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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION:

GEORGIA BROWER, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF WILLIAM JAMES CALDWELL (BROWER),
DECEASED, ET AL., Petitioners v.
COUNTY OF INYO, ET AL.

CASE NO:

87-248

PLACE:

WASHINGTON, D.C.

DATE:

January 11, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGIA BROWER, INDIVIDUALLY AND :
AS ADMINISTRATOR OF THE ESTATE :
OF WILLIAM JAMES CALDWELL :
(BROWER), DECEASED, ET AL., :
Petitioners :
v. :
COUNTY OF INYO, ET AL. :

No. 87-248

-----x

Washington, D.C.
Wednesday, January 11, 1989

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:05
o'clock a.m.

APPEARANCES:

ROBERT GENE GILMORE, ESQ., Fresno, California; on behalf
of the Petitioners.
PHILIP W. McDOWELL, ESQ., Assistant Counsel for the
County of Inyo, Independence, California; on behalf of
the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-248, Georgia Brower v. The County of Inyo.

Mr. Gilmore, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT GENE GILMORE

ON BEHALF OF THE PETITIONERS

MR. GILMORE: Thank you. Mr. Chief Justice, and may it please the Court:

This Court is once again called upon to determine the circumstances under which an individual who was seized will be deemed seized under the Fourth Amendment. It is the Petitioners' position in this case that the decedent, William Brower, was seized within the meaning of the Fourth Amendment when he was chased into a concealed police roadblock. The Ninth Circuit's decision to the contrary we believe is contrary in itself with this Court's prior precedents beginning with Terry v. Ohio on up through U.S. v. Mendenhall, and finally this past summer with Michigan v. Chesternut.

Most significant in the Terry case we feel is the test set forth in a footnote, footnote number 16. Now, that footnote, although it is only a footnote, has been incorporated into the majority opinions in the

1 Mendenhall, the INS v. Delgado, the Michigan v.
2 Chesternut case.

3 Therein the Court stated that it was not all
4 conduct or all personal intercourse between a policeman
5 and a citizen which will constitute a seizure. Only
6 when the officer by means of physical force or a show of
7 authority has in some way restrained the liberty of a
8 citizen may we conclude that there has been a seizure
9 within the Fourth Amendment.

10 The test is very easy and straightforward to apply
11 in a situation where the fleeing suspect decides to
12 stop, submit to the authority and/or is physically and
13 bodily restrained. It is not so easy to apply in
14 situations where the suspect does not submit to the
15 authority or where the suspect, perhaps in a case
16 similar to this, is not arrested or detained or
17 restrained in the traditional sense of laying on of
18 hands or handcuffing. In these latter situations, the
19 Court has given guidance to us and has further refined
20 the test set forth in Terry. The Court did this in 1980
21 in the Mendenhall case.

22 In the Mendenhall case, the Court held that a
23 person was seized within the meaning of the Fourth
24 Amendment when, in consideration of all of the
25 circumstances surrounding the incident, a reasonable

1 person would believe that they are not free to leave.
2 Although that majority opinion in Mendenhall was only
3 joined in by two Justices, it was later adopted by the
4 full majority in the INS v. Delgado case.

5 QUESTION: Mr. Gilmore, even if we were to agree
6 with you that the complaint alleged facts sufficient to
7 allege a seizure, that isn't the end of the matter, is
8 it?

9 MR. GILMORE: Not by a long shot, Justice
10 O'Connor. That is only the issue of seizure. There is
11 still the issue of reasonableness that must be overcome.

12 QUESTION: Right.

13 MR. GILMORE: This past summer --

14 QUESTION: Mr. Gilmore, you -- you said a minute
15 ago that -- that the freedom -- the individual's freedom
16 has to have been restrained in some way. It's more than
17 in some way, isn't it?

18 Suppose -- suppose the police receive word that
19 there is someone who has taken a hostage in a particular
20 house and they cordon off a 10-block area. As soon as
21 they put up those, those police barricades, is that a
22 seizure?

23 MR. GILMORE: Of the suspect or the hostages?

24 QUESTION: Of, of the suspect.

25 MR. GILMORE: Yes, I believe it would be, Justice

1 Scalia, because the Court in the Mendenhall case has
2 said that we look to the conduct of the police
3 officers. And as the Court stated in Michigan v.
4 Chesternut, this is an objective standard which allows
5 us to measure the conduct from one police encounter to
6 the next. Would the conduct of the police officers
7 reasonably impart to the hostage taker that he was not
8 free to leave -- and certainly throwing up a, a number
9 of officers around the hostage scene would tell him he's
10 not free to leave.

11 QUESTION: He's certainly free to leave the house.
12 He can't get out of the barricaded area.

13 What if -- what if there's a fleeing suspect and
14 the -- and the police notifies all airports and all bus
15 terminals to keep a lookout for this individual and
16 instructs its officers to stop him if he tries to leave
17 the state? Is that a seizure?

18 MR. GILMORE: It is if we follow Mendenhall to its
19 logical conclusion. I suggest --

20 QUESTION: It doesn't seem like a seizure to me.

21 MR. GILMORE: Well, I, I would suggest, Justice
22 Scalia, that in keeping with my response to Justice
23 O'Connor, that it is a seizure. What we need to do is,
24 is further determine, before liability certainly can
25 attach, as to whether it was reasonable.

1 Again, following Mendenhall to a reasonable and
2 logical conclusion tells us that if the conduct of the
3 police reasonably -- reasonably -- communicates to the
4 suspect that he is not free with -- free to leave,
5 meaning in a broader sense that he has a, a freedom of
6 liberty. This is much more than just a freedom against
7 bodily restraint.

8 QUESTION: Mr. Gilmore, when do you think the
9 seizure took place in this case?

10 MR. GILMORE: Justice Stevens, I believe the
11 seizure took place at the very instant that the pursuit
12 began long before we ever got 20 miles down the road --

13 QUESTION: Do you think it was unreasonable at that
14 point?

15 MR. GILMORE: I cannot say in all honesty if it was
16 reasonable or unreasonable simply because we are the
17 very --

18 QUESTION: If the police officer thinks he's -- the
19 driver is driving away in a stolen car, it's certainly
20 not unreasonable to pursue him, is it?

21 MR. GILMORE: Absolutely not in a general sense.

22 QUESTION: So, then it was not unreasonable at its
23 inception, if that is the time when the seizure took
24 place.

25 MR. GILMORE: If that was the circumstances within

1 which this case --

2 QUESTION: I asked you when, when it took place.
3 You said then, and I, I think you'd have a hard time
4 convincing me it was unreasonable at that time.

