

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: CALIFORNIA, Petitioner V. HODARI D.

CASE NO: 89-1632

PLACE: Washington, D.C.

DATE: January 14, 1991

PAGES: 1 - 50

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

**LIBRARY**  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

1                    IN THE SUPREME COURT OF THE UNITED STATES

2    - - - - - X  
3    CALIFORNIA,                    :  
4                    Petitioner                    :  
5                    v.                                :    No. 89-1632  
6    HODARI D.                        :  
7    - - - - - X

8                                    Washington, D.C.  
9                                    Monday, January 14, 1991

10                    The above-entitled matter came on for oral  
11    argument before the Supreme Court of the United States at  
12    11:04 a.m.

13    APPEARANCES:

14    RONALD E. NIVER, ESQ., Deputy Attorney General of  
15                    California, San Francisco, California; on behalf of  
16                    the Petitioner.

17    CLIFFORD M. SLOAN, ESQ., Assistant to the Solicitor  
18                    General, Department of Justice, Washington, D.C.; on  
19                    behalf of United States, as amicus curiae, in support  
20                    of the Petitioner.

21    JAMES L. LOZENSKI, ESQ., Berkeley, California; appointed  
22                    by this Court on behalf of the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENTS OF	PAGE
3	RONALD E. NIVER, ESQ.	
4	On behalf of the Petitioner	3
5	CLIFFORD M. SLOAN, ESQ.	
6	On behalf of United States,	
7	as amicus curiae, in support	
8	of the Petitioner	20
9	JAMES L. LOZENSKI, ESQ.	
10	On behalf of the Respondent	30
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 89-1632, California v. Hodari D.

5 Spectators are reminded that the Court remains  
6 in session. There will be no talking in the courtroom.

7 Is it Niver or Niver?

8 MR. NIVER: Niver, sir.

9 QUESTION: Mr. Niver, you may proceed.

10 ORAL ARGUMENT OF RONALD E. NIVER

11 ON BEHALF OF THE PETITIONER

12 MR. NIVER: Mr. Chief Justice, and may it please  
13 the Court:

14 In this case the California court of appeal  
15 reversed a finding of juvenile wardship against  
16 Respondent, holding first that he had been seized under  
17 the Fourth Amendment, second that the detention was  
18 without reasonable cause to detain, and third, the rock of  
19 cocaine which he discarded at the time of the seizure was  
20 the fruit of that detention. Today we challenge the first  
21 and third conclusions. We argue that Respondent had not  
22 been seized when he dropped his contraband, and that in  
23 any event the discovery of the evidence was not the  
24 product of any illegality.

25 The relevant facts are that about 10:00 p.m. on

1 April 18, 1988, two officers were on routine patrol in an  
2 unmarked car in Oakland when they turned a corner to see,  
3 about 40 yards away from them, four young men talking to  
4 the driver of a car parked on the street. When they  
5 looked toward the police car, the driver sped away and the  
6 pedestrians ran away. The officers drove to the  
7 approximate place where the men had been standing, and one  
8 of them, Officer Pertoso, got out of the car. The other  
9 officer, McColgin, drove in the general direction toward  
10 which two of the pedestrians had run away. But Officer  
11 Pertoso ran the other way in an effort to intercept one or  
12 more of them. And that is just what happened.

13 As Officer Pertoso turned the corner he saw  
14 Respondent running toward him, but looking over his  
15 shoulder as if to see if he were being followed. When he  
16 turned to face the officer, the two men were 11 feet away  
17 from each other. At this point the officer had said  
18 nothing to respondent. Respondent then did two things.  
19 First he threw an object onto the sidewalk, and then he  
20 continued toward the officer, who forced him to the ground  
21 and handcuffed him. The officer then recovered the  
22 object, which proved to be a rock of cocaine.

23 We first address the question of seizure. A  
24 seizure --

25 QUESTION: Mr. Niver, the State conceded there

1 was no articulable suspicion?

2 MR. NIVER: We have never contested that, Your  
3 Honor, and the case comes to this Court based upon the  
4 premise, the assumption that there was no articulable  
5 suspicion. Yes, Your Honor.

6 QUESTION: Why --

7 QUESTION: You mean even -- excuse me, go ahead.

8 QUESTION: Why do you take that position?

9 MR. NIVER: Well, because there was a finding by  
10 the trial court which was not contested in the trial  
11 court. When it came to the California court of appeal we  
12 did not change theories. It has always been litigated  
13 under those circumstances. And when it came to this Court  
14 we chose to maintain our position.

15 QUESTION: Well, that there's no unreason --  
16 that there's no suspicion to stop as of what point?

17 MR. NIVER: As of the point that the -- at the  
18 point before respondent dropped his rock of cocaine. The  
19 finding was that there was no basis to chase him.

20 QUESTION: In -- all right.

21 QUESTION: In your view does the fact that  
22 someone in the defendant's circumstances here is running  
23 away, some evidence that would give rise to a reasonable  
24 articulable suspicion?

