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Fourth Amendment--Protection against Unreasonable Seizure of the Person: The New Common Law Arrest Test for Seizure

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FOURTH AMENDMENT—PROTECTION AGAINST UNREASONABLE SEIZURE OF THE PERSON: THE NEW(?) COMMON LAW ARREST TEST FOR SEIZURE

California v. Hodari D., 111 S. Ct. 1547 (1991)

I. INTRODUCTION

In *California v. Hodari D.*,¹ the United States Supreme Court held that a police pursuit of a fleeing suspect, no matter how threatening, does not amount to a seizure for Fourth Amendment purposes.² Under the Court's analysis, the Fourth Amendment does not become relevant until the suspect submits or is physically touched by the officer.³ Consequently, evidence a suspect discards during pursuit is not subject to exclusion at trial as the fruit of a Fourth Amendment seizure.⁴

Upon surveying the *Hodari D.* opinions, this Note concludes that the Court's decision calls into question the continuing validity of the exclusionary rule as a means of deterring improper police behavior. This Note points out the distinction and contradiction in logic between Justice Scalia's opinion for the majority in *Hodari D.* and the Court's earlier opinions governing Fourth Amendment seizures of persons. Further, this Note delineates the window of opportunity the Court's decision has opened to harrasing police behavior.

II. BACKGROUND

A. THE EXCLUSIONARY RULE

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁵ The ba-

¹ 111 S. Ct. 1547 (1991).

² *Id.* at 1549.

³ *Id.*

⁴ *Id.*

⁵ U.S. CONST. amend. IV.

sic purpose of this Amendment, "as recognized in countless decisions of [the Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."⁶

In *Boyd v. United States*,⁷ the Supreme Court announced a rule of exclusion of evidence obtained in violation of the Fourth Amendment.⁸ This "exclusionary rule," as it exists today, prohibits the fruits of an unreasonable search or seizure from being admitted into evidence in a criminal case.⁹ The rule is intended to motivate the law enforcement profession "to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights."¹⁰

Although the procedure at issue in *Boyd* was literally neither a search nor a seizure,¹¹ the Court nonetheless found it violated the defendant's Fourth Amendment rights.¹² The Court adhered to a liberal construction of constitutional provisions for the security of person and property, stating "a close and literal construction de-

⁶ *Camara v. Municipal Court*, 387 U.S. 523, 528 (1966) (citations omitted).

⁷ 116 U.S. 616 (1886).

⁸ *Id.* at 633. In *Boyd*, the United States brought criminal charges against an importer of goods, alleging the use of fraudulent invoices to avoid payment of duties. The Court held that forcing Boyd to disclose invoices implicated his Fifth Amendment right against self-incrimination. *Id.*

The "exclusionary rule" thus laid down was a product of the interrelationship between the Fourth and Fifth Amendments. *See id.* ("the seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself.").

The continued validity of the exclusionary rule announced in *Boyd* was called into question in *Adams v. New York*, 192 U.S. 585 (1904) (fact that papers may have been illegally taken from the party against whom they are offered is not a valid objection to their admissibility). However, the rule was reaffirmed in *Weeks v. United States*, 232 U.S. 383 (1914) (prejudicial error committed where letters and papers, taken from the accused in violation of the Fourth Amendment, were used in evidence over his objection).

⁹ *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990).

¹⁰ *See Dunaway v. New York*, 442 U.S. 207, 221 (1979) (Stevens, J., concurring); *see also Illinois v. Krull*, 480 U.S. 340, 347 (1987) ("[T]he Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process."); *but see Terry v. Ohio*, 392 U.S. 1, 14 (1968) ("Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.").

¹¹ The documents were not seized, but would remain in the defendant's possession subject to inspection at trial. *Boyd*, 116 U.S. at 640 (Miller, J., concurring) ("The act is careful to say that 'the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.'").

¹² *Id.* at 630.

prives [those provisions] of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance."¹³

In addition to evidence directly obtained from an illegal search or seizure, the Court has applied the exclusionary rule to evidence indirectly, or derivatively, obtained from such invasions.¹⁴ Writing for the Court in *Silverthorne Lumber v. United States*, Justice Holmes stated, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. . . . [T]he knowledge gained by the Government's own wrong cannot be used by it in the way proposed."¹⁵ Once the primary illegality is established, the exclusionary rule will apply to suppress all evidence obtained as "fruit of th[is] poisonous tree."¹⁶

¹³ *Id.* at 635. The Court later repudiated this position in *Olmstead v. New York*, stating: Justice Bradley in the *Boyd* case . . . said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

277 U.S. 438, 465 (1928) (the Court found that using a wiretap to listen in on telephone conversations was neither a 'search' nor a 'seizure' under the Fourth Amendment).

Forty years later, however, the Court renounced the *Olmstead* "narrow view," finding it substantially eroded by the Court's subsequent decisions. *Katz v. United States*, 389 U.S. 347, 353 (1967) ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

For the continuing validity of this view post-*Hodari D.*, see *infra* text accompanying notes 85-88.

¹⁴ See, e.g., *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (The government could not make use of information obtained during an unlawful search in order to subpoena from the victims the very documents illegally uncovered); *Nardone v. United States*, 308 U.S. 338 (1939) (Not only were unlawfully intercepted telephone messages inadmissible, but also the prosecution was not allowed to make use of the information so obtained).

The exclusionary rule has no application, however, where "the Government learned of the evidence 'from an independent source,' or the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (citing *Silverthorne Lumber*, 251 U.S. at 392; and *Nardone*, 308 U.S. at 341). The exclusionary rule also is inapplicable where the government would have, without the illegality, ultimately or inevitably discovered the evidence. *Nix v. Williams*, 467 U.S. 431 (1984).

¹⁵ *Silverthorne Lumber*, 251 U.S. at 392.

¹⁶ *Wong Sun*, 371 U.S. at 488 (citing *Nardone*, 308 U.S. at 341). "[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation— whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." *United States v. Crews*, 445 U.S. 463, 470 (1980) (citations omitted).

Application of the exclusionary rule thus requires both discovery of a Fourth Amendment violation and determination of the time at which the violation occurred.¹⁷ Police activity which does not amount to a "search" or "seizure," or is not "unreasonable," is unaffected by the exclusionary rule.¹⁸ Moreover, evidence discovered prior to a "search" or "seizure" does not come within the purview of the rule.¹⁹

B. THE *TERRY* STOP

Until *Terry v. Ohio*,²⁰ the Fourth Amendment proscribed any seizure of a person that was not justified by the same "probable cause" showing necessary to make a traditional, "trip to the stationhouse" arrest reasonable.²¹ In *Terry*, however, the Supreme Court "defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause . . . could be replaced by a balancing test."²²

¹⁷ *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

¹⁸ *Id.*

¹⁹ *Rios v. United States*, 364 U.S. 253, 262 (1960). Significantly, evidence so discovered may be used in determining whether the eventual "search" or "seizure" was "unreasonable." *Id.* (the police approached a taxicab and the passenger inside dropped a package of narcotics; the admissibility of the evidence turned upon the question of when the arrest occurred); see also Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 417 n.90 (1971) (citing *Capitoli v. Wainwright*, 426 F.2d 868, 869-70 (5th Cir. 1970), where all the evidence in a car, except a package thrown from it during the preceding chase was suppressed).

²⁰ 392 U.S. 1 (1968).

²¹ *Dunaway v. New York*, 442 U.S. 200, 210-11 (1979).

Either "probable cause" or consent was required to take a person into custody. *Id.* "Probable cause" existed if the facts and circumstances before the officer were "such as to warrant a man of prudence and caution in believing that an offense has been committed." *Carroll v. United States*, 267 U.S. 132, 161 (1924). The "probable cause" requirement also applied to searches. *Terry*, 392 U.S. at 37.

In order to get around this justification requirement police argued that a legal distinction should be made between an investigatory "stop" and an "arrest" ("seizure of the person"), and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of a crime. *Id.* at 10. Police argued that they should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. *Id.* Upon suspicion that the person may be armed, they should have the power to "frisk" him for weapons. *Id.*

²² *Dunaway*, 442 U.S. at 210-11.