5 MR. GILMORE: I have nothing to indicate to the
6 Court that it was unreasonable at that moment, again
7 concentrating --

8 QUESTION: When does it become unreasonable for the
9 police to follow someone in these circumstances? Five
10 miles down the road or 10 miles or when?

11 MR. GILMORE: Well, Justice O'Connor --

12 QUESTION: Is there ever an obligation that the
13 police have to stop following someone in these
14 circumstances?

15 MR. GILMORE: I think that there is, and I believe
16 that there is because, as the Court has indicated in the
17 Chesternut case, we must consider all of the
18 circumstances. And on the issue of reasonableness,
19 Tennessee v. Garner tells us that we must weigh and
20 consider the nature of the intrusion, and --

21 QUESTION: Well, don't you think that creates a
22 very perverse incentive for people to try to take
23 evasive action from the police in their automobiles?

24 MR. GILMORE: It may well, but I believe that we
25 have to consider again the purpose for which the pursuit

1 is taking place. And it may well be, as the district
2 court indicated in Tennessee v. Garner, if a suspect
3 chooses to flee, he may well, in some instances, assume
4 the risk, but I believe that we have to look to the
5 conduct for the --

6 QUESTION: Well, this is more than that because
7 when this person takes to the roads on a two-lane road
8 at high speed trying to evade police action, the person
9 puts a lot of other people at risk, doesn't he?

10 MR. GILMORE: Generally speaking, yes, Justice
11 O'Connor, that person does.

12 QUESTION: And yet, you think the police have to
13 break off the pursuit?

14 MR. GILMORE: Not necessarily. Again, it depends
15 on the circumstances of each case.

16 And if, if I may, this particular case was
17 dismissed at the complaint stage. We have not had an
18 opportunity to flush out the facts of this case. I can
19 relate to the Court that this took place -- and I
20 believe --

21 QUESTION: It was dismissed purely on the single
22 issue of seizure.

23 MR. GILMORE: That is correct.

24 QUESTION: And that no, no one, though, ever got to
25 the question reasonableness.

1 MR. GILMORE: The specific issue of reasonableness
2 was not addressed by the district court. There was
3 some, I believe, indirect inference, if you will, by the
4 Ninth Circuit.

5 QUESTION: And did the -- did the -- did the courts
6 below specifically deal with the chase?

7 MR. GILMORE: I believe the Ninth Circuit dealt
8 with it certainly not -- perhaps it was not addressed
9 with as much energy or as --

10 QUESTION: Did you argue that the chase amounted to
11 a seizure?

12 MR. GILMORE: In and of itself, no.

13 QUESTION: That's what I thought.

14 MR. GILMORE: It was --

15 QUESTION: Why do we have to get into whether the
16 chase amounted to a seizure here if we were to determine
17 that the existence of the roadblock resulted in a
18 seizure?

19 MR. GILMORE: Mr. Chief Justice, I believe that the
20 reason that it's important is to fully develop and
21 utilize the case of Mendell -- Mendenhall and the test
22 that has been given to us. If -- and there is some,
23 some concern that the roadblock was not, in fact, a,
24 a seizure. The Galas case tells us this out the Sixth
25 Circuit. But I think by way of emphasizing that if the

1 Mendenhall case shows us that a seizure occurs at the
2 moment of the pursuit, then certainly we have the same
3 situation with respect to the roadblock.

4 QUESTION: Yes, but if you're wrong on the
5 Mendenhall case, you could nonetheless prevail on the
6 idea of that the, the forcing the guy into the roadblock
7 was a -- was a seizure. That would be sufficient for
8 your purposes, wouldn't it?

9 MR. GILMORE: Yes, it would.

10 QUESTION: And there -- as I read the petition for
11 certiorari, the question -- there is no question as to
12 reasonableness presented. It's simply the vel --
13 seizure vel non.

14 MR. GILMORE: The issue of the seizure is most
15 predominant.

16 But I believe, if I may in further response to the
17 last question, why should we consider a seizure from the
18 inception of the pursuit? And there's a very good,
19 practical reason. If we ignore the conduct of the
20 police -- and we are told to look at all of the
21 circumstances. This is what Chesternut tells us, to
22 look at all of the circumstances. If we ignore the
23 police conduct from the inception of the pursuit up
24 until the time that there -- the young man collides with
25 the roadblock, we have removed from judicial scrutiny

1 all of the conduct of the police officers in that
2 interim.

3 QUESTION: Why is that so?

4 MR. GILMORE: It can be --

5 QUESTION: I don't --

6 QUESTION: What's wrong with that?

7 QUESTION: I just don't understand that argument.

8 Your question presented by the certiorari petition is
9 whether the roadblock amounted to a seizure. Those are
10 the two questions. Both questions relate to the
11 roadblock, and I don't know why -- and when you do get
12 to the issue of the reasonableness -- you can't look at
13 the whole picture. I just don't understand your
14 argument.

15 MR. GILMORE: Well, it was my understanding of
16 Chesternut, Mr. Justice, that we are to look at all of
17 the circumstances, and the complaints as well as the
18 decision of the Ninth --

19 QUESTION: Well, you're entitled to look at them
20 all, but if the roadblock is enough all by itself just
21 on the issue of seizure, why make your case harder than
22 you have to?

23 MR. GILMORE: It may appear --

24 QUESTION: Do you still contend the roadblock
25 amounted to a seizure?

1 MR. GILMORE: Very definitely, yes, sir.

2 QUESTION: Can we talk about the roadblock? Let's
3 assume that I -- I -- that I don't think a chase is a
4 seizure, that I think a chase is at most an attempted
5 seizure, and that all you have here is a -- is -- is a
6 roadblock. You would agree, would you not, that there's
7 no seizure unless it's intentional. If -- if a police
8 officer leaves a -- a jail for the night and locks the
9 -- locks the gate not knowing that a visitor is still --
10 Is still in the jail, would you call that a seizure?

11 MR. GILMORE: Yes, I --

12 QUESTION: Isn't it like a false arrest? Isn't it
13 an intentional kind of action?

14 MR. GILMORE: Well, I believe that it -- it is
15 still a seizure. The -- whatever was accomplished by
16 the law enforcement has certainly indicated to that
17 person that he is not free to leave. I most definitely
18 think there's a seizure.

19 Now, on the issue of whether this requires --

20 QUESTION: Well -- well, then can we pursue that
21 just one minute? Suppose a police car slips on ice
22 accidentally and all of a sudden blocks another car and
23 the other car hits the police cruiser. That's not a
24 seizure, is it?

25 (Pause.)

1 MR. GILMORE: No. That's a little tougher. Mr.
2 Justice, I think again --

3 QUESTION: There's an intentional component to the
4 element of seizure.

5 MR. GILMORE: Perhaps intentional, but I do not
6 believe intentional in the sense that we decided in the
7 Daniels and the other cases of the individuals who were
8 prisoners and there was an excessive use of force
9 alleged against them. This Court I believe indicated
10 that mere negligence was not enough.

11 In those cases we were addressing the Fourteenth.
12 Here we are addressing the Fourth. We're addressing the
13 issue of not somebody in prison. We're addressing the
14 freedom of an individual walking the street.

15 Now, again, if the Court means did -- did he
16 intentionally run the car into the individual as opposed
17 to simply accidentally, I think that there perhaps is
18 quite a distinction to be drawn.

19 QUESTION: But if the -- I suppose you could say
20 that the officers put the roadblock up there to stop
21 him. And if he had skidded to a stop and stopped four
22 feet from the truck, they still -- they still stopped
23 him.

24 MR. GILMORE: They did, and --

25 QUESTION: And on purpose.

1 MR. GILMORE: And on purpose.

2 We have a -- we have a mechanism utilized by the
3 police, and we by no means are indicating that there
4 should be a per se unconstitutional ruling with respect
5 to all roadblocks. But what we have to do, what the
6 Court has indicated that we need to do, is to look at
7 the conduct of the police. They intentionally set that
8 roadblock as -- as -- just as intentionally as the
9 police officer pulled the trigger in the Tennessee
10 Garner case.

11 QUESTION: Well, if all we're talking about here is
12 the question of seizure, you will still have to persuade
13 someone somewhere that it was an unreasonable seizure in
14 order -- in order to prevail. So, you could have a --
15 this Court could hold this particular roadblock was a
16 seizure and you would, nonetheless, lose your case if it
17 were found to be a perfectly reasonable seizure under
18 the Fourth Amendment.

19 MR. GILMORE: That is correct. We ask only the
20 opportunity to prove that it was unreasonable. We have
21 so far in four years been denied that.

22 QUESTION: Well, getting back to the beginning, was
23 there pursuit -- to starting of the pursuit with seizure?

24 MR. GILMORE: I believe under Mendenhall, Justice
25 Marshall, it definitely is.

1 QUESTION: Would that apply if the police had a
2 broken down Ford and the criminal had a Bugatti?

3 MR. GILMORE: Yes.

4 QUESTION: That still would be a --

5 MR. GILMORE: As long as the officer in his
6 broken-down vehicle in some way manifested to that
7 individual -- to a reasonable individual that he was not
8 at liberty to leave.

9 And if I may stress the point here, again we're not
10 talking about under the Fourth Amendment a mere --
11 certainly it comes to something --

12 QUESTION: But you insist on putting the pursuit in
13 this case, the starting of the pursuit. And I don't see
14 where that has anything in the world to do with the
15 case --

16 MR. GILMORE: Well --

17 QUESTION: -- about the roadblock.

18 MR. GILMORE: The test that we must apply --

19 QUESTION: They're two different animals.

20 MR. GILMORE: No. I believe that they're not two
21 different animals. If I -- if I may disagree --

22 QUESTION: Well, the pursuit moves and the
23 roadblock doesn't. Isn't that a difference?

24 MR. GILMORE: But they're all conduct of the police
25 officers.

1 QUESTION: Isn't that the difference?

2 MR. GILMORE: There is a difference, but they were
3 all put into force or into play by the police officers.

4 QUESTION: And that made it a seizure.

5 MR. GILMORE: That made it a seizure. Once that's
6 reasonably communicated to the decedent, he couldn't
7 leave.

8 QUESTION: If the roadblock was on the opposite
9 side of town and the pursuit started on this side, the
10 pursuit would be a procedure.

11 MR. GILMORE: Absolutely, and I think I can explain
12 that if I might.

13 QUESTION: I doubt it.

14 (Laughter.)

15 MR. GILMORE: Let me give it a try.

16 I think what's -- what's most important here is we
17 need to look at the interest that's being protected by
18 the Fourth. Again, this is not a mere right to be free
19 from bodily restraint. The case, Terry v. Ohio, spoke
20 not of bodily restraint. It spoke of being restrained
21 -- one's liberty being restrained.

22 And if I may, there is -- there are a couple --
23 there are a couple of other quotes from Terry v. Ohio
24 that emphasize that what we're dealing with is something
25 much broader than simple bodily restraint. The Court

1 speaks in language of intrusion upon the sanctity of the
2 individual, invasion of the person's personal security,
3 freedom from all -- and I'm quoting here -- "freedom
4 from all restraints or interference of others, freedom
5 from unreasonable government intrusion."

6 Certainly if this Court -- and in Michigan v.
7 Chesternut, the Court there spoke about a right to
8 ignore, a right to disregard. They are speaking about
9 something much more noble, something much broader than a
10 right to simply be free from -- from physical restraint
11 and being handcuffed, if you will.

12 QUESTION: It's just a couple of sentences,
13 though. It's not a treatise. You -- you -- you sort of
14 suspect that they -- they at least left out one thing.
15 It has to be intentional or else you're going to have to
16 change your answer about the skidding police car.

17 MR. GILMORE: I personally am still troubled with
18 the skidding police car.

19 QUESTION: Yes, me too.

20 MR. GILMORE: The skidding police car -- I -- I
21 believe that I would have to concede if the officer
22 simply negligently skidded across the road and there was
23 an automobile accident -- and this must happen thousands
24 of times -- that I would have a lot of difficulty
25 arguing --

1 QUESTION: Let's assume I think you need intent.
2 What was the intent with the roadblock here? When I --
3 when the police set up a roadblock, do they necessarily
4 intend to -- to restrict? I often see a roadblock, and
5 I just take a -- take a street before the roadblock, use
6 another street. They clearly intend to block further
7 use of that street, but do they intend by setting up a
8 roadblock to stop dead any individual who is using that
9 road? Is that clear?

10 MR. GILMORE: Well, two things. One, they -- they
11 do intend to restrain the individual's liberty to just
12 simply go wherever he wishes.

13 QUESTION: To use that road.

14 MR. GILMORE: To use that road or to go where he
15 wishes --

16 QUESTION: And that's a seizure. So, any --

17 MR. GILMORE: That's a --

18 QUESTION: Any roadblock is a seizure?

19 MR. GILMORE: Any roadblock is a seizure if the
20 police communicate reasonably that that individual is
21 not simply free to totally ignore it. If that
22 individual in this case was free to turn around, take a
23 side road, go right past the officer that was pursuing
24 him and totally, as the Court has said, ignore or
25 disregard, then we would not have a seizure.

1 QUESTION: So, a roadblock by itself does not
2 amount to a seizure if -- if you've got some alternate
3 route to go. I mean, you could block -- you could block
4 a road for purposes of repairing it.

5 MR. GILMORE: Here again I must fall back on the
6 Mendenhall. Did that roadblock and did the totality of
7 the circumstances, both the seizure as well as the
8 roadblock, radio communications, whatever it was that
9 the police officers did, if it reasonably communicated
10 to the individual --

11 QUESTION: Is it a seizure of everybody that comes
12 down the road?

13 MR. GILMORE: Under Mendenhall, yes, probably
14 reasonable.

15 QUESTION: Well, your argument is certainly much
16 stronger, it seems to me, when you combine the pursuit
17 and the roadblock. When you start talking about either
18 one by itself as -- as a seizure, I think you get into
19 trouble.

20 MR. GILMORE: If the --

21 QUESTION: I think that's right. Otherwise you're
22 saying if you put up an unreasonable roadblock -- let's
23 say there's really nothing wrong with the street, and
24 some policeman says, well, I think there's something
25 wrong, and it's unreasonable to think there's anything

1 wrong, so they put up a roadblock. If that's an
2 unreasonable roadblock, do you say there's been a -- an
3 unconstitutional seizure?

4 MR. GILMORE: No. I think we're confusing
5 reasonableness with the issue of seizure itself. If the
6 roadblock was designed, was intended, if I may borrow on
7 the Justice's terminology -- if it was designed or
8 intended to restrain an individual's liberty, most
9 definitely, but just to block a pothole, no.

10 QUESTION: Mr. Gilmore, if the person pursued in
11 this case by the police had drawn a gun on the officer
12 and threatened to shoot him and then took off, do you
13 think that on -- on those facts that a summary judgment
14 could be granted for the police?

15 MR. GILMORE: If I understand the Justice's
16 question, I'm being asked if under those circumstances
17 it would be reasonable for the officer to --

18 QUESTION: In effect.

19 MR. GILMORE: -- to use deadly force.

20 Yes, most definitely. And that quite alters the
21 circumstances --

22 QUESTION: Well, let me ask you then if that is so,
23 whether the decedent in this case is not in the same
24 position. He is armed with a deadly weapon, in effect,
25 the vehicle, and is engaged in aggressive and a

1 dangerous course of action in -- in trying to take
2 evasive action and flee. Why isn't that like the person
3 drawing the gun?

4 MR. GILMORE: Again, if I understand --

5 QUESTION: As a matter of law.

6 MR. GILMORE: As a matter of law, if we have
7 somebody who is armed?

8 QUESTION: This person is in effect armed with this
9 vehicle that he has chosen to use in an -- in an
10 aggressive and a dangerous manner just as a -- a deadly
11 weapon such as a gun.

12 MR. GILMORE: I believe that if -- If it is
13 interpreted as a deadly weapon, if the utilization of
14 the vehicle in the manner that it was being utilized in
15 fact presented significant or presented risk of serious
16 injury or death to others, most certainly we should not
17 exclude that --

18 QUESTION: Well, don't you think it did exactly
19 that at night on a two-lane highway at high speed and in
20 the circumstances we know here, over a 20-mile course?

21 MR. GILMORE: With all due respect, Justice
22 O'Connor, that is -- that goes to the issue that we have
23 been begging to get before the Court and that is the
24 reasonableness. We have not even had an opportunity to
25 flush out, to look at more than a police report in the

1 situation.

2 If the highway was straight, If there were no other
3 individuals on the highway that night, if it was late at
4 night as it was, it would be a different situation than
5 pursuing him through downtown Los Angeles and or
6 downtown Washington, because I think again the scenarios
7 that we can think about are as numerous as our
8 imagination will allow.

9 All we are asking is for this Court to follow the
10 Mendenhall and Chesternut logic finding that there is a
11 seizure. There is a whole other issue before liability
12 attaches, and that's reasonableness of the conduct. And
13 it may well prove that what the officers did that night
14 was reasonable, but if we don't get an opportunity to
15 explore and to look into that conduct, if we say that
16 this is not a seizure, whatever those police officers
17 did that night is going to go without judicial
18 scrutiny. If the young man in *Tennessee v. Garner* --

19 QUESTION: Well, I guess the state takes the
20 position that even if it is a seizure, as a matter of
21 law, it was reasonable because this person is just like
22 a person armed with a gun.

23 MR. GILMORE: If the Court made a ruling or if
24 there was a judicial finding that all fleeing suspects
25 in all types of vehicles under all circumstances, be it

1 a dirt road or a super highway, is utilizing a dangerous
2 weapon, if you will, that's the type of finding that
3 would have to be brought about.

4 But I go back to the young man in Tennessee who was
5 shot. If by circumstances that bullet moved over a
6 couple of inches and he survived and limped home or
7 wherever reached his -- some solitude somewhere -- the
8 officer in that case told him he was a police officer.
9 He told him he was under arrest, and he pulled a gun and
10 he shot him. Would the conduct be any less egregious
11 against a nonviolent individual just because the
12 individual fortuitously got over the fence and got away
13 and maybe was permanently injured as opposed to being
14 killed?

15 QUESTION: Well, if that young man had been armed
16 with a gun, however, I believe our opinion in Garner
17 said that it would be reasonable to shoot him.

18 MR. GILMORE: I believe that was what the opinion
19 said, yes.

20 QUESTION: So, that's the question, whether
21 somebody using a vehicle in the manner of this decedent
22 is in the same circumstance.

23 MR. GILMORE: That -- that is the question
24 particularly. Does the -- does the car -- does it have
25 the same deadly force perhaps as a weapon, a knife, a

1 gun?

2 I'd like to reserve a few moments, if I could.

3 QUESTION: Very well, Mr. Gilmore.

4 Mr. McDowell, we'll hear from you next.

5 ORAL ARGUMENT OF PHILIP W. McDOWELL

6 ON BEHALF OF THE RESPONDENTS

7 MR. McDOWELL: Thank you, Your Honor. Mr. Chief
8 Justice, and may it please the Court:

9 The, the overriding issue today is whether -- not
10 whether this case will receive judicial scrutiny. The
11 case will receive scrutiny -- can receive scrutiny in
12 the state court. The question is whether it will
13 receive scrutiny under the Fourth Amendment based upon
14 the issue of seizure and reasonableness.

15 The, the main issue from our point of view is
16 whether the roadblock can act as a seizure. The Court
17 probably noticed that I didn't really address that
18 directly in my -- in my brief. I think I'm ready to
19 address that now that we feel that for a roadblock --

20 QUESTION: Why didn't -- why didn't you address it
21 directly in your brief? Ordinarily you don't save
22 things for oral argument --

23 MR. McDOWELL: No. And it wasn't intentional.
24 Really it was a matter of taking time to formulate the
25 -- what I felt was the appropriate argument, and I -- I

1 didn't feel I had it formulated at that time.

2 But I feel that there are basically four elements
3 to a roadblock being a seizure. The one that Justice
4 Scalia pointed out that it has to be intentional, that
5 it has to be designed to cause a --

6 QUESTION: Is there any question in this case of
7 why they put the truck up?

8 MR. McDOWELL: As a --

9 QUESTION: I mean, it may -- it may not amount to a
10 seizure, but it was certain -- whatever it was, it was
11 intentional.

12 MR. McDOWELL: It was intentional to have him stop,
13 but -- but not by a -- intentional -- intentional to
14 have someone stop, you can put on a red light, turn the
15 switch.

16 QUESTION: Yes.

17 MR. McDOWELL: That, that indicates an intent --

18 QUESTION: Well, it isn't just to stop. Weren't
19 they also going to ask him to get out and take him down
20 to the station?

21 MR. McDOWELL: Oh, they certainly were. To --

22 QUESTION: So, they intended to seize him.

23 MR. McDOWELL: Intend to seize him.

24 QUESTION: So, there's no issue about intent to
25 seize.

1 MR. McDOWELL: Not intent to seize, but the issue
2 -- intent to seize by the use of a collision with a
3 roadblock.

4 QUESTION: Not by use of the collision,
5 necessarily --

6 MR. McDOWELL: Yes.

7 QUESTION: -- but by use of the roadblock. The
8 roadblock was intended to stop him so they could take
9 him down to the station.

10 MR. McDOWELL: That's right.

11 QUESTION: And why isn't that intentional seizure?

12 MR. McDOWELL: Well, that's an intentional seizure,
13 but it doesn't involve the use of deadly force --

14 QUESTION: Well, the guy got killed, didn't he?

15 MR. McDOWELL: Well, we're --

16 QUESTION: (Inaudible).

17 MR. McDOWELL: That's not -- that's not --

18 QUESTION: Deadly force isn't involved in this case.

19 MR. McDOWELL: I'm sorry?

20 QUESTION: Deadly force isn't an issue in whether
21 there's a seizure or not.

22 MR. McDOWELL: Well, I think for -- I have trouble
23 -- I just have trouble with that.

24 QUESTION: That will be -- that will be
25 reasonableness, later I suppose.

1 MR. McDOWELL: The use of deadly force goes with --
2 with reasonableness. If you design a roadblock as -- as
3 we believe that there -- the Petitioner is trying to
4 allege, to be a use of deadly force to seize somebody,
5 I'm not sure how you would seize somebody in a car
6 without using deadly force. You have a -- if you have
7 a vehicle going down a highway at a high rate of speed,
8 maybe some day they'll come up with a way to seize it
9 without using what would be a potentially dangerous
10 force.

11 QUESTION: Well, they often turn on the lights and
12 pull up alongside and force them to stop.

13 MR. McDOWELL: Well, I would assume that would be
14 construed as --

15 QUESTION: They don't always kill them.

16 MR. McDOWELL: -- as deadly force. If you force
17 somebody over --

18 QUESTION: Well, there are lots of time don't they
19 -- don't officers force people over on to the curb and
20 cause them to stop without killing them?

21 MR. McDOWELL: I don't know if they -- I don't know
22 that officers --

23 QUESTION: They do it in the movies a lot anyway.

24 (Laughter.)

25 MR. McDOWELL: We see a lot of things in the movies.

1 But I feel there has to be -- it has to be an
2 intentionally designed roadblock, intentional --
3 intentional to -- to cause an unavoidable collision, and
4 then you have a seizure roadblock. A roadblock that's
5 put up there to say stop --

6 QUESTION: Well, what you're saying is that the
7 intentional component of a seizure must be you have to
8 intend that it be unreasonable.

9 MR. McDOWELL: Well, no. Oh, no. No, it could be
10 very reasonable. I think it's reasonable to stop a
11 person that is going at a high rate of speed. Justice
12 O'Connor referred to the analogy of a gun. I think the
13 -- in the Tennessee v. Garner case, but in this case,
14 the gun is not pointed at the officer. The gun is
15 pointed down the highway, and everyone on the highway is
16 held hostage. So, it's reasonable to --

17 QUESTION: Well, maybe it isn't --

18 QUESTION: (Inaudible).

19 QUESTION: -- perfectly reasonable, but I don't --
20 I just don't understand why it's not a seizure and why
21 it's not intentional.

22 MR. McDOWELL: If, if the -- because the volition
23 -- the reason for -- if the reason for the collision has
24 to do --

25 QUESTION: No, no, no. The reason for putting up

1 the roadblock and trying to stop the man.

2 MR. McDOWELL: Well, that -- that can be
3 reasonable, and a roadblock --

4 QUESTION: Sure, it could be reasonable, but why
5 isn't it perfectly clear it was intentional? The
6 purpose of doing it was to cause -- to apprehend the
7 fleeing felon.

8 MR. McDOWELL: Because the, the roadblock didn't --
9 if it's not designed to cause the collision, then the
10 roadblock is not the seizure.

11 QUESTION: It's designed to cause the man to have a
12 choice between either stopping and being arrested or
13 running into it. Those are his only two choices.

14 MR. McDOWELL: Right. And -- but he has choices.
15 He uses volition. If he -- if he decides to run into
16 it --

17 QUESTION: And -- and you think one of those
18 choices is not a seizure?

19 MR. McDOWELL: I think --

20 QUESTION: On the one hand, you're going to get
21 killed; on the other hand, you're going to get hauled
22 down to the station --

23 MR. McDOWELL: The seizure is when he does submit
24 to authority or when he's physically restrained.

25 QUESTION: Well -- well, on this record can't you

1 find that he didn't have a choice?

2 MR. McDOWELL: Well, I don't think you can. I
3 don't think it goes that far. It indicates there was a
4 collision.

5 QUESTION: Well, on -- on this -- on this record,
6 it's a permissible inference. One legitimate inference
7 is that he had no choice.

8 MR. McDOWELL: Well, we don't feel -- if he -- he
9 had no choice, then it has to be shown that the
10 roadblock was intended for that purpose.

11 QUESTION: Well, it was.

12 MR. McDOWELL: Intended to give him no choice.

13 QUESTION: As opposed to what other purpose?

14 MR. McDOWELL: To have him stop voluntarily -- to
15 have him not go any further that direction. He may have
16 stopped voluntarily. He may have decided to make a
17 U-turn and go the other way.

18 QUESTION: Well, but if you see a big roadblock up
19 ahead, with police lights flashing and so on, and you
20 come to a stop, that really isn't voluntary.

21 MR. McDOWELL: Well, the stop itself, it's --
22 rather than trying to outrun -- to run around the
23 roadblock or turn -- turn around, to come to a stop
24 without running into the roadblock.

25 QUESTION: You say that for it to be a seizure, he

1 must actually run into the roadblock?

2 MR. McDOWELL: For the -- for the roadblock to be
3 the seizure, yes.

4 QUESTION: Well, but how about the combination of
5 the pursuit and the roadblock where the -- a police car
6 is coming after him from behind and he has a roadblock
7 in front, and his choices narrow very rapidly --

8 MR. McDOWELL: But he still has a choice.

9 QUESTION: -- as he gets to it.

10 MR. McDOWELL: If his only choice is to stop, he
11 still has a choice to stop and not run into the
12 roadblock.

13 QUESTION: Well, but that's submitting to a force
14 majeure, really.

15 MR. McDOWELL: Of course, but --

16 QUESTION: You say that's still not a seizure?

17 MR. McDOWELL: Well, when -- when the officer turns
18 on the light, isn't he telling you to stop? You really
19 don't have any other choice but to stop. He turns on
20 the red light. We want you to stop. The red light is
21 not the seizure. We're saying the roadblock is the
22 equivalent to the red light. The seizure is when --
23 when in fact he does stop when the police -- if he stops
24 and runs, the roadblock hasn't seized him. He just
25 changes his mode of escape.

1 The only time the roadblock really becomes the --
2 the seizure rather than the request to stop is when it's
3 intentionally designed to cause the unavoidable
4 collision. And -- and even in that case, if there's a
5 collision, if the person is able to run away, they're
6 still not seized. The seizure --

7 QUESTION: Why can't you --

8 QUESTION: Could you find that from this record?

9 MR. McDOWELL: I'm sorry?

10 QUESTION: Couldn't you find that from this
11 record? Couldn't a trier of fact find that if all of
12 the allegations of the Plaintiff are believed, that this
13 roadblock was deliberately constructed in order to cause
14 a collision?

15 MR. McDOWELL: It doesn't say that. It says that a
16 collision occurred.

17 QUESTION: No, it says the roadblock was
18 effectively concealed, doesn't it?

19 MR. McDOWELL: Well, it talks about concealed. That
20 -- that doesn't necessarily mean it's --

21 QUESTION: The words "effectively concealed" are in
22 quotation marks in Judge Pregerson's opinion. I assume
23 they're in the complaint.

24 MR. McDOWELL: Oh, they -- they definitely are in
25 the complaint.

1 QUESTION: Yes.

2 MR. McDOWELL: I'm not -- I'm not disputing
3 what's --

4 QUESTION: You can give that away, Mr. Gilmore.
5 Why try to hold that territory? I mean, if -- if we
6 wouldn't reach that under -- under -- under the seizure
7 provision of the Constitution, I expect we'd find
8 substantive due process restrictions against
9 intentionally setting up roadblocks to kill people who
10 have -- who have done nothing but stolen a car. You
11 don't think that's going to survive anyway, do you?

12 I have the wrong counsel. Mr. McDowell.

13 MR. McDOWELL: I'm sorry. I'm sorry. Could you
14 repeat the question?

15 QUESTION: Why -- why do you try to hold on to the
16 territory that -- that even if it was intentionally set
17 up, it couldn't violate the -- in order to kill the
18 fleeing felon, it couldn't violate the search and
19 seizure provision of the Constitution?

20 MR. McDOWELL: Oh, I -- I'm sorry. I'm not saying
21 that. If -- if -- if in fact --

22 QUESTION: If it was intentionally set up --

23 MR. McDOWELL: If it was intentionally set up --

24 QUESTION: -- in order to have him crash into it --

25 MR. McDOWELL: Then -- that's what I'm saying.

1 Then -- then I would agree there would be a seizure.
2 But I think it has to go that far, otherwise --
3 otherwise you're -- you're allowing the suspect to
4 decide what a seizure is --

5 QUESTION: And you --

6 MR. McDOWELL: -- when he decides to run the
7 roadblock, but catches the edge of the roadblock --

8 QUESTION: And your position is if it isn't
9 intentionally set up for that purpose, what? There's no
10 -- there's no seizure --

11 MR. McDOWELL: The roadblock is not the seizure,
12 that it's -- it's -- I'm going to get back to saying
13 reasonable. I don't want to say that.

14 QUESTION: There's no seizure because he hasn't
15 stopped.

16 MR. McDOWELL: There's -- there's no seizure
17 because he hasn't -- he hasn't stopped. And if -- if he
18 -- I say if he attempts to run the roadblock, catches a
19 fender of the -- of the vehicle, spins out, we're back
20 to the -- the Galas v. McKee situation where it's his
21 own volition that -- that caused him not to be able to
22 flee any longer. It's not the roadblock.

23 QUESTION: How about if someone comes up to you in
24 an airport, to use something from one of yesterday's
25 cases, a DEA officer, and says you're under arrest?

1 Now, you have an opportunity, an option, to run away and
2 see if he can catch you, but no one would doubt that
3 that's -- that's a seizure, do you think?

4 MR. McDOWELL: Well, I -- I don't think that's a
5 seizure, Your Honor. I think the seizure takes -- is a
6 -- is a two-part test. You have the communication by
7 the officer, and then you have the -- the resulting
8 conduct of the -- of the person. If -- If they do in
9 fact submit, if they say you're under arrest, and you
10 say, okay, where -- where do I go or if they start to
11 run, but they're grabbed, they're physically restrained
12 or they submit to authority, then there's a seizure.

13 QUESTION: Well, Mr. McDowell, you have here an
14 allegation in the complaint that not only did the person
15 stop, he was killed in the process by virtue of a
16 roadblock which was set up on a high-speed chase. Now,
17 I don't see anything frightening about saying that
18 amounts to a seizure.

19 MR. McDOWELL: Well --

20 QUESTION: I suppose you can defend this case on
21 the ground that what was done was reasonable.

22 MR. McDOWELL: Sure, yes.

23 QUESTION: Is that the position you take?

24 MR. McDOWELL: I think that's -- we certainly --

25 QUESTION: I mean, I don't understand putting 20

1 minutes of argument into saying this isn't a seizure on
2 the facts alleged in the complaint.

3 MR. McDOWELL: Well, we feel that it -- that it
4 should indicate that it was intentionally designed to
5 cause the collision and that -- you know, obviously,
6 we'd like to have some standards for roadblocks in the
7 future. Obviously, the next part we feel that it was
8 reasonable under the circumstances.

9 QUESTION: Well, you're going to stick with that no
10 matter what?

11 MR. McDOWELL: Well --

12 QUESTION: You're going to argue the reasonableness
13 of it or not?

14 MR. McDOWELL: Yes, okay.

15 QUESTION: Mr. McDowell, I -- I thought your
16 position was that it isn't enough that it be
17 unreasonable, that even if it is unreasonable, that's
18 not enough. It has to be intentional.

19 MR. McDOWELL: Well --

20 QUESTION: There's a difference between setting up
21 a roadblock unreasonably, negligently putting a car, a
22 police car, in front of it with -- with high beams on so
23 the person doesn't see it and intentionally doing
24 that in order that the fleeing felon will crash into the
25 roadblock. That is intentionally seizing him by means

1 of the roadblock.

2 MR. McDOWELL: I agree.

3 QUESTION: I thought that was your position.

4 MR. McDOWELL: That's my position, yes.

5 QUESTION: But it could still be unreasonable and
6 not in your view be, a -- an unlawful seizure.

7 MR. McDOWELL: Not a Fourth Amendment seizure.

8 QUESTION: That's what I --

9 MR. McDOWELL: Yes.

10 QUESTION: You've got me puzzled, now. You're
11 saying it can both be a seizure and be unreasonable and
12 not violate the Fourth Amendment?

13 MR. McDOWELL: No.

14 QUESTION: Okay.

15 MR. McDOWELL: No. Obviously, if -- if you meet
16 both tests, then -- then -- then it would violate the
17 Fourth Amendment.

18 QUESTION: And I take it the test you're proposing
19 is that if the fugitive has the ability to thwart the
20 seizure, then there's no seizure.

21 MR. McDOWELL: Yes. I think -- I think that
22 summarizes it.

23 And that's what not alleged, the -- the
24 unavailability, the intentional causing of the
25 collision. We know there was a collision. That's not

1 disputed.

2 QUESTION: Has the ability to thwart --

3 QUESTION: Well, isn't it a fair reading of the
4 ccmplaint that he couldn't?

5 MR. McDOWELL: I don't think -- I don't think the
6 ccmplaint is sufficient on that. I realize it may come
7 close, but I don't feel it's sufficient to meet the
8 standard that -- that that was the -- that he had no
9 choice but to -- but to collide with -- with the
10 roadblock.

11 The second part is the reasonableness. To say --
12 when you basically have the motoring public held hostage
13 by the -- or certainly in jeopardy by the person driving
14 at the high speed, that it's appropriate to put up a
15 rcadblock, even a roadblock that's designed to -- to
16 catch somebody with physical force.

17 QUESTION: Somewhere in your argument are you going
18 to mention Tennessee against Garner?

19 MR. McDOWELL: Well, I think we've been -- we've
20 been referring to it inferentially, at least.

21 QUESTION: Well --

22 MR. McDOWELL: I think that's the -- the standard.

23 QUESTION: Be specific about it.

24 MR. McDOWELL: Well, I think in this case -- or in
25 the Garner case, the -- the Court referred to, in

1 footnote 7 I believe it was, the -- a model penal code,
2 that if you have a felon, if you have -- in this case a
3 fleeing felon, if you have a -- a substantial risk that
4 a person to be arrested will cause death or serious
5 bodily harm -- and I think that can easily be inferred
6 from the fact of the high speed chase on the -- or the
7 highway.

8 QUESTION: Well, do you think -- well, go ahead and
9 finish answering for Justice --

10 MR. McDOWELL: If the apprehension is delayed, then
11 it's appropriate to use -- it's reasonable to use deadly
12 force.

13 QUESTION: But do you think they could have shot
14 this fellow?

15 MR. McDOWELL: Yes. I think a roadblock is a more
16 reasonable way to -- to do --

17 QUESTION: But you think that the officer in
18 pursuit could have just shot him in the head, and that
19 would have been reasonable.

20 MR. McDOWELL: (Inaudible).

21 QUESTION: What? That's your position, as I
22 understand it.

23 MR. McDOWELL: That -- that -- that deadly force
24 could be used --

25 QUESTION: Well, that means the -- that the officer

1 could have shot him in the head and that would be a
2 reasonable way to deal with the situation.

3 MR. McDOWELL: (Inaudible).

4 QUESTION: You just drive up alongside of him and
5 shoot him.

6 QUESTION: Yes.

7 QUESTION: That -- because he's using a -- the car
8 is equivalent to a gun.

9 MR. McDOWELL: Well, that's maybe why it's more
10 appropriate to use a -- to use a roadblock, but deadly
11 force could be -- could be used.

12 QUESTION: Yes, but if you're making that argument,
13 I think Justice White's example would -- you'd -- you'd
14 find that to be reasonable because you're saying driving
15 at high speed on a highway in a car at night is very
16 dangerous and therefore you can use deadly force to --

17 MR. McDOWELL: That seems to be the reasoning in
18 Tennessee v. Garner that -- that deadly force -- in that
19 case a gun was used. If it -- if he -- Mr. Garner had
20 been fleeing from a dangerous felony or if he had
21 produced a gun, a gun would have been appropriate. In
22 this case it ended up being vehicle versus vehicle, and
23 felt that it was appropriate -- an appropriate response.

24 QUESTION: And, analytically, what we have in this
25 case is just the same then as if the officer had driven

1 up alongside and shot the man in the head.

2 MR. McDOWELL: Well, there certainly is a
3 difference in the method and what's -- what is judged is
4 the method of -- of seizure. That didn't happen. The
5 Court -- the Court could find that that would be
6 unreasonable --

7 QUESTION: Well, one can infer from the allegation
8 in the complaint that what happened was pretty close to
9 that because according to the complaint, they did hide
10 the trailer. It was effectively concealed in a way that
11 at the speed the man was traveling driving into the
12 headlights, he wouldn't -- there's no chance in the
13 world that he wouldn't smash into it and at that speed,
14 get killed.

15 MR. McDOWELL: According to the -- to the complaint.

16 QUESTION: Complaint. We -- I don't know if it's
17 true or not, but that's what they've alleged, and we've
18 got to assume it's true.

19 MR. McDOWELL: There has been the issue of the
20 pursuit. We also feel that a -- that a pursuit is not a
21 -- is not a seizure. I believe that issue came up
22 basically because of the recent case of Michigan v.
23 Chesternut.

24 And again, I think even Michigan v. Chesternut
25 indicates that two-part test. There has to be the

1 communication of -- of an intent to seize, and then
2 there has to be a seizure. And in the Chesternut case,
3 there was a seizure initially, the seizure of the
4 drugs. So, you had both things. The drugs were
5 apparently dropped by Mr. Chesternut in response to the
6 communication to Mr. Chesternut that -- that had -- in
7 that case, the communication wasn't sufficient to be a
8 seizure. But had it been, had there been sufficient
9 conduct by the police that it had been construed, then
10 there was a seizure that resulted.

11 So, you need -- you need the -- the action and
12 reaction before you -- before you're able to determine
13 that there -- that there is a seizure. If the reaction
14 is to -- to not be seized and to flee, it's -- it
15 certainly is counter-intuitive to -- to believe that a
16 seizure occurred.

17 If there's no further questions, I think I've
18 covered our side. Thank you.

19 QUESTION: Thank you, Mr. McDowell.

20 Mr. Gilmore, you have six minutes remaining.

21 REBUTTAL ARGUMENT OF ROBERT GENE GILMORE

22 MR. GILMORE: Thank you, Mr. Chief Justice.

23 I'd like to address, if I can, the last point that
24 was raised on the Chesternut case and -- and the issue
25 of whether there has to be a certain communication by

1 the law enforcement officers to the intended -- or the
2 suspect. I believe -- and I may be wrong, but I believe
3 that the Court specifically indicated in that case that
4 communicating or communication of an intent is -- is
5 important only to the extent that it may have actually
6 been communicated, that the Court indicated that it was
7 not a requirement that you somehow communicate the
8 intent. I don't -- I'm not sure how a case would ever
9 be proved if we have to look to the subjective intent of
10 every police officer making an arrest.

11 I think also on the issue of the case of
12 Chesternut, it's important to understand that the Court
13 was asked in that case to make a determination that a
14 pursuit alone was a -- a seizure. The Court found that
15 there was no seizure, but what's important is why the
16 Court found no seizure.

17 The Court found that there was no seizure not
18 because there was a lack of bodily restraint or a
19 submission to authority, but the Court, again following
20 the Mendenhall test, looked to the conduct of the police
21 officers and very simply said that these officers --
22 what they did could not reasonably communicate to anyone
23 that the individual was not free to walk away or
24 disregard the show of authority.

25 QUESTION: But, counsel, Mendenhall says we adhere

1 to the view that a person is seized only when, by means
2 of physical force or a show of authority, his freedom of
3 movement is restrained. Now, it seems to me quite
4 plausible to read that as saying that if the person does
5 not choose to submit to the restraint, that the
6 attempted seizure has not taken place.

7 MR. GILMORE: One interpretation of freedom of
8 movement, restraint of freedom of movement, could be
9 taken that we require bodily restraint. That's only
10 one. I think in light of the language that was quoted
11 earlier from the Terry -- and that's where that came --
12 the Terry v. Ohio case, that we're speaking of something
13 much, much broader than a simple freedom from bodily
14 restraint. Freedom of movement should be read as a
15 right of movement, not a simple bodily restraint.

16 Also on the issue that was raised of the roadblock
17 and whether it should be -- there should be a finding or
18 an allegation in the complaint of whether it was
19 intentional or not, here again I think that there must
20 be an distinction drawn between the intention in the
21 sense that the officers did what they intended to do, as
22 in this case pursuing and setting up a roadblock, versus
23 an intention to kill this young man. I don't know that
24 I could allege or ever prove that these police officers
25 tried to kill this boy. I don't think that would be

1 possible, but I do not believe in -- in utilizing or
2 looking to the requirement of intent that this Court
3 would require such a showing under the Fourth
4 Amendment. Certainly, again, under the Daniels case, et
5 cetera, we know that negligence is not enough with
6 respect to a Fourteenth Amendment.

7 But I'm not sure that this Court, when we're
8 looking to the arbitrary conduct of a police officer --
9 and that's what we're trying to restrict -- that this
10 Court would require intentional in the sense that they
11 intended to kill the young man, only that they intended
12 their conduct, setting up the roadblock.

13 There is the question that was raised as to whether
14 deadly force was -- was an issue on seizure, and I think
15 the general consensus was, no, that's something that
16 should be left for the issue of reasonableness. And not
17 to work against myself, but I don't feel that that's
18 necessarily correct. The Court in the Michigan v.
19 Tennessee case indicated that what we are doing is
20 measuring and gauging the coercive conduct of the police
21 officer. And we're not doing that to determine whether
22 the conduct itself was somehow inherently offensive or
23 heinous. What we're doing is looking to the conduct to
24 see if it rises out of the normal social conduct which
25 Terry tells us is okay, is not a seizure. Is it

1 sufficiently coercive in the sense that it is now
2 elevated out of that circumstance and into a seizure?

3 I think it's important in that sense that the Ninth
4 Circuit did find on the same factual situation again
5 that the conduct here was intentional, unjustified,
6 brutal and offensive to human dignity. Certainly if
7 that was the case -- if that's what these facts tell us,
8 then I think that this certainly is coercive to the
9 extent that it raises and arises beyond mere social
10 conduct by the police officers.

11 QUESTION: Mr. Gilmore, why shouldn't we adopt a
12 constitutional rule that encourages people to abide by
13 police directives? If those directives turn out to be
14 unreasonable, then they have a constitutional cause of
15 action against the police officers. But why should we
16 adopt a rule that says go ahead, run, flee down the
17 highway? And even if you do that and endanger public
18 lives, you will still have a constitutional cause of
19 action against the police officers if it turns out that
20 their chase is unreasonable.

21 In other words, why shouldn't we adopt the rule
22 that you have to stop? And if -- if they've been wrong
23 in stopping you, then you have a cause of action, but if
24 you don't listen to them and endanger the public, you
25 don't have a constitutional cause of action? Why

1 doesn't that make sense?

2 MR. GILMORE: Well, I think that would be too harsh
3 a law. I think the law in that case, if that was the
4 rule, that if you flee you are opening yourself to
5 deadly force under any circumstances -- if I -- am I
6 misunderstanding the --

7 QUESTION: I'm not saying they can kill you. I
8 mean, that's a different -- I think we're all agreed
9 that if they intentionally sought to -- to kill this
10 person, it would be no different.

11 MR. GILMORE: Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gilmore.

13 The case is submitted.

14 (Whereupon, at 10:51 o'clock a.m., the case in the
15 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-248 - GEORGIA BROWER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE
OF WILLIAM JAMES CALDWELL (BROWER), DECEASED, ET AL.,
Petitioners V. COUNTY OF INYO, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman
(REPORTER)

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