceded by Hodari D.

Since there is no express or direct conflict with the instant decision, this Court does not have jurisdiction and should deny review.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH EITHER STATE V. RAMSEY, 475 SO. 2D 671 (FLA. 1985) OR BEY V. STATE, 355 SO. 2D 850 (FLA. 3D DCA 1978).

The State seeks to invoke this Court's discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal. Art. V, § 3(b)(3), Fla. Const. Conflict jurisdiction can arise when a court announces a rule of law that conflicts with a rule previously announced by this Court or another district court of appeal, or applies a rule of law to produce a different result in a case with substantially the same controlling facts as a case disposed of by this Court or another district court of appeal. Nielson v. City of Sarasota, 117 So. 2d 731, 731 (Fla. 1960).

The State argues first that the Fourth District Court of Appeal's decision in Hebert v. State, 962 So. 2d 1068 (Fla. 4<sup>th</sup> DCA 2007), conflicts with this Court's decision in State v. Ramsey, 475 So. 2d 671 (Fla. 1985). The Fourth acknowledged that the Ramsey decision broadened the literal language of the escape statute; §944.40, Florida Statutes (2005), to include situations where a suspect has been placed under arrest and then flees custody. Ramsey, 475 So. 2d at 672. In interpreting the escape statute, the Ramsey court wrote:

Since a suspect does not become a "prisoner" until he is placed under arrest, . . . "transportation to a place of confinement" begins at the time the suspect is placed under arrest, because that is the very first step in the process.

Id. This Court added, "Even though not yet physically restrained, one who has been placed under arrest has had his liberty restrained in that he is not free to leave."

The holding does not conflict with the Hebert decision in any manner. Unlike Ramsey, the issue in Hebert was whether he was ever placed under arrest. The Fourth concluded, following the U.S. Supreme Court's decision in California v. Hodari D., 499 U.S. 621 (1991), that a valid arrest requires either physical force or submission on the part of the suspect. Hebert, 962 So. 2d at 1070. The suspect in Ramsey had already submitted to police authority by stopping when the officer pulled him over for a traffic infraction. Thus, Ramsey was *not* free to leave and had his liberty restrained. When Ramsey subsequently fled the officer, he was properly charged with escape. Hence, the factual differences between Ramsey and Hebert determined the results. Distinguishing a case on its facts does not establish discretionary conflict jurisdiction. Ortiz v. State, 963 So. 2d 226 (Fla. 2007).

Next, the State alleges that Hebert is contrary to Bey. But Bey did not even involve an escape charge. Bey, 355 so. 2d at 851. Bey was convicted of resisting an officer with violence.

The question there was whether the police officer was justified in following Bey into his house when Bey ignored the officer's order to stop. Id. The Third discussed a 1975 statute, §901.22, Fla. Stat., which allowed an officer to pursue and re-take a person who had been arrested. Bey argued that he had not been arrested because the officer had not detained him. Id. at 851-52. The Third concluded that:

[W]hen a police officer confronts and tells a person that he is under arrest and the officer has the present power to control the person, although he may not actually do so, a constructive arrest has been effected.

Id. at 852. Even on the facts, Bey and Hebert are distinguishable because in Hebert the officer never had the "present power to control the person." The Fourth District fully reviewed the Bey case because the State relied on Bey in their answer brief on direct appeal. After reciting the facts and issues in that case, the Fourth concluded:

Because Bey was decided prior to Hodari, we find it neither persuasive nor in direct conflict.

Hebert, 962 So. 2d at 1071. Bey was a 1978 case. Not only has Hodari D. been decided since then, several Florida courts have cited to Hodari D. when reviewing escape cases, including this Court. See Perez v. State, 620 So. 2d 1256 (Fla. 1993) (police calling out for defendant to halt and subsequent chase did not constitute a seizure until defendant was caught); State v. Battis, 926 So. 2d 427 (Fla. 2d DCA 2006); Thomas v. State, 805 So.

2d 102 (Fla. 4<sup>th</sup> DCA 2002); Sweeney v. State, 633 So. 2d 66 (Fla. 4<sup>th</sup> DCA 1994); Brown v. State, 623 So. 2d 800 (Fla. 4<sup>th</sup> DCA 1993) (did not cite to Hodari but used its analysis to reverse an escape conviction).

Next, the State argues that the Fourth's decision is incorrect regardless of the alleged conflict, reciting facts not contained within the four corners of the Fourth's opinion. This Court has written that article V, section 3(b)(3) of the Florida Constitution requires that conflict between decisions must appear within the four corners of the majority opinion. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). "Neither a dissenting opinion nor the record itself can be used to establish jurisdiction," said this Court. Id. In a footnote, the Reaves Court explained further:

This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record . . . Thus, **it is pointless and misleading** to include a comprehensive recitation of facts not appearing in the decision below . . .

Id. at n. 3 (emphasis added).

But even if the additional facts were included in the Hebert opinion, the State misses the point. Neither the instant case

nor the previously cited cases dealing with when a suspect is seized (and therefore, in custody) have held that a person is arrested if they are hit by a police bullet. In order to *escape* from custody, it is axiomatic that one must first *be in custody*. The Fourth's decision here merely agreed with this premise, finding that Hebert was seized only when the officer took physical control of him when he fell down after being shot. This holding constitutes the essence of common sense and conforms to the intent of the escape statute. The Fourth's decision is far from being incorrect. Furthermore, it is not in direct or express conflict with any other Florida decision.

**CONCLUSION**

Respondent respectfully requests this Court to deny review.

Respectfully submitted,

CAREY HAUGHWOUT  
Public Defender

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DEA ABRAMSCHMITT  
Assistant Public Defender  
Florida Bar No. 084506  
15<sup>TH</sup> Judicial Circuit of Florida  
The Criminal Justice Building  
421 3<sup>RD</sup> Street/6<sup>TH</sup> Floor  
West Palm Beach, Florida 33401  
(561) 355-7600  
[appeals@pd15.state.fl.us](mailto:appeals@pd15.state.fl.us)

Attorney for Kenneth Nelson

Hebert

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the Respondent's Brief on Jurisdiction has been furnished to by courier to: MARK J. HAMEL, Assistant Attorney General, Counsel for Petitioner/Appellee, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, on this \_\_\_\_\_ day of October, 2007.

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\_\_\_\_\_  
Counsel for Petitioner/Appellant

**CERTIFICATE OF FONT SIZE**

Undersigned Counsel hereby certifies that the Instant Jurisdiction Brief is submitted with Courier New 12-Point font in compliance with *Fla. R. App. P. 9.210*.

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DEA ABRAMSCHMITT  
Appellate Counsel