The constitutionality of the "stop and frisk" was at issue in *Terry*. A police officer observed a group of men he thought intended to rob a store. He approached the men, identified himself as a police officer, and asked the men their names. When further questioning failed to dispel his suspicions, the officer grabbed hold of the defendants and, searching them for weapons, found they were carrying guns. 392 U.S. at 6-7.

The defendants moved to suppress the evidence so discovered as the fruit of an unreasonable search and seizure under the Fourth Amendment, arguing that the "stop" was an arrest, made without probable cause. The prosecution countered by arguing that

The Court refused to recognize a "rigid all-or-nothing model of justification and regulation under the Fourth Amendment."²³ In the Court's view "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness."²⁴

The Court acknowledged that there were limits to its analysis, however.²⁵ The Court stated, "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons."²⁶ "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."²⁷

the officer did not "arrest" the men until after he discovered the weapons. The trial court denied defendant's motion, and the Supreme Court upheld the denial. *Id.* at 7-8. The Court found that the stop and frisk was a search and seizure for purposes of the Fourth Amendment, but that it was justified by the officer's "reasonable suspicion" that criminal activity was afoot. *Id.* at 21, 31.

²³ *Terry*, 392 U.S. at 17.

²⁴ *Id.* at 17 n.15. The Court reasoned, "Focusing the inquiry squarely on the dangers and demands of the particular situation . . . seems more likely to produce rules which are intelligible to police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to [whether his conduct meets a technical definition of 'search,' or 'seizure'].²⁵ *Id.* " 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'²⁶ *Id.* at 19.

In determining whether a seizure or search is "unreasonable" the inquiry is a dual one— "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."²⁷ *Id.* at 20-21. In balancing the need to search and seize against the intrusion the procedure entailed in the present case, the Court concluded, where "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger, the policeman was justified in conducting a limited pat down, or 'frisk' for weapons."²⁸ *Id.* at 27-30.

²⁵ *Id.* at 21 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

²⁶ *Id.* at 19 n.16. Personal intercourse between policemen and citizens that does not rise to the level of a Fourth Amendment seizure, is consensual, and thus need not be justified under the Fourth Amendment. *Florida v. Royer*, 460 U.S. 491 (1983) (What began as a consensual conversation in a public place escalated into a seizure when Royer accompanied police to an interrogation room).

²⁷ *Terry*, 392 U.S. at 19 n.16. Thus, the Court did not rule out the proposition that a Fourth Amendment seizure may have taken place prior to the "stop and frisk."²⁸ *Id.* Based on the record before it, however, the Court stated "[w]e cannot tell with any certainty . . . whether any such 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus

Justice Stewart elaborated on the level of restraint required for a seizure of a person under the Fourth Amendment in *United States v. Mendenhall*.²⁸ Justice Stewart concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."²⁹ The Court later adopted this approach as the standard to be applied in Fourth Amendment cases.³⁰

In *Michigan v. Chesternut*,³¹ the Court was presented with the question whether evidence discarded by a fleeing suspect during a police pursuit was the fruit of a Fourth Amendment seizure.³² Police officers followed the defendant, who picked up his pace upon seeing them, but they did not use their siren or flashers, command

may assume that up to that point no intrusion upon constitutionally protected rights had occurred." *Id.*

²⁸ 446 U.S. 544 (1980) (police request to see identification and ticket of individual who stopped upon policemen's approach constituted seizure).

²⁹ *Mendenhall*, 446 U.S. at 554. This is referred to as the "*Mendenhall* test." While Justice Stewart announced the opinion of the Court in *Mendenhall*, the portion of his opinion which included the *Mendenhall* test was joined only by then Justice Rehnquist. *Id.*

Justice Stewart set forth some examples of police conduct which might indicate a "seizure" under this test: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554.

³⁰ See, e.g., *I.N.S. v. Delgado*, 466 U.S. 210, 218 (1984) (*Mendenhall* test not met; posting agents near exits of workplace should not have given respondents, who were otherwise free to continue working and move about, reason to believe that they would be detained if they refused to respond to questioning); *Florida v. Royer*, 460 U.S. 491, 501-02 (1983) (*Mendenhall* test met; Royer was unlawfully seized when police officers, who had possession of his plane ticket, identification and luggage, told him they suspected him of drug trafficking and asked him to accompany them to an interrogation room).

Before the *Mendenhall* test was adopted as the standard to be applied, the Court decided *Reid v. Georgia*, a case factually similar to *Hodari D.* See *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam). In *Reid*, a DEA agent noticed two men walking through an airport concourse who met the profile of drug couriers. When the men left the terminal, the agent approached them, identified himself, and asked them to show him their airline ticket stubs and identification, which they did. The agent thought the men appeared nervous during the encounter. The agent asked the men if they would agree to return to the terminal and consent to a search of their persons and luggage. One nodded his head, and the other said "yeah, okay." As the three of them entered the terminal, however, one of the men began to run and, before he was apprehended, abandoned his shoulder bag, which contained cocaine. *Id.* at 439.

The Court concluded that the facts before the agent were "simply too slender a reed to support the seizure in this case." *Id.* at 441. However, the Court did not enunciate at what point the encounter became a "seizure." In concurrence, Justice Powell stated, "Because we . . . do not consider the initial seizure question in our decision today, that issue remains open for consideration by the state courts in light of the opinions in *Mendenhall*." *Id.* at 443 (Powell, J., concurring).

³¹ 486 U.S. 567 (1988).

³² *Id.* at 569.

him to halt or display their weapons.³³ The officers did not operate their police car to block the defendant's course, "or otherwise control the direction or speed of his movement."³⁴

Applying the *Mendenhall* test, the Court found that the police conduct in question was not a Fourth Amendment seizure, reasoning that it "would not have communicated to a reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement."³⁵ The Court refused to adopt a bright line rule that a police pursuit "is or is not necessarily a seizure under the Fourth Amendment."³⁶ Instead, the Court adhered to its "traditional contextual approach" of assessing the coercive effect of police conduct, under all the circumstances.³⁷

III. FACTS AND PROCEDURAL HISTORY

At approximately 10:00 p.m. on April 18, 1988, Officers Brian McColgin and Jerry Pertoso of the Oakland Police Department's Narcotics Task Force were on patrol, travelling westbound on Foothill Boulevard in an unmarked brown Dodge.³⁸ They were dressed in street clothes but wearing blue jackets with "police" embossed on the front and back.³⁹ Both officers were familiar with this area because it was reputedly "an area with high narcotic activity."⁴⁰ The officers had participated in narcotics arrests in this area before.⁴¹

As the officers turned south from Foothill onto 63rd, they saw four or five young black males standing around a red compact car

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 573-74.

³⁶ *Id.* at 572. Justice Kennedy, joined by Justice Scalia in concurrence, would have adopted the negative perspective. *Id.* at 577 (Kennedy, J., concurring). Justice Kennedy stated, "whether or not the officer's conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." *Id.* (Kennedy, J., concurring).

³⁷ *Id.* at 573. Expressing his approval of the Court's focus on the coercive effect of police conduct, rather than the reaction of the suspect, Professor Wayne LaFave stated: The "free to leave" concept, in other words, has nothing to do with a particular suspect's choice to flee rather than submit or with his assessment of the probability of successful flight. Were it otherwise, police would be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop.

³⁸ WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2 at 61 (1987, Supp. 1991).

³⁹ Joint Appendix at 26-27, *California v. Hodari D.*, 111 S. Ct. 1547 (1991) (No. 89-1632) [hereinafter Joint Appendix].

⁴⁰ *California v. Hodari D.*, 111 S. Ct. 1547, 1548 (1991).

⁴¹ Joint Appendix, *supra* note 38, at 27-28.