25 MR. NIVER: Yes, Your Honor, it is some

1 evidence. Correct. The court of appeal so concluded,  
2 but, consistent with State law at the time, found that  
3 flight without more is not sufficient. It's relevant, but  
4 not sufficient.

5 QUESTION: Now, do you take the position that  
6 the police are free to chase somebody without any  
7 reasonable, articulable suspicion?

8 MR. NIVER: We take the position that it does  
9 not violate the Fourth Amendment until that person has  
10 actually been restrained. That is the position which we  
11 urge upon this Court today.

12 QUESTION: May I ask --

13 QUESTION: That's a pretty serious step, isn't  
14 it?

15 MR. NIVER: Yes, Your Honor. But to -- we  
16 believe that this is consistent with this Court's case  
17 law. A seizure under the Fourth Amendment is composed of  
18 two distinct elements, two dimensions. First --

19 QUESTION: May I ask, before you get into the  
20 definition of seizure, is it your view of the record that  
21 had he not thrown the cocaine, the rock or whatever it  
22 was, down, he would not have been stopped?

23 MR. NIVER: Oh, he would have been stopped.

24 QUESTION: He would have been seized?

25 MR. NIVER: Yes, Your Honor.

1 QUESTION: So that the question then is whether  
2 there's anything illegal about an attempted seizure?

3 MR. NIVER: That's exactly the case, Your Honor.

4 QUESTION: Anything illegal about an attempted  
5 seizure without articulable suspicion.

6 MR. NIVER: That's right, Your Honor.

7 QUESTION: And is it not rather clear that that  
8 should be illegal?

9 MR. NIVER: Your Honor, our position is to the  
10 contrary. Our position is it does not violate the Fourth  
11 Amendment until there is actual restraint.

12 QUESTION: So the exclusionary rule should not  
13 apply to attempted illegal conduct by the police?

14 MR. NIVER: It does not violate -- that's right,  
15 Your Honor. It does not violate this person's right under  
16 the Fourth Amendment until he is actually seized. An  
17 attempted seizure is not mentioned in the language of the  
18 Fourth Amendment or in this Court's cases.

19 QUESTION: Well, it seems to me that you have to  
20 have -- you certainly are going to defend -- you're  
21 certainly going to say that the officer properly seized  
22 him when he finally did --

23 MR. NIVER: Yes, Your Honor.

24 QUESTION: -- physically, and the reason is, I  
25 suppose, that he had thrown the rock away.

1 MR. NIVER: That's exactly right, Your Honor.

2 QUESTION: That gave -- that gave some sort of  
3 reasonable suspicion to do something about it, or what?  
4 Probable cause?

5 MR. NIVER: At that point it was probably  
6 probable cause. It was probable cause, yes.

7 QUESTION: Because otherwise the case is over,  
8 if you had no legal basis to actually seize him  
9 physically.

10 MR. NIVER: At the time he seized him physically  
11 he had more than Terry suspicion. He had --

12 QUESTION: So you think it -- you think the  
13 issue is whether there was a seizure prior to throwing the  
14 rock away?

15 MR. NIVER: Yes, Your Honor.

16 QUESTION: Is it not clear from what you have  
17 acknowledged that the reason he threw the rock away is  
18 that the police were in the act of attempting to conduct  
19 an illegal seizure? Isn't that what prompted him to throw  
20 the rock away?

21 MR. NIVER: He was prompted -- Your Honor, yes,  
22 Your Honor -- no, Your Honor. He was prompted to --

23 QUESTION: Why do you think he threw it away?

24 MR. NIVER: We will never know, because the  
25 record does not articulate it. He -- let's put it --

1       excuse me, Your Honor. He threw it away because he saw a  
2       police officer.

3               QUESTION: Who was in an illegal attempt to try  
4       and seize him at the very moment, was he not? You just  
5       acknowledged that.

6               MR. NIVER: We have never acknowledged that at  
7       that point there was a show of authority. All he saw was  
8       a police officer running after him. Even if, taking the  
9       view of the court of appeal and the respondent, there was  
10      a show of authority, there was no manifestation to this  
11      person that he would have been searched, only that he  
12      would have been seized.

13              QUESTION: Mr. Niver, is there anything in the  
14      record about factually why this particular respondent  
15      threw the -- the block or brick away at the time he did?

16              MR. NIVER: Nothing at all, Your Honor.

17              QUESTION: So it's just really speculation or  
18      guessing from what the record shows about the series of  
19      events?

20              MR. NIVER: Entirely, Your Honor.

21              QUESTION: Is it anything more than guessing  
22      whether they would have arrested him if he hadn't thrown  
23      it away?