⁴¹ *Id.* at 28.

which was parked along the curb.⁴² The youths were approximately forty yards away.⁴³ Although the officers did not recognize any of the individuals, they believed they had interrupted some kind of narcotic activity.⁴⁴ However, neither officer saw any money or drugs being exchanged.⁴⁵

When the youths saw the officers' car approaching, they apparently panicked and took flight.⁴⁶ Hodari⁴⁷ and one companion ran west through an alley to the rear of an abandoned house.⁴⁸ The others fled south.⁴⁹ The red car also departed south, at a high rate of speed.⁵⁰

Officer McColgin drove the patrol car to the curb where the red car had been parked.⁵¹ Officer Pertoso left the car to give chase on foot, while McColgin remained in the car and continued south on 63rd.⁵² The officers intended to stop the youths and find out what their purpose was for being in the area.⁵³

When Pertoso left the car, all of the individuals were out of sight.⁵⁴ Pertoso ran to cut them off.⁵⁵ He went back north on 63rd, then west on Foothill, and turned south on 62nd Avenue.⁵⁶ Hodari, meanwhile, emerged from the alley onto 62nd and ran north.⁵⁷ Hodari was looking over his shoulder as he ran, as if to see if someone was following him.⁵⁸ When he turned and saw Pertoso, Hodari looked startled.⁵⁹ They were approximately eleven feet apart.⁶⁰

At this point, "in an underhand scooping motion" Hodari discarded a single loose rock, alongside a house.⁶¹ A moment later, Pertoso tackled Hodari, handcuffed him, and radioed for assist-

⁴² *Id.* at 27.

⁴³ *Id.* at 39.

⁴⁴ *Id.* at 29; *see also id.* at 40.

⁴⁵ *Id.* at 28, 43.

⁴⁶ *California v. Hodari D.*, 111 S. Ct. 1547, 1549 (1991).

⁴⁷ Hereinafter, the respondent will be referred to as "Hodari," for simplicity.

⁴⁸ Joint Appendix, *supra* note 38, at 39.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 29.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 41.

⁵⁵ *Id.*

⁵⁶ *Id.*; *see also id.* at 46.

⁵⁷ *Id.* at 41.

⁵⁸ *Id.*

⁵⁹ *Id.* at 46.

⁶⁰ *Id.* at 42.

⁶¹ *Id.* at 41-42.

ance.⁶² Upon searching Hodari, Pertoso found \$130 in cash and a pager.⁶³ Laboratory analysis determined that the rock Hodari discarded was crack cocaine.⁶⁴

In the juvenile proceeding brought against him, Hodari moved to suppress the evidence relating to the cocaine, as the fruit of an unlawful seizure of his person.⁶⁵ The court denied the motion without opinion.⁶⁶

The California Court of Appeal reversed.⁶⁷ The court found that Hodari had been "seized" when he saw Officer Pertoso running towards him,⁶⁸ that this seizure was unreasonable under the Fourth Amendment,⁶⁹ and that the evidence of the cocaine was the fruit of the illegal seizure.⁷⁰ The court thus held that Hodari's motion was improperly denied at trial.⁷¹

In concluding that a Fourth Amendment seizure had occurred, the Court of Appeal utilized the rationale of *Michigan v. Chesternut*.⁷² The Court of Appeal reasoned that Pertoso's action was "reasonably perceived" as an intrusion upon Hodari's freedom of movement and as "a maneuver intended to block or 'otherwise control the direction or speed' " of Hodari's movement, and therefore was a Fourth Amendment seizure.⁷³

The court rejected the State's contention that "by its citation of

⁶² *Id.* at 30, 42.

⁶³ *Id.* at 103.

⁶⁴ *Id.* at 109.

⁶⁵ *Id.*

⁶⁶ The California Court of Appeal inferred from the record that the juvenile court's main concern was "with the nexus between the illegality and the evidence, rather than the issue of whether there was illegal police conduct." *In re Hodari D.*, 265 Cal. Rptr. 79, 81-82 (Cal. Ct. App. 1989) ("The [juvenile] court stated: 'I'm not concerned with the illegality of the chase on these facts. I think this was clearly illegal. The cops had no reasonable basis for doing what they did in chasing him.'").

⁶⁷ *Id.* at 80.

⁶⁸ *Id.* at 83. Relying on the United States Supreme Court's focus on the coercive effect of police conduct in *Michigan v. Chesternut*, the Court of Appeal found that since Hodari had no knowledge of the actions of Officers Pertoso and McColgin between the time he left their presence and the time he was confronted by Pertoso, the officers' conduct during this interval was irrelevant to its Fourth Amendment analysis. *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567, 576 n.7 (1988)).

⁶⁹ *Id.* at 84. On appeal, the State did not dispute the lower court's finding that the police had no reasonable cause to chase or detain Hodari. *Id.* Nonetheless, the Court of Appeal analyzed the issue and concluded that, "[t]he factors of nighttime, high drug activity in the area, and seeking to avoid police [by fleeing]" do not constitute "reasonable suspicion" sufficient to justify a seizure. *Id.* at 84-85.

⁷⁰ *Id.* at 86.

⁷¹ *Id.*

⁷² *Id.* at 83 (citing *Chesternut*, 486 U.S. at 575).

⁷³ *Id.*

*Hester v. United States*⁷⁴ in *Brower v. County of Inyo*⁷⁵, a civil rights case, the Supreme Court had adopted the suggestion of two justices in *Chesternut* that there can be no detention until a fleeing suspect is actually caught."⁷⁶ The court reasoned that if the statement of those justices "refer[red] to a requirement of *physical* restraint, it would be contrary to many years of Supreme Court precedent stating that no physical restraint is necessary to constitute a detention."⁷⁷

Even if physical seizure were required, the court concluded, the confrontation between Hodari and Officer Pertoso was tantamount to a physical seizure. The court reasoned that "[Hodari], who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked 'police' who was eleven feet away and running towards him."⁷⁸

The California Supreme Court denied the State's application for review.⁷⁹ The United States Supreme Court granted certiorari to consider whether, at the time he dropped the drugs, Hodari had been "seized" within the meaning of the Fourth Amendment.⁸⁰

⁷⁴ 265 U.S. 57 (1924). In *Hester*, the defendant was under surveillance as a result of an informant's tip. Officers saw the defendant hand an accomplice a quart bottle, at which point an "alarm" was given, and the two men fled. An officer pursued, and the two men dropped bottles, which the officers recognized as containing illegal whiskey. The Court of Appeal distinguished *Hester*:

It appears from these facts that the officers in *Hester* had at least a reasonable suspicion, having lawfully witnessed the transaction with the bottles, which would have justified a detention prior to defendant's flight. The case has no application to illegal detentions, nor does it purport to define what constitutes a detention, but merely states that there was no seizure when the officers inspected the bottles.

In re Hodari D., 265 Cal. Rptr. at 83.

⁷⁵ 489 U.S. 593 (1989).

⁷⁶ *In re Hodari D.*, 265 Cal. Rptr. at 83 (citing *Chesternut*, 486 U.S. at 576 (Kennedy, J., concurring, joined by Scalia, J.)).

⁷⁷ *Id.* at 83 n.3 (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972) (involuntary rolling down of vehicle window in response to officer's request denoted a "forcible stop"); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) ("[o]nly when the officer, by means of physical force or *show of authority*, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.") (emphasis supplied)).

The Court of Appeal also cited California and federal cases which held that "giving chase 'in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention.'" *In re Hodari D.*, 265 Cal. Rptr. at 83 (citing *People v. Washington*, 236 Cal. Rptr. 840 (Cal. App. 1987); *People v. Meniffee*, 160 Cal. Rptr. 682 (Cal. App. 1979); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980)).

⁷⁸ *Id.* at 84 n.4.

⁷⁹ *In re Hodari D.*, 1990 Cal. LEXIS 1302 (1990). At the same time, the California Supreme Court ordered the decision of the Court of Appeal withdrawn from official publication. *Id.*

⁸⁰ *California v. Hodari D.*, 111 S. Ct. 1547, 1549 (1991). Petitioner, State of Califor-

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

The Supreme Court reversed the decision of the California Court of Appeal.⁸¹ Writing for the majority,⁸² Justice Scalia concluded that although the police pursuit may have constituted a "show of authority" enjoining Hodari to stop, Hodari was not "seized" until physically apprehended, because he did not submit to that injunction.⁸³ Thus, the Court held that evidence abandoned during the pursuit was not the fruit of a Fourth Amendment seizure, and Hodari's motion to suppress this evidence was properly denied at trial.⁸⁴

The majority based its conclusion on the dictionary definition and common law usage of the word "seizure."⁸⁵ The Court stated that "[f]rom the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'"⁸⁶ Further, "[f]or most purposes at common law, the word connoted not merely grasping or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control."⁸⁷ Where, as here, the arrestee did not actually bring his object within physical control, therefore, the Court concluded that there was no seizure.⁸⁸

As a policy matter, the Court reasoned that because street pur-

nia, conceded that the officer did not have a "reasonable suspicion" to seize Hodari when the pursuit began. *Id.* at 1549 n.1.

The order granting certiorari is published at 111 S. Ct. 38 (1991).

⁸¹ *Hodari D.*, 111 S. Ct. at 1552.

⁸² Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, Kennedy, and Souter joined Justice Scalia.

⁸³ *Hodari D.*, 111 S. Ct. at 1552.

The majority accepted as true, without deciding, that the police pursuit amounted to a "show of authority" as soon as Hodari saw the officer nearly upon him. *Id.* at 1550 (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

The majority did not decide whether the police had "reasonable suspicion" to stop Hodari when the pursuit began, choosing instead to rely on the State's concession that they did not. *Id.* at 1549 n.1. The majority stated however, "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense." *Id.* (citing Proverbs 28:1, "The wicked flee when no man pursueth").

⁸⁴ *Id.* at 1549.

⁸⁵ *Id.*

⁸⁶ *Id.* (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828); 2 JOHN BOUVIER, A LAW DICTIONARY 510 (6th ed. 1856); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1981)).

⁸⁷ *Id.* at 1549-50 (citing *Pelham v. Rose*, 76 U.S. (9 Wall.) 103, 106 (1870) ("A *res* capable of manual delivery was not seized until 'taken into custody.'")).

⁸⁸ *Id.* at 1550 (the word seizure "does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee.").

suits always place the public at some risk, compliance with police orders to stop should be encouraged.⁸⁹ Moreover, the Court argued that its decision would not alter police expectations.⁹⁰ Since police do not attempt to stop suspects expecting them to get away, the Court explained, "it fully suffices to apply the exclusionary rule to their genuine successful seizures."⁹¹

The majority acknowledged the "principle" that all common law arrests are seizures,⁹² but rejected suggestion that Officer Pertoso's "uncomplained-with show of authority" was a common law arrest.⁹³ The Court explained that in order to constitute an arrest at common law, the arrestee either had to submit to, or be physically touched by, the person making the arrest.⁹⁴ Without either submission or touching, however, there could be no arrest and thus no Fourth Amendment seizure.⁹⁵

Because Hodari did not submit when confronted by the officer, and because there was no physical contact between the officer and Hodari during the chase, the Court concluded that the officer did not seize Hodari until he tackled him.⁹⁶ Moreover, since "[a] seizure is a single act, and not a continuous fact," even if "Pertoso had laid his hands upon Hodari to arrest him," if "Hodari had bro-

⁸⁹ *Id.* at 1551.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* The Court did not cite authority for this "principle," which is apparently first enunciated here.

⁹³ *Id.*

⁹⁴ *Id.*

A common law arrest was predicated on either "actual" or "constructive" seizure of the arrestee. Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 553 (1924).

An "actual" seizure, or detention, was accomplished by physical control, taking possession, or laying on of hands, which subjected the arrestee to actual control. *Id.* Actual seizure also arose from "a surrender or yielding upon demand, to immediately apprehended coercion, rather than resisting it." *Id.* However, words indicating an arrest without submission by the arrestee were not sufficient. *Id.* (footnote omitted).

A "constructive" seizure was accomplished "by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although he [did] not succeed in stopping or holding him even for an instant." ASHER L. CORNELIUS, *THE LAW OF SEARCH AND SEIZURE* 163-64 (2d ed. 1930) (footnote omitted); Wilgus, *supra* this note, at 556 (citing *Whitehead v. Keyes*, 85 Mass. 495 (1862); *Genner v. Sparkes*, 1 Salk. 79, 6 Mod. 173 (1704) (where the bailiff had tried to arrest one who fought him off by a fork, the court said, "if the bailiff had touched him, that had been an arrest."); *People v. McLean*, 68 Mich. 480 (arrest occurred where officer laid his hand on the shoulder of the accused and pronounced words of arrest, despite the fact that immediately thereafter the accused pulled a revolver and forced his way free)).

⁹⁵ *Hodari D.*, 111 S. Ct. at 1551 (citing Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940)).

⁹⁶ *Id.*

ken away and [] *then* cast away the cocaine, it would hardly be realistic to say that disclosure had been made during the course of an arrest."⁹⁷

The majority replied to the dissent's contention that Supreme Court jurisprudence, beginning with *Katz v. United States*,⁹⁸ had "unequivocally reject[ed] the notion that the common law defines the limits of the term 'seizure' in the Fourth Amendment."⁹⁹ The majority explained that it did not assert that under the Fourth Amendment the common law "defines the limits of the term 'seizure'; only that it defines the limits of a *seizure of the person*."¹⁰⁰ Thus, the majority maintained that its reasoning was consistent with *Katz*: "What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g. telephone conversations) can be seized under the Fourth Amendment. That is quite different from saying that what constitutes an arrest (seizure of the person) has changed."¹⁰¹

The majority rejected the dissent's contention that the Court's decision in *Terry v. Ohio*¹⁰² broadened the range of encounters encompassed within the term "seizure."¹⁰³ *Terry*, the Court stated, "unquestionably involved conduct that would constitute a common-law seizure; its novelty (if any) was in expanding the acceptable *justification* for such a seizure, beyond probable cause."¹⁰⁴

In accordance with this position, the majority interpreted the *Mendenhall* test to be a necessary, but not a sufficient condition for the seizure of a person under the Fourth Amendment.¹⁰⁵ Because this test was worded "only if" rather than "whenever," the majority reasoned that a Fourth Amendment seizure does not automatically result from a police "show of authority" which the subject reasonably believes is intended to restrict her freedom.¹⁰⁶ Rather, a suspect must submit to this authority in order to be "seized."¹⁰⁷ Finding the *Mendenhall* test met during pursuit, therefore, was perfectly consistent with finding that seizure did not occur until after

⁹⁷ *Id.* at 1550 (citing *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 471 (1874)).

⁹⁸ 389 U.S. 347 (1967).

⁹⁹ *Hodari D.*, 111 S. Ct. at 1551 n.3 (citing *Hodari D.*, 111 S. Ct. at 1555 (Stevens, J., dissenting)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 392 U.S. 1 (1968).

¹⁰³ *Hodari D.*, 111 S. Ct. at 1551 n. 3 (citing *Hodari D.*, 111 S. Ct. at 1555 (Stevens, J., dissenting)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1551.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

the pursuit ended.¹⁰⁸

The majority found *Michigan v. Chesternut*¹⁰⁹ and *Brower v. County of Inyo*¹¹⁰ consonant with its approach.¹¹¹ The majority reasoned that since the *Mendenhall* test was not met in *Chesternut*,¹¹² the Court in that case did not reach the question whether a police pursuit, in and of itself, could constitute a Fourth Amendment seizure.¹¹³ The majority found persuasive the fact that the Court in *Brower* did not consider the possibility that a seizure could have occurred during the course of a twenty mile police chase.¹¹⁴ The majority reasoned that was because that twenty mile "show of authority" did not produce a stop.¹¹⁵

B. THE DISSENTING OPINION

Writing for the dissent, Justice Stevens¹¹⁶ strongly objected to the majority's literal interpretation of the language of the Fourth Amendment, stating that it broke sharply from a long line of cases which had rejected this analysis.¹¹⁷ Further, the dissent rejected the majority's reliance on the common law of arrest to define the limits of the seizure of a person.¹¹⁸ Finally, Justice Stevens denounced the majority's focus on the reaction of the citizen, rather than the egregious police conduct, in defining the timing of a seizure.¹¹⁹

The dissent asserted that beginning with *Katz v. United States*, the Court abandoned a literal reading of the Fourth Amendment.¹²⁰ Instead, the Court adopted a position of applying the safeguards of the Fourth Amendment to "all evils that are like and equivalent to

¹⁰⁸ *Id.* at 1552.

¹⁰⁹ 486 U.S. 567 (1980). See *supra* notes 31-37 and accompanying text.

¹¹⁰ 489 U.S. 593 (1989) (collision between Brower's car and police roadblock was a seizure).

¹¹¹ *Hodari D.*, 111 S. Ct. at 1552.

¹¹² *Id.* The police cruiser's slow following of the suspect did not convey the message that he was not free to disregard the police and go about his business. *Chesternut*, 486 U.S. at 573. See *infra* text accompanying notes 171-73.

¹¹³ *Hodari D.*, 111 S. Ct. at 1552.

¹¹⁴ *Id.* (citing *Brower*, 489 U.S. at 597).

¹¹⁵ *Id.*

¹¹⁶ Justice Stevens was joined by Justice Marshall.

¹¹⁷ *Hodari D.*, 111 S. Ct. at 1555 (Stevens, J., dissenting); see *supra* notes 11-13 and accompanying text.

¹¹⁸ *Id.* at 1556-57 (Stevens, J., dissenting).

¹¹⁹ *Id.* at 1555 (Stevens, J., dissenting).

¹²⁰ *Id.* (Stevens, J., dissenting) (citing *Katz v. United States*, 389 U.S. 347 (1967)). *Katz* involved electronic surveillance conducted "without any trespass and without the seizure of any material object." The Court concluded that such electronic eavesdropping is a "search and seizure" within the meaning of the Constitution. 389 U.S. at 353-54; see *supra* notes 11-13 and accompanying text.

those embraced within the ordinary meaning of its words.”¹²¹ The Court in *Katz* specifically held that the Fourth Amendment extended to processes which could not have been the subject of a common-law seizure.¹²²

Soon thereafter, in *Terry v. Ohio*, the Court expanded the acceptable justification for a seizure of a person from probable cause to reasonable suspicion.¹²³ Justice Stevens explained that “[a]s a corollary to the lesser justification for a stop, the Court [in *Terry*] necessarily concluded that the word “seizure” in the Fourth Amendment encompassed official restraints on individual freedom that fall short of a common-law arrest.”¹²⁴ The majority’s emphasis on *Hester v. United States*, decided over forty years before *Terry*, was therefore misplaced.¹²⁵

Moreover, the dissent argued, the majority’s “novel conclusion” that actual control is required for a seizure of a person makes the Court’s discussions of whether the *Mendenhall* test was met in cases where no actual control was imposed seriously misleading.¹²⁶

The dissent acknowledged that the officer’s attempt to take Hodari into custody was not a common law arrest.¹²⁷ The dissent

¹²¹ *Id.* (Stevens, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438 (1928) (Butler, J., dissenting)).

¹²² *Id.* (Stevens, J., dissenting) (citing *Katz*, 389 U.S. at 353-54).

¹²³ *Id.* at 1555 (Stevens, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

¹²⁴ *Id.* at 1555 (Stevens, J., dissenting) (citing *Terry*, 392 U.S. at 19). In further support of his position that a seizure of a person who refuses to submit to a show of authority requires something less than a physical touching, Justice Stevens cited *United States v. Jacobsen*, 466 U.S. 109 (1984):

While the concept of a “seizure” of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the “seizure” of a person within the meaning of the Fourth Amendment— meaningful interference, however brief, with an individual’s freedom of movement. (citations omitted).

¹²⁵ *Hodari D.*, 111 S. Ct. at 1555 n.9 (Stevens, J., dissenting) (citing *Hester v. United States*, 265 U.S. 57 (1924)).

¹²⁶ *Id.* at 1557 (Stevens, J., dissenting) (citing *I.N.S. v. Delgado*, 466 U.S. 210 (1984)).

The dissent also pointed out that the majority’s focus on the suspect’s reaction as opposed to the policeman’s conduct, was the exact argument that was rejected by the Court in *Chesternut*:

Petitioner argues that the Fourth Amendment is never implicated until an individual stops in response to the police’s show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual.

Id. at 1558 n.13 (Stevens, J., dissenting) (citing *Michigan v. Chesternut*, 486 U.S. 567, 572 (1980)). The Court in *Chesternut* decided to adhere to its “traditional contextual approach” in determining whether a seizure had occurred. *Id.* at 1558 (Stevens, J., dissenting) (citing *Chesternut*, 486 U.S. at 573).

¹²⁷ *Id.* at 1553 (Stevens, J., dissenting). The dissent stated that if the officer had succeeded in touching Hodari before he dropped the rock (assuming the touching precipi-

pointed out, however, that such an attempt was unlawful at common law.¹²⁸ The dissent noted the irony "in the fact that the Court's own justification for its result is its analysis of the rules of the common law of arrest that antedated our decisions in *Katz* and *Terry*. Yet, even in those days the common law provided the citizen with protection against an attempt to make an unlawful arrest."¹²⁹

Justice Stevens condemned the majority's decision to remove from scrutiny the interval of time between the officer's show of authority and complete submission by the citizen.¹³⁰ During this interval, Justice Stevens explained, evidence could be discovered which would make a seizure, initiated unreasonably, reasonable.¹³¹ Thus, police would "be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop." ¹³²

The dissent argued that the ends the Court sought to achieve in denying suppression of the evidence in this case would have been better served by enlarging the scope of reasonable justification, rather than narrowing the definition of a seizure.¹³³ Placing police conduct beyond scrutiny, the dissent argued, contradicts the purpose of the exclusionary rule, and Fourth Amendment prohibitions, to deter improper police behavior.¹³⁴

V. ANALYSIS

*California v. Hodari D.*¹³⁵ represents the culmination of a strug-

tated the abandonment), the evidence would have been the fruit of an unlawful common law seizure. *But see supra* text accompanying note 97 (if Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest).

¹²⁸ *Hodari D.*, 111 S. Ct. at 1553 (Stevens, J., dissenting) (citing Perkins, *supra* note 95, at 201 n.3, "[A]n officer might be guilty of an assault because of an attempted arrest, without privilege, even if he did not succeed in touching the other. Furthermore, if the other submitted to such an arrest without physical contact, the officer is liable for false imprisonment." (citation omitted)).

¹²⁹ *Id.* at 1561 (Stevens, J., dissenting).

¹³⁰ *Id.* (Stevens, J., dissenting).

¹³¹ *Id.* (Stevens, J., dissenting). The majority's decision, Justice Stevens argued, thus distinguishes "show of authority" seizures from physical force seizures, and all searches, which need to be justified at their inception. *Id.* at 1560 (Stevens, J., dissenting).

¹³² *Id.* at 1561 (Stevens, J., dissenting) (citing 3 LAFAYE, *supra* note 37, § 9.2 at 61).

¹³³ *Id.* at 1559 (Stevens, J., dissenting).

¹³⁴ *Id.* (Stevens, J., dissenting). Moreover, the dissent argued that the majority's decision to apply a rigid test will not reduce litigation in this area: "The range of possible responses to a police show of force, and the multitude of problems that may arise in determining whether, and at what moment, there has been 'submission,' can only create uncertainty and generate litigation." *Id.* at 1560 (Stevens, J., dissenting).

¹³⁵ 111 S. Ct. 1547 (1991).

gle between two factions of the Supreme Court.¹³⁶ One group, including Justices Scalia and Kennedy, has been intimating its stance on the issue presented in *Hodari D.* for several years.¹³⁷ Until now, their position has been relegated to dicta and separate opinions.¹³⁸ In *Hodari D.*, however, their position not only prevailed, but prevailed handily.¹³⁹ Writing for a seven member majority, Justice Scalia concluded that a police "show of authority" which is unheeded by a suspect does not amount to a seizure of the person for purposes of the Fourth Amendment.¹⁴⁰

The Court thus refined its analysis of *Terry v. Ohio* and its progeny.¹⁴¹ There remain, under these cases, two categories of Fourth Amendment seizures: those based upon physical force and those based on an official show of authority.¹⁴² Under Justice Scalia's approach in *Hodari D.*, however, the Court limited the reach of the show of authority category.¹⁴³ An official show of authority, which an individual reasonably believes is intended to restrict her freedom of movement, and which meets the *Mendenhall* test,¹⁴⁴ does not amount to a seizure for Fourth Amendment purposes unless and until that individual submits.¹⁴⁵

The Court justified this position by appealing to the "principle," apparently first enunciated here, that the common law of arrest defines the limits of the seizure of a person under the Fourth Amendment.¹⁴⁶ By so doing, however, the Court expanded the physical force category of Fourth Amendment seizures.¹⁴⁷ A common law arrest, and now a Fourth Amendment seizure, results from

¹³⁶ See, e.g., *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (opinion by Scalia, J.) ("Violation of the Fourth Amendment requires intentional acquisition of physical control."); *Michigan v. Chesternut*, 486 U.S. 567, 577 (1988) (Kennedy, J., concurring) ("It is at least plausible to say that whether or not the officer's conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate the Fourth Amendment protections until it achieves a restraining effect."); compare with *Chesternut*, 486 U.S. at 572-73 (opinion by Blackmun, J.) (Court refused to adopt a rule that "a lack of particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual.").

¹³⁷ See *supra* note 136.

¹³⁸ *Id.*

¹³⁹ *Hodari D.*, 111 S. Ct. at 1547.

¹⁴⁰ *Id.*

¹⁴¹ See *supra* notes 20-30 and accompanying text.

¹⁴² See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); see also *supra* text accompanying note 27.

¹⁴³ *Hodari D.*, 111 S. Ct. at 1550.

¹⁴⁴ See *supra* note 29 and accompanying text.

¹⁴⁵ *Hodari D.*, 111 S. Ct. at 1550.

¹⁴⁶ *Id.* at 1550-51.

¹⁴⁷ See *id.* at 1553 (Stevens, J., dissenting).

physical contact, however slight, between the person arresting and the person arrested, for the purpose of the arrest.¹⁴⁸ Thus while control over a subject is required for a show of authority seizure, it is not required for a physical force seizure.¹⁴⁹

In *Brower v. County of Inyo*, writing for the Court, Justice Scalia announced that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control."¹⁵⁰ In *Hodari D.*, however, Justice Scalia stated that in order to determine whether a Fourth Amendment seizure has occurred one may simply "appea[l] to the principle that all common law arrests are seizures."¹⁵¹ Since an arrest at common law did not require the acquisition of physical control, Justice Scalia's reasoning in *Hodari D.* contradicts his reasoning for the Court in *Brower*.¹⁵²

The outcomes of *Brower* and *Hodari*, however, are unchanged under either analysis. The police officer exercised control over Hodari when he tackled him.¹⁵³ The police made physical contact with Brower when his car collided with the roadblock they set up to stop him.¹⁵⁴ The decision in *Brower* did not turn on the question of physical control.¹⁵⁵

The question before the Court in *Brower* concerned the relationship between police activity and the termination of a subject's movement, that is necessary to constitute a Fourth Amendment seizure.¹⁵⁶ The County of Inyo argued that the police intended to stop the defendant only by show of authority, by pursuit and by setting up a roadblock in his path.¹⁵⁷ The defendant's crashing into the roadblock, the County argued, was an accidental effect of otherwise lawful police activity and thus was not a Fourth Amendment seizure.¹⁵⁸

After surveying the history and purpose of the Fourth Amendment, the Court concluded that a seizure occurs whenever a person is "stopped by the very instrumentality set in motion or put in place in order to achieve that result."¹⁵⁹ The subjective intentions of the

¹⁴⁸ *Id.* at 1550; see *supra* note 94-95 and accompanying text.

¹⁴⁹ See *id.*

¹⁵⁰ *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

¹⁵¹ *Hodari D.*, 111 S. Ct. at 1551.

¹⁵² *Id.* This is under "physical force" branch of the Fourth Amendment seizure of the person. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

¹⁵³ *Hodari D.*, 111 S. Ct. at 1549.

¹⁵⁴ *Brower*, 489 U.S. at 594.

¹⁵⁵ See *id.*

¹⁵⁶ *Id.* at 596-97.

¹⁵⁷ *Id.* at 597.

¹⁵⁸ *Id.* at 595-96.

¹⁵⁹ *Id.*

police were therefore irrelevant.¹⁶⁰

At common law, an arrest occurred whenever police made physical contact with a suspect for the purpose of arresting him.¹⁶¹ Therefore, since a common law arrest resulted when the defendant collided with the roadblock, *Brower* could have been decided by simply "appealing to the principle that all common law arrests are seizures."¹⁶² The Court's discussion of the history of the Fourth Amendment was "at best, seriously misleading."¹⁶³

Necessary to sustain the Court's conclusion that the common law of arrest defines the limits of Fourth Amendment seizures, is the premise that the *Mendenhall* test was meant as a necessary but not sufficient condition for a show of authority seizure.¹⁶⁴ For, if meeting the *Mendenhall* test were all that was required for a Fourth Amendment seizure in these instances (i.e. submission was not also required), then the seizure of a person under the Fourth Amendment would be a broader notion than the common law arrest.¹⁶⁵ The Court found the existence of this premise exemplified by *Brower* and *Michigan v. Chesternut*.¹⁶⁶

The Court found significant the fact that it was not discussed in *Brower* whether a Fourth Amendment seizure could have occurred during the course of a twenty mile police chase.¹⁶⁷ The Court reasoned that was because that "show of authority did not produce a stop."¹⁶⁸ The Court's emphasis on *Brower* is inappropriate, how-

¹⁶⁰ *Id.*

¹⁶¹ See *supra* notes 94-95 and accompanying text.

¹⁶² See *supra* note 94 (a common law arrest occurs when there is the intentional application of physical force for the purpose of arrest).

¹⁶³ See *California v. Hodari D.*, 111 S. Ct. 1547, 1557 (1991) (Stevens, J., dissenting); see also *Brower*, 489 U.S. at 595-97.

¹⁶⁴ See *Hodari D.*, 111 S. Ct. at 1550.

¹⁶⁵ See *supra* note 94.

¹⁶⁶ *Hodari D.*, 111 S. Ct. at 1551-52 (citing *Brower*, 489 U.S. at 596 and *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)).

The Court based this premise not only on the common law of arrest, but also the language of the *Mendenhall* test itself. *Id.* at 1550. The Court found especially persuasive the fact that the *Mendenhall* test was worded so that an individual is seized "only if" the test was met, rather than an individual is seized "whenever" the test was met. *Id.* at 1551. Lower courts did not so interpret these words. See, e.g., *In re D.J.*, 532 A.2d 138, 140 (D.C. 1987) (commencement of police pursuit was a seizure for purposes of the Fourth Amendment under *Mendenhall* test); *People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985) (same).

It can be legitimately argued, however, that the Court has not yet decided a case in which police conduct met the *Mendenhall* test, but the subject did not submit. See *Hodari D.*, 111 S. Ct. at 1559 (Stevens, J., dissenting) ("the facts of this case are somewhat unusual"); but see *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam).

¹⁶⁷ *Id.* at 1552 (citing *Brower*, 489 U.S. at 597).

¹⁶⁸ *Id.*

ever. *Brower* was a civil rights case, in which damages were sought for an unreasonable seizure of a person under the Fourth Amendment.¹⁶⁹ The "unreasonableness" was not the chase of Brower, who was fleeing police in a stolen car, but rather the erection of a police roadblock around a blind corner, and then shining a light in Brower's face so he could not see the roadblock in time to stop.¹⁷⁰

The Court also found significant its perception that the question of whether a police pursuit could constitute a seizure was not reached in *Chesternut*.¹⁷¹ As Justice Stevens pointed out in dissent, however, the Court in *Chesternut* rejected the proposition that a police pursuit can never constitute a Fourth Amendment seizure.¹⁷² In finding that there was no seizure in *Chesternut*, the Court relied on the fact that the police officers did not harass the defendant, not that the defendant did not submit, which would have ended the matter without discussion under the "necessary, but not sufficient" approach.¹⁷³

The most troubling aspect of the decision in *Hodari D.*, however, is the Court's conclusion that its decision will have no effect on police behavior.¹⁷⁴ The Court erroneously concluded that "unlawful [police] orders [to "stop"] will not be deterred, [] by sanctioning through the exclusionary rule those of them that are not obeyed. . . . [I]t fully suffices to apply the deterrent to their genuine successful seizures."¹⁷⁵ In reaching this conclusion, the Court stated "we must presume that only a few of those orders will be without adequate basis" and that "policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun."¹⁷⁶

The Court did not base its presumptions on a belief in the good faith of policemen. The Court previously rejected "good faith" as a justification for declining to apply the exclusionary rule.¹⁷⁷ Because police are engaged in "the often competitive enterprise of ferreting

¹⁶⁹ *Brower*, 489 U.S. at 594.

¹⁷⁰ *Id.*

¹⁷¹ See *Chesternut*, 486 U.S. at 572-73 ("Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.").

¹⁷² *Id.*

¹⁷³ See *id.* at 573-76.

¹⁷⁴ See *Hodari D.*, 111 S. Ct. at 1551.

¹⁷⁵ *Id.* This is, of course, not because the Court has defined as lawful police orders made without adequate justification which are not obeyed.

¹⁷⁶ *Id.*

¹⁷⁷ *Beck v. Ohio*, 379 U.S. 89 (1964).

out crime,"¹⁷⁸ "‘good faith on the part of the arresting officers is not enough.’ If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police."¹⁷⁹

The Court offered no explanation or justification for its presumptions and thus presumed too much. By presuming that the police only make a few orders to stop without adequate basis, the Court presumed that its decision reached only a limited number of cases. By presuming that police cannot be influenced to make orders which they expect will be disobeyed (which would seem a logical result of not applying the exclusionary rule),¹⁸⁰ the Court presumed that its decision will have no effect on police behavior. By therefore presuming, *hysteron proteron*, the conclusion it set out to prove, the Court argued circuitously. The Court began and ended its argument with the bald assertion that the remedial objectives of the exclusionary rule would not be served by applying the rule to deliberate, but unsuccessful, attempts to violate the Fourth Amendment.

A better reasoned approach to the question of whether to apply the exclusionary rule centers on the extent to which the remedial objectives of the rule would be served.¹⁸¹ Because of the substantial social costs of excluding highly probative and "inherently trustworthy" evidence, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."¹⁸²

Without perfect information regarding police-citizen encounters, not all violations of the Fourth Amendment will be discovered and sanctioned.¹⁸³ Where the probability of benefit¹⁸⁴ outweighs the probability of sanction, police will have an incentive to attempt to violate the Fourth Amendment.¹⁸⁵ Refusing to sanc-

¹⁷⁸ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹⁷⁹ *Beck*, 379 U.S. at 97 (citing *Henry v. United States*, 361 U.S. 98, 102 (1959)).

¹⁸⁰ See *infra* notes 189-209 and accompanying text.

¹⁸¹ *United States v. Leon*, 468 U.S. 897, 908 (1983).

¹⁸² *Id.* at 905-08 (citing *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

¹⁸³ See generally Steven Shavell, *Deterrence and the Punishment of Attempts*, 29 J. LEGAL STUD. 435, 440-44 (1990).

¹⁸⁴ Of course, evidence of guilt will not always be revealed when police violate the Fourth Amendment.

¹⁸⁵ This follows the "standard model of deterrence." See Shavell, *supra* note 183, at 436-37. Of course, the mere fact that police have an incentive to violate the Fourth Amendment, does not mean that they will, in actuality, do so. Indeed, empirical studies have questioned the effect the exclusionary rule has on police behavior. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 416 (1970) (Burger, C.J., dissenting)

tion unsuccessful attempts will further reduce the probability of sanction and add to this incentive.¹⁸⁶

The Court in *Hodari D.* argued, however, that because police do not attempt to stop suspects with an eye toward failure, this added incentive will not result in more attempts, and more harrasing police behavior.¹⁸⁷ Because expectations are ultimately tied to probabilities, however, this logic fails close inspection.¹⁸⁸

If the probability of sanction declines, the probability of benefit will outweigh the probability of sanction more often than before, and police will engage in more attempts to violate the Fourth Amendment.¹⁸⁹ Further, because an attempt alone may result in the subject abandoning incriminating evidence, police may make attempts with the intention of failure.¹⁹⁰ Where the police are able to control, or effectively predict the suspect's response, these attempts

(citing Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970)); see also 1 LAFAVE, *supra* note 37, § 1.2 at 25-28. However, the Supreme Court has retained the exclusionary rule for the sole purpose of deterring improper police behavior. *Nix v. Williams*, 467 U.S. 431, 446 (1984). Ignoring this purpose casts doubt upon the rule's legitimacy. The discussion that follows assumes that the Court is not abandoning, *sub silentio*, the Fourth Amendment exclusionary rule.

¹⁸⁶ Shavell, *supra* note 183, at 436. The amount of the reduction will depend on the probability that an unsuccessful attempt will be discovered and sanctioned. *Id.* at 447. If the probability is very low, the reduction may be minimal. *Id.*

¹⁸⁷ *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991) ("Unlawful orders will not be deterred . . . by sanctioning through the exclusionary rule, those of them that are *not* obeyed. Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.").

¹⁸⁸ See generally Stephen Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721 (1989).

¹⁸⁹ See Shavell, *supra* note 183, at 436 (punishing attempts increases deterrence by raising the probability of imposing sanctions). Because the magnitudes of benefit (admission of the evidence discovered) and sanction (suppression of the evidence discovered) are equal in this situation, the probabilities of benefit and sanction will determine whether the police attempt to violate the Fourth Amendment. See *id.* at 439-40.

Following the Court's statement regarding the good faith of policemen, *supra* note 177, this argument disregards conscience as a motivating factor in police activity. Rather, the argument assumes, as does any argument of deterrence, the presence of rational actors. Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 655 (1990). Rational actors are informed by the probable consequences of their actions and seek to maximize benefit and minimize burden. *Id.* at 654.

¹⁹⁰ *Hodari D.*, 111 S. Ct. at 1559 (Stevens, J., dissenting) (citing 3 LAFAVE, *supra* note 37, § 9.2 at 61).

Police would not actually intend to fail, but rather to "strategically abandon" the attempt if it did not yield evidence of guilt. See Shavell, *supra* note 183, at 446 (strategic abandonment occurs when a person desists from proceeding with an attempt upon noticing that the chances of being discovered and sanctioned now outweigh the chances of benefit).

may become a common investigative technique.¹⁹¹

The police may begin such a hypothetical encounter by approaching an individual in a public place.¹⁹² If the individual stops in response to police inquiries, he has consented to the encounter.¹⁹³ Complying with a request does not constitute a common law arrest (Fourth Amendment seizure).¹⁹⁴ Evidence obtained as the fruit of a consensual encounter is not subject to the exclusionary rule.¹⁹⁵ Only when police behavior rises to the level of an official "show of authority" does submission complete a seizure rather than indicate consent.¹⁹⁶

One jurisdiction's case law demonstrates how difficult this important factual determination can be.¹⁹⁷ Interpreting the Fourth Amendment to the Constitution, District of Columbia courts have held that no seizure occurred when police called to an individual, "Police. Wait a second. We want to talk to you."¹⁹⁸ Seizure occurred, however, when police called, "Come here, police officers."¹⁹⁹

Continuing the hypothetical, if the individual declines the po-

¹⁹¹ See 3 LAFAYETTE, *supra* note 37, § 9.2 at 61.

¹⁹² For a pre-*Hodari D.* analysis of the same factual context, see Mascolo, *supra* note 19, at 415-417.

¹⁹³ *Florida v. Royer*, 460 U.S. 491 (1982); cf. *Reid v. Georgia*, 448 U.S. 438, 439, 441 (1980) (per curiam) (DEA agent asked if defendants would agree to return to airport terminal and to consent to a search of their persons and their shoulder bags. One defendant nodded affirmatively and the other said "yeah, okay." The Court determined that there was no reasonable and articulable suspicion "to support the seizure in this case."). Shavell, *supra* note 183, at 438.

The hypothetical that follows is based on the premise that the individual does not wish to comply with the police. Contrary to the Court's statement in *Hodari D.*, such a desire may not stem from a guilty conscience, but rather a fear of unjustified harassment. See *Hodari D.*, 111 S. Ct. at 1553 (Stevens, J., dissenting). The presumption should be for the latter, until it can be empirically proven that all such desires stem from a guilty conscience. See *Ker et ux. v. California*, 374 U.S. 23, 56 (1963) (Brennan, J., dissenting) (presumption that only those who are in fact guilty will forcibly resist arrest does violence to the presumption of innocence in criminal cases); but see *Hodari D.*, 111 S. Ct. at 1549 n.1; Proverbs 28:1 ("The wicked flee when no man pursueth: but the righteous are bold as a lion.").

¹⁹⁴ *Wilgus*, *supra* note 94, at 555 (citing *Arrowsmith v. LeMesurier*, 2 Bos. & P.N.P. 211, per Lord Mansfield, criticized by Miller, J., in *Warner v. Riddiford*, 4 Com. B.N.S. 205) (going voluntarily to the magistrate after the officer showed the accused he had a warrant for his arrest was not such a detention as to constitute an arrest).

¹⁹⁵ *Royer*, 460 U.S. at 500.

¹⁹⁶ *Id.* (the *Mendenhall* test represents the point at which police conduct has become so harassing as to indicate seizure rather than consent).

¹⁹⁷ See Edwin J. Butterfoss, *Bright Line Seizures*, 79 J. CRIM. L. & CRIMINOLOGY 450, 456 n.109 (comparing *Richardson v. United States*, 520 A.2d 692, 697 (D.C. 1987) with *Johnson v. United States*, 468 A.2d 1325, 1327 (D.C. 1983)).

¹⁹⁸ *Richardson*, 520 A.2d at 697.

¹⁹⁹ *Johnson*, 468 A.2d at 1327.

lice invitation to stop and answer questions, the police may follow him.²⁰⁰ Evidence obtained as a result of following is not subject to the exclusionary rule.²⁰¹

If the individual then picks up his pace, the police may step up their pursuit.²⁰² The police may chase the individual,²⁰³ run head-long at him,²⁰⁴ or fire rounds of gunfire by his head.²⁰⁵ The Fourth Amendment will not come into play unless and until he submits or is physically apprehended.²⁰⁶ Any evidence abandoned during such a chase is not subject to the exclusionary rule.²⁰⁷

It is unavailing to the individual being pursued that the police conduct is threatening enough to convey to a reasonable person that he was not free to disregard the police and continue on his way. An individual is no longer free to ignore the police as he would anyone else met on the street.²⁰⁸ The effect of *Hodari D.* is that an individual must stop and respond to questions whenever posed by police.²⁰⁹

²⁰⁰ *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (following is not considered a sufficient "show of authority" to indicate a seizure).

If an individual decides to "willfully elude or flee a police officer after receiving a visual or audible signal from the officer to bring his motor vehicle to a stop," he has committed a crime in twenty-one states. Brief for the states of Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, New Jersey, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as *Amici Curiae* at 10 n.4, *Michigan v. Chesternut*, 486 U.S. 567 (1988) (No. 86-1824). In those situations, it has been argued that a police order to stop, in and of itself, is a "seizure." The Court was not presented with this situation in *Chesternut* or *Hodari D.*, and has not ruled on this issue.

²⁰¹ *Chesternut*, 486 U.S. at 573.

²⁰² *California v. Hodari D.*, 111 S. Ct. 1547, 1549 (1991).

The proposition that unprovoked flight provides the police with reasonable suspicion to detain has not been tested as of yet. This proposition has, however, found support with certain members of the Court. *See id.* at 1558 n.1 (Opinion by Scalia, J.) ("The wicked flee when no man pursueth"); *see also Chesternut*, 486 U.S. at 576 (Kennedy, J., concurring) ("respondent's unprovoked flight gave the police ample cause to stop him").

²⁰³ *Hodari D.*, 111 S. Ct. at 1550.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1561 (Stevens, J., dissenting). *See, e.g., Hoffman v. Ruesch*, 1991 U.S. App. LEXIS 13701 (6th Cir. 1991).

²⁰⁶ *Hodari D.*, 111 S. Ct. at 1550.

²⁰⁷ *Id.*

²⁰⁸ *Cf. Brown v. Texas*, 443 U.S. 49, 53 (1979) ("In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference.").

²⁰⁹ *Hodari D.*, 111 S. Ct. at 1551 ("Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply.").

As a policy matter, the overarching issue presented in *Hodari D.* was whether the exclusionary rule should apply to deliberate police action which but-for the uncooperative nature of the suspect would be a violation of the Fourth Amendment. The Supreme Court simply was willing to allow a suspect's fear of unlawful police activity defeat his claim based on that activity.

VI. CONCLUSION

In *California v. Hodari D.*, the Supreme Court concluded that harrassing police conduct which does not immediately yield a stop, but which prompts an individual to reveal what would otherwise be impermissible for the police to seek by means of a search of his person is not prohibited by the Fourth Amendment.²¹⁰ In determining whether a Fourth Amendment seizure has occurred, a reviewing court must focus not only on the harrassing police behavior, but also on the initial reaction of the suspect.²¹¹

If the suspect does not immediately yield to police overtures, the police may institute a progression of procedures, designed to control the reaction of the suspect while prodding him toward self-incrimination. If the suspect does immediately yield, then he has arguably consented to the encounter. Either way, the protections of the Fourth Amendment are not implicated and the exclusionary rule does not apply.

Under *Hodari D.*, police are permitted to stray from "the legitimate investigative sphere"²¹² without risk of sanction.²¹³ Allowing police this freedom is a departure from "courts' traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires."²¹⁴

Commentators asked courts to be "suspicious of police-citizen encounters that result in 'abandonment' of incriminating evidence. These [abandonments] are sometimes the intended purposes of ingenious 'investigatory' schemes between fellow officers."²¹⁵ In-

²¹⁰ *Id.* at 1550. The police may thus do "indirectly what is denied them directly." See Mascolo, *supra* note 19, at 419; cf. *Boyd v. United States*, 116 U.S. 616, 630 (1886) (The basis of the exclusionary rule is that the government may not do indirectly, through violation of the Fourth Amendment, what is denied it directly through the Fifth Amendment).

²¹¹ *Id.*

²¹² *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

²¹³ *Hodari D.*, 111 S. Ct. at 1553 (Stevens, J., dissenting).

²¹⁴ *Terry*, 392 U.S. at 15 ("When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.").

²¹⁵ Alexander E. Eisemann, *Addressing the Pretext Problem: The Role of Subjective Police*

stead, the Court in *Hodari D.* gave police considerable freedom to intrude on an individual's privacy in order to advance these "abandonments," and to stop without reasonable cause those they wish to question.²¹⁶

TIMOTHY J. DEVETSKI

Motivation in Establishing Fourth Amendment Violations, 63 B.U.L. REV. 223, 278 (1983) (citing *Massachusetts v. Painten*, 368 F.2d 142, 143 (1st Cir. 1966) (police officers, making visit to defendant's apartment on pretext of routine investigation, stationed one officer in back of building to prevent escape; evidence that defendant "abandoned" in response to police knock, in view of that officer, was suppressed), *appeal dismissed*, 389 U.S. 560 (1968)); Mascolo, *supra* note 19, at 415; 3 LAFAYETTE, *supra* note 37, § 9.2 at 61.

²¹⁶ *Hodari D.*, 111 S. Ct. at 1562 (Stevens, J., dissenting) ("The Court's immediate concern with containing criminal activity poses a substantial, though unintended, threat to values that are fundamental and enduring.").