24              MR. NIVER: The officer testified that he wanted  
25      to stop him and question him about why he ran away. There

1 was nothing in the record from the officer's testimony --

2 QUESTION: A Terry stop or an arrest?

3 MR. NIVER: A Terry stop. He did not intend to  
4 arrest him when he went after him.

5 QUESTION: Is there anything in the record to  
6 show whether he was a purchaser or a seller?

7 MR. NIVER: No, Your Honor. As a matter of  
8 fact, the finding of wardship was simple possession. So,  
9 no, Your Honor, we don't have any --

10 QUESTION: So there's nothing in the record to  
11 show that he might have been the purchaser?

12 MR. NIVER: No, Your Honor.

13 QUESTION: Mr. Niver, you make a point of the  
14 fact it would have been just a Terry stop rather than an  
15 arrest. It would have been a Terry stop without any  
16 articulable suspicion, would it not?

17 MR. NIVER: It would -- yes, Your Honor.

18 QUESTION: So it would have been equally illegal  
19 as an arrest.

20 MR. NIVER: It would have violated the Fourth  
21 Amendment to detain him --

22 QUESTION: Just as much as a Terry -- just as  
23 much as an arrest would.

24 MR. NIVER: Yes, Your Honor.

25 QUESTION: After the running began?

1           MR. NIVER: After the running began, the running  
2 by itself, the court of appeal found, was not sufficient  
3 to detain him. We have not challenged that in this case,  
4 Your Honor.

5           QUESTION: Mr. Niver, what about -- well, there  
6 were other drugs admitted in evidence, were there not?

7           MR. NIVER: They were -- there is -- no, Your  
8 Honor. They were not admitted against him for the finding  
9 of the wardship. The only evidence used against him to  
10 establish wardship was the single rock of cocaine which he  
11 discarded at the time he confronted the officer. There  
12 was a bag of 15 rocks, but they were never found to be  
13 either possessed by him or in fact even cocaine. The only  
14 question before this Court was the legality of the seizure  
15 of the single rock.

16           Continuing on the matter of the elements of a  
17 seizure, this Court has acknowledged, has defined a  
18 seizure in its case law as composed of two distinct  
19 elements: some official action and restraint upon the  
20 movement of the citizen at whom the action is directed.  
21 That has been the rule since Terry v. Ohio defined a  
22 seizure as physical force or show of authority which has  
23 restrained the liberty of a citizen. Since Terry this  
24 Court has found -- had occasion to define the parameters  
25 of both elements.

1           With regard to the requirement of a display of  
2 authority, this Court has said, beginning in a plurality  
3 of cases, of Mendenhall and Royer, and concluding with  
4 Delgado and Chesternut, that an objective standard  
5 requires the question whether an official action was such  
6 that a reasonable person would have believed that he or  
7 she was not free to leave. Respondent suggests that that  
8 test replaced that set forth in Terry, but we believe this  
9 is conceptually incorrect. Mendenhall and its progeny did  
10 not dispense with the requirement of restraint.

11           This may be illustrated by a simple example. If  
12 an officer says to a pedestrian, stop in the name of the  
13 law, and the person flees, never to be caught, he has not  
14 been seized in any physical or constitutional sense. The  
15 reason is that the second element, restraint upon  
16 movement, has not been satisfied. This Court has never  
17 held that a person has been seized in the absence of  
18 restraint by police.

19           QUESTION: What if the police officer fired a  
20 couple of warning shots, and the fellow still ran and then  
21 threw the rock away?

22           MR. NIVER: If he ran and escaped apprehension,  
23 he has not been seized.

24           QUESTION: So that even shooting at him wouldn't  
25 be enough?

1 MR. NIVER: It would be a display of authority,  
2 certainly. It would not be a violation of the Fourth  
3 Amendment in the absent of restraint.

4 QUESTION: In your view, when the police officer  
5 puts on red lights behind a car, when does the stop take  
6 place? When the red lights are put on or when the car  
7 pulls over to the curb?

8 MR. NIVER: When the car pulls over to the curb.

9 QUESTION: And if there is no basis for the  
10 stop, suppose the car pulls away at a high speed?

11 MR. NIVER: Then the seizure has terminated.

12 QUESTION: Can the police officer acquire a  
13 basis for stopping the car after it pulls away at a high  
14 speed, if he had no basis to turn on the lights to begin  
15 with?

16 MR. NIVER: I'm not sure I understand, Your  
17 Honor.

18 QUESTION: Suppose the police officer has no  
19 basis for turning on the red lights, but does so anyway.

20 MR. NIVER: Yes.

21 QUESTION: The car then pulls away at a high  
22 speed. Is the police officer justified in pursuing and  
23 stopping?

24 MR. NIVER: I would say that if there are other  
25 circumstances present, certainly.

1 QUESTION: Just the circumstances I give.

2 MR. NIVER: A high-speed chase, I would suggest

3 --

4 QUESTION: Well, let's forget high speed.

5 MR. NIVER: All right.

6 QUESTION: Suppose he pulled -- ignores the  
7 lights and continues?

8 MR. NIVER: I would think so, yes, Your Honor.  
9 Yes, Your Honor.

10 QUESTION: You think there would be basis for a  
11 reasonable suspicion at that point?

12 MR. NIVER: At that point, yes, Your Honor, I  
13 do.

14 QUESTION: And I suppose in one example --

15 QUESTION: Is this high speed above the speed  
16 limit? I -- Justice Stevens and I were -- when you say he  
17 pulls away at a high speed, do you mean a high speed above  
18 the speed limit, or -- what was your answer assuming?

19 MR. NIVER: A high speed that is suggesting --

20 QUESTION: Within the speed limit?

21 MR. NIVER: Something -- either speeding or  
22 something suspicious about the circumstances of leaving.  
23 Or, for example, in terms of officer -- highway safety,  
24 something unsafe about it. There are a lot of  
25 circumstances involving cars that do not arise in the

1 streetside detentions.

2 This Court has never held that a violation, that  
3 the Fourth Amendment is implicated by a detention in the  
4 absent -- absence of restraint by police. Now a restraint  
5 upon liberty does not mean only an application of physical  
6 force, such as the use of handcuffs. Instead the concept  
7 of restraint is broader and includes submission by the  
8 officer to a display of authority. The true test is not  
9 the use of force or the absence of force, but the presence  
10 of control over the -- by the officer over the citizen.

11 The contours of this element were explored by  
12 this Court's recent decision in *Brower v. County of Inyo*.  
13 There the Court characterized the seizure as a  
14 governmental termination of freedom of movement through  
15 means intentionally applied. Respondent suggests this  
16 test, even if relevant, is satisfied if the person cannot  
17 go wherever he wants because of the presence of the  
18 police, but this open-ended view of a seizure is  
19 inconsistent with *Brower's* declaration that a seizure is  
20 an intentional acquisition of physical control.

21 The overarching principle, then, is control.  
22 Even if there is a show of authority, if a person can  
23 avoid the officer's control and does so, there is no  
24 seizure under the Fourth Amendment. In this case we have  
25 argued in the briefs that there was not even a show of

1 authority in this case. But even if there was, even if  
2 the respondent reasonably believed that the officer was  
3 attempting to detain him, there was no physical control  
4 over the respondent at the time that he discarded his rock  
5 of cocaine. Rather, he did not acquiesce in the officer's  
6 presence. Instead he dropped the rock of cocaine and  
7 continued to move. The officer had to force him to the  
8 ground and handcuff him.

9 The court of appeal below said that his  
10 movement, the direction of his path was influenced by the  
11 officer --

12 QUESTION: Let me give you a hypothetical.  
13 Supposing an officer comes up to somebody he has no basis  
14 for suspecting, pulls a gun on him and says, from a  
15 distance across the room, says disarm yourself, throw any  
16 weapon you may have in your pocket to the ground, and the  
17 fellow does it, and then after that he arrests him. Is  
18 that lawful conduct? Does that violate the Fourth  
19 Amendment?

20 MR. NIVER: Yes, Your Honor, it does.

21 QUESTION: Why? The fellow wasn't under -- at  
22 the time of the command all he knew is that he was being  
23 -- and say he runs away then and he never catches the man.  
24 He never catches him, so there is never a successful  
25 seizure.

1 MR. NIVER: At the -- well, he was ordered to  
2 drop his weapon.

3 QUESTION: Right.

4 MR. NIVER: His act in dropping the weapon was a  
5 submission to the officer's authority.

6 QUESTION: And so -- does that mean there was a  
7 seizure or was there not a seizure?

8 MR. NIVER: A seizure -- there was a seizure of  
9 the person and there was a seizure of his weapon.

10 QUESTION: Even though he never caught him?  
11 Even though he never subdued him?

12 MR. NIVER: The seizure ended when he ran away  
13 and was not -- when he ran from the control of the  
14 officer.

15 QUESTION: But he was never under the control of  
16 the officer, under your argument as I understand it.

17 MR. NIVER: Our argument is that if a person  
18 submits to a show of -- submits to a show of authority --

19 QUESTION: I see.

20 MR. NIVER: -- at that point he is seized. It  
21 doesn't require physical control, not in the sense that  
22 the officer and the person are standing next to each  
23 other. It requires submission. If a person objectively  
24 submits to the show of authority by a police officer, that  
25 is a detention within the meaning of the Fourth Amendment.

1 QUESTION: So if this man understood the chase  
2 to be a show of authority where he was attempting to catch  
3 him, then it would be a seizure and it would have been an  
4 illegal seizure? And throwing it away would be just like  
5 throwing the gun away?

6 MR. NIVER: In this case -- if I understand Your  
7 Honor's question, in this case it was not a submission  
8 because he attempted to run.

9 QUESTION: Well, my fellow threw the gun on the  
10 ground and then ran, and he never got caught.

11 MR. NIVER: He was ordered to do so, Your Honor.

12 QUESTION: So the thing that's wrong here is  
13 there is no -- nothing equivalent to an order to stop or  
14 an order to throw the rock away?

15 MR. NIVER: That's exactly right, Your Honor.

16 QUESTION: Mr. Niver, you're saying, if I  
17 understand it, that there's no Fourth Amendment violation  
18 when the police obtain evidence as a result of unlawful  
19 conduct by them, unless that unlawful conduct constitutes  
20 a completed seizure? Is that fair to say?

21 MR. NIVER: Or unless the police officer has  
22 ordered the person to --

23 QUESTION: Yeah, but that in your view would  
24 amount to a seizure, because it would be a submission to  
25 authority, right?

1 MR. NIVER: Correct, Your Honor.

2 QUESTION: Okay. Would --

3 MR. NIVER: It's very much -- it's --

4 QUESTION: All right, would your -- would your  
5 position be different if instead of raising the issue  
6 under the Fourth Amendment, the issue had been raised  
7 under the Due Process Clause, pure and simple?

8 MR. NIVER: If the respondent had argued --

9 QUESTION: Somebody says there's a violation of  
10 due process in obtaining evidence as a result of unlawful  
11 police conduct and using that evidence in trial.

12 MR. NIVER: Well, I believe that this Court has  
13 not so held since Roshan. I don't believe -- no, I don't  
14 believe that a motion to suppress under the Due Process  
15 Clause would be -- would be cognizable. Unless it  
16 violates the Fourth Amendment, the evidence is admissable.

17 QUESTION: So that for evidentiary purposes,  
18 illegal police conduct is really not subject to regulation  
19 unless you do have a narrow or strict Fourth Amendment  
20 violation?

21 MR. NIVER: Well, not all intrusive police  
22 conduct violates the Constitution, and if it does violate  
23 the Constitution, it does not necessarily violate the  
24 Fourth Amendment. To be suppressible, the police conduct  
25 has to violate the Fourth Amendment. At the time of the

1 officer confronted the respondent, who then dropped his  
2 rock, that did not violate the Fourth Amendment, because,  
3 number one, he was not under the police officer's control  
4 and there was no seizure of his --

5 QUESTION: I understand your point on that.

6 QUESTION: I assume, as far as deterrence is  
7 concerned, it doesn't make much difference that no  
8 policeman chases somebody with the expectation that he  
9 won't stop him, or says halt or I'll shoot with the  
10 expectation that he won't halt, and that therefore he'll  
11 be able to get away with his unlawful action. I mean, I  
12 assume, ex ante, the policeman has no incentive to commit  
13 an unlawful act if we adopt the rule that you're proposing  
14 to us.

15 MR. NIVER: There is already --

16 QUESTION: You're free to answer the question,  
17 Mr. Niver.

18 MR. NIVER: There is already in place an  
19 exclusionary rule which advises the officer that if he  
20 chases him and if he seizes him and if he searches him,  
21 that evidence will be excluded.

22 Thank you.

23 QUESTION: Thank you, Mr. Niver.

24 Mr. Sloan, we'll hear from you.

25 ORAL ARGUMENT OF CLIFFORD M. SLOAN

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ON BEHALF OF UNITED STATES,  
AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

MR. SLOAN: Mr. Chief Justice, and may it please  
the Court:

This case concerns the meaning of the term  
seizure in the Fourth Amendment. In our view control is  
an essential element of the seizure. Control can be  
achieved through actual physical control or a coercive  
assertion of governmental authority and citizen  
acquiescence in that authority. In respondent's view, no  
control is necessary. One way of understanding the  
difference between our position and respondent's position  
is to consider if the facts of this case were exactly the  
same, with one change. And that is that respondent had  
succeeded in alluding the police after throwing down his  
rock of cocaine. In respondent's view, a seizure would  
nevertheless have taken place, and the cocaine must  
nevertheless be suppressed, even though the police might  
not succeed in apprehending respondent for a period --

QUESTION: But Mr. Sloan, is that any more  
anomalous than the hypothetical I gave and the answer  
counsel gave of pulling the gun on the man and say drop  
your weapon, and then he runs away and he never gets  
caught? Was there a seizure in that case?

MR. SLOAN: Well, if I could ask for one point

1 of clarification in your hypothetical, Justice Stevens.  
2 Does the individual stop at all, or is he running the  
3 entire time and throws the gun away?

4 QUESTION: He's running the entire time.

5 MR. SLOAN: If he's running the entire time, I  
6 think there is not a seizure of the person. There is a  
7 seizure of the gun, just as in this case the respondent  
8 was running the entire time, and there is not a seizure  
9 when he is running. If he stops, then it's acquiescence  
10 to the authority. But if he's running the entire time  
11 there is not a seizure of the person.

12 QUESTION: Did I understand you to say the  
13 procedure was taking place? Did you say the -- the arrest  
14 was taking place when he was running?

15 MR. SLOAN: I -- no, I did not say that, Your  
16 Honor. I said that -- in fact it's quite clear that it's  
17 our position that the seizure did not take place until the  
18 officer actually gained control of the individual. Until  
19 that --

20 QUESTION: Well, what was going on during the  
21 running?

22 MR. SLOAN: Well, what the record reveals is  
23 that Officer Pertoso was running up a street in one  
24 direction, respondent was running --

25 QUESTION: Did he tell him he was an officer of

1 the law?

2 MR. SLOAN: No, he did not.

3 QUESTION: Well, how did the man know it?

4 MR. SLOAN: Well, what is revealed in the record  
5 is that he had a jacket that said Police on it. He was in  
6 an unmarked car.

7 QUESTION: And while the man was running he  
8 could look back and see the jacket?

9 MR. SLOAN: Well, apparently --

10 QUESTION: He's got eyes in the back of his  
11 head?

12 MR. SLOAN: No, Your Honor, but the evidence is  
13 that he saw the car with the individuals in it as he stood  
14 there before he ran.

15 QUESTION: I thought he was running towards the  
16 officer anyway?

17 MR. SLOAN: He was running towards the officer  
18 at the time of the event that the actual seizure -- that  
19 the throwing away of the rock of cocaine took place and  
20 the eventual seizure. The individuals ran away from the  
21 police when they were standing around the car and saw the  
22 police car emerge.

23 QUESTION: But I thought --

24 QUESTION: Why do you need all of this bending  
25 of language? The fact that he saw him throw away a bag

1 that had cocaine in it, now what more is necessary for  
2 conviction?

3 MR. SLOAN: Well, we entirely agree, Justice  
4 Marshall, that when he saw him throw away the rock of  
5 cocaine, that furnished probable cause for the -- for the  
6 arrest. We entirely agree with that proposition.

7 QUESTION: Well, why do you have to find out  
8 whether he was under arrest before then?

9 MR. SLOAN: Well, in our view it's quite clear  
10 that there was not a seizure before then, and that was in  
11 fact the fallacy in the court of appeals' opinion, was  
12 that they thought that it was critical --

13 QUESTION: I think you just want to confuse us,  
14 that's all.

15 QUESTION: Mr. Sloan, I thought the police  
16 vehicle was unmarked.

17 MR. SLOAN: It was, Justice O'Connor.

18 QUESTION: And there's no evidence that the  
19 defendant understood it was a police vehicle or police in  
20 it?

21 MR. SLOAN: Well, what the evidence is that's in  
22 the record, and it's the testimony of the two officers at  
23 the suppression hearing, is that they did -- they had  
24 jackets on that said Police. They were driving an  
25 unmarked car. Whatever inferences are drawn -- are drawn

1 from those facts that are in the record. We would agree  
2 -- it would be our position that there would be reasonable  
3 suspicion from fleeing from police if they reasonably  
4 thought it was police. As counsel for the State has said.  
5 That issue has not been presented in the petition and is  
6 not presented in the case. But we would definitely  
7 believe that that would be reasonable suspicion in and of  
8 itself.

9 QUESTION: But is it correct there's no evidence  
10 that they knew whether they were police officers or -- or  
11 perhaps rival distributors of illegal substances who might  
12 have been after them? They don't -- we don't know from  
13 the record, do we? They could have run from people other  
14 than police is what I'm suggesting.

15 MR. SLOAN: It is -- it is possible. The facts  
16 in the record are, as I have stated, that they had the  
17 jackets on --

18 QUESTION: Well, for example, had the officers  
19 got out of the car before they started to run?

20 MR. SLOAN: No. I believe --

21 QUESTION: So they wouldn't have been able to  
22 see what was on their jackets, would they?

23 MR. SLOAN: That's probably correct. Now, it's  
24 possible in some of the case law there are inferences that  
25 can be drawn about this as a brown unmarked Dodge in this

1 particular neighborhood, but the only evidence is the  
2 testimony of the officers and the reaction of those  
3 individuals when they ran. But that -- whether they  
4 recognized they were police or not really doesn't bear on  
5 the question of whether there was a seizure. It would  
6 bear on the question of whether there was reasonable  
7 suspicion or not --

8 QUESTION: Yes.

9 MR. SLOAN: -- which is not presented in this  
10 case. But it doesn't bear on the question of whether  
11 there was a seizure or not.

12 The thrust of our position is that it is a  
13 contradiction in terms to say that an individual is at the  
14 same time in flight and has been seized, and that is the  
15 burden of respondent's position and it is the burden of  
16 the court of appeals' decision. Now, the Fourth Amendment  
17 addresses the seizure --

18 QUESTION: But Mr. Sloan, in my other  
19 hypothetical you said you wanted to ask if the fellow was  
20 running. Supposing he was standing there and the officer  
21 points a gun at him and says drop your weapon. He dropped  
22 his weapon, then runs. Is it now a contradiction in terms  
23 to say he has been seized?

24 MR. SLOAN: If, when he was standing there, an  
25 objective observer would say that he had manifested

1 acquiescence --

2 QUESTION: Well, he threw his gun on the ground  
3 pursuant to the command --

4 MR. SLOAN: Well, I don't think that the  
5 throwing --

6 QUESTION: -- and then ran.

7 MR. SLOAN: I think that the throwing of the  
8 object is distinct from the question of the seizure of the  
9 person. In one instance you're talking about the seizure  
10 of the person.

11 QUESTION: Right.

12 MR. SLOAN: There is clearly a seizure of the  
13 gun in that instance. Now as to whether the person has  
14 been seized it would be a close factual question in that  
15 situation whether he had manifested acquiescence. If he  
16 held up his hands and said you've got me, or something --

17 QUESTION: No, my facts are he just threw the  
18 gun on the ground and ran, and was never caught.

19 MR. SLOAN: Well, in those -- under those facts  
20 I do not think that it would be a seizure, because I don't  
21 think that there is anything, aside from the throwing down  
22 of the gun, that manifests acquiescence in the coercive  
23 assertion of authority for the seizure of the person. The  
24 mere throwing down of an object is not itself sufficient  
25 to establish acquiescence in the authority.

1           QUESTION: Suppose he does acquiesce in the  
2 authority. He said -- the police officer without any  
3 basis says stop, I want to talk to you. That's all he  
4 says. And the defendant says you've got me and throws out  
5 the gun. Then what?

6           MR. SLOAN: In that circumstance there, there  
7 has been a seizure. Now, that would then present the  
8 second question, which is whether, once there has been a  
9 seizure the, the gun that is dropped, or drugs in another  
10 situation, after an officer just says stop, I want to talk  
11 to you, should be suppressed as fruits of the poisonous  
12 tree, and we would submit that it should not be. But  
13 that's for a separate reason. But under your  
14 hypothetical, Justice Kennedy, there clearly has been a  
15 seizure of the person. The officer orders him to stop and  
16 he stops.

17           QUESTION: And so what is the result with  
18 reference to the gun?

19           MR. SLOAN: Well, with reference to the gun it  
20 would be our position that it is not a fruit of the  
21 unlawful seizure, because the decision to throw down the  
22 gun in that circumstance is a sufficient intervening  
23 independent act of free will.

24           QUESTION: Can you argue that here?

25           MR. SLOAN: Yes, we can, and we do. That even

1 if the court of appeal is correct and respondent is  
2 correct that control is not necessary to the seizure and  
3 that a person can at the same time be in flight and be  
4 seized, the independent act of throwing down the drugs not  
5 in response to any order or any indication from the police  
6 that that is what he's supposed to do is a sufficient  
7 intervening independent act of free will.

8 On that point the Court's cases on the  
9 exclusionary rule are quite clear that there has to be an  
10 exploitation of the illegality, but for causation is not  
11 itself sufficient. There has to be something purposeful  
12 by the exploitation of the illegality. And in that  
13 instance there would not be such an exploitation.

14 Now, as we have pointed out in our brief, the  
15 history of the Fourth Amendment strongly supports the  
16 conclusion that control is an element of a seizure. The  
17 common understanding of the term at the time the Fourth  
18 Amendment was adopted and as it is today, is that a  
19 seizure requires an element of control. And that is  
20 revealed -- the historical evidence, that is revealed in  
21 dictionaries of the 18th and 19th century, in early  
22 decisions construing the term seizure, and in early State  
23 constitutions that equated the concepts of arrest and of  
24 seizure.

25 Now this Court has never found there to be a

1 seizure when there has not been some element of  
2 governmental control in either of the senses that I have  
3 described. Respondent suggests that we are advocating  
4 some major change in the law. In fact respondent's  
5 conclusion would lead to a fundamental change in the law,  
6 because it would be the first time that this Court had  
7 ever held that there was a seizure without any element of  
8 governmental control. The principle that a seizure  
9 requires an element of governmental control provides a  
10 clear and coherent interpretation of the term seizure.  
11 Respondent's view, in contrast, is virtually limitless,  
12 and it would lead to some absurd consequences.

13 QUESTION: Thank you, Mr. Sloan.

14 Mr. Lozenski, we'll hear from you.

15 ORAL ARGUMENT OF JAMES L. LOZENSKI

16 ON BEHALF OF THE RESPONDENT

17 MR. LOZENSKI: Mr. Chief Justice, and may it  
18 please the Court:

19 The question here is how far the police can go  
20 in engaging in intimidating and coercive conduct before  
21 the Fourth Amendment rights are implicated. First, I  
22 would like to clarify the facts of this case somewhat.  
23 You had four young men standing around a car at 10 o'clock  
24 at night. An unmarked police car pulls up to the curb,  
25 getting ready to turn the corner. These young men

1     apparently see this police -- or this unmarked car. They  
2     take off and flee. Instantaneous with their flight, the  
3     police officers engage in a pincer maneuver. The purpose  
4     of the pincer maneuver was to cut them off, stop them,  
5     find out who they were and what they were doing.

6             Office Pertoso says I didn't follow them. I ran  
7     in a different direction while the other officer went  
8     around the block. And the State says there is no show of  
9     authority here in this 11-foot scenario where Office  
10    Pertoso confronts Hodari. Hodari is running along looking  
11    over his shoulder. He turns around and he sees Officer  
12    Pertoso bearing down on him. Officer Pertoso is --

13            QUESTION: Does the record show that he -- that  
14    Hodari knew that Officer Pertoso was a police officer?

15            MR. LOZENSKI: The record does not reflect what  
16    Hodari knew, Mr. Chief Justice.

17            QUESTION: There isn't any testimony about that?

18            MR. LOZENSKI: No. Mr. Chief Justice, Officer  
19    Pertoso -- and both officers have testified that they were  
20    dressed in the standard task force uniform, that is a blue  
21    jacket with Police written on the front, with Police  
22    written on the back, blue jeans, tennis shoes, and gun  
23    belts. So I think, in answer to your question, Mr. Chief  
24    Justice, when Hodari saw this officer bearing down on him,  
25    he knew it was a police officer.

1                   QUESTION: When you say bearing down, actually  
2 they were running towards one another, weren't they?

3                   MR. LOZENSKI: Officer Pertoso was running  
4 directly at Hodari, blocking his path.

5                   QUESTION: And Hodari had looked over his  
6 shoulder, and then he turned, and 11 feet away he saw  
7 Pertoso?

8                   MR. LOZENSKI: Bearing right down on him,  
9 blocking his path, Your Honor.

10                  QUESTION: Yeah.

11                  QUESTION: You think that alone is enough to  
12 make a reasonable person believe they're not free to go,  
13 seeing someone running towards you?

14                  MR. LOZENSKI: Justice O'Connor, in the manner  
15 in which Officer Pertoso was bearing down on Hodari, yes,  
16 I do.

17                  QUESTION: Well, I thought we didn't have any  
18 evidence about the manner. It was just two people running  
19 at each other, I mean, in the same -- in opposite  
20 directions.

21                  MR. LOZENSKI: My recollection --

22                  QUESTION: Do we have other evidence?

23                  MR. LOZENSKI: My recollection of the record,  
24 Your Honor, is Officer Pertoso says he was running  
25 directly at Hodari. He wasn't running to the right or to

1 the left, but he was running directly at Hodari.

2 QUESTION: Well, do you think that if a police  
3 officer is running down the sidewalk towards someone, and  
4 there is a jogger running in the opposite direction toward  
5 the police officer, that that alone constitutes a seizure?

6 MR. LOZENSKI: Justice O'Connor, I do not  
7 believe that constitutes a seizure, because I think what's  
8 required here is intimidating and coercive conduct on the  
9 part of the police officer. Whether it's --

10 QUESTION: But we don't have any evidence of  
11 that. There was no gun drawn, there was no order to stop.  
12 We aren't told of any other evidence, except running  
13 towards each other.

14 MR. LOZENSKI: Yes. But I think the officer  
15 said -- the officer testified that our intent was to stop  
16 them. And I think this officer's --

17 QUESTION: Well, but we make an objective  
18 inquiry. We don't look at what the officer's intent might  
19 have been, do we? We look at the objective facts and what  
20 a reasonable person would believe, whether he has been  
21 seized.

22 MR. LOZENSKI: Justice O'Connor, I believe on  
23 the facts of this case and in this 11-foot scenario here,  
24 where the officer is bearing down on him, that was a  
25 sufficient blocking of his path to constitute a seizure.

1 In the -- in the hypothetical that you gave me, I don't  
2 believe that at that point -- if you just have an officer  
3 running in the general direction of someone, I do not  
4 believe that would be a seizure. But that is not what we  
5 have here.

6 QUESTION: Now if the defendant just keeps  
7 running, when does the seizure end, do you suppose? You  
8 say there is a seizure --

9 MR. LOZENSKI: Yes.

10 QUESTION: -- when, when the defendant sees the  
11 policeman running towards him. When would that seizure  
12 end if the defendant just keeps running?

13 MR. LOZENSKI: Well, if the --

14 QUESTION: And isn't caught.

15 MR. LOZENSKI: If he escapes from the officer -  
16 -

17 QUESTION: Um-hum.

18 MR. LOZENSKI: -- then the seizure would end at  
19 that point, when he --

20 QUESTION: What point?

21 MR. LOZENSKI: When he manages --

22 QUESTION: When does he escape?

23 MR. LOZENSKI: -- to get away from the police  
24 officer.

25 QUESTION: It seems to me it leaves a lot of

1 unanswerd questions there on the back end of your  
2 position.

3 MR. LOZENSKI: Well, I think in this case the  
4 officer would have of tackled -- would have tackled Hodari  
5 if Hodari hadn't submitted to his authority.

6 QUESTION: Did he submit? Did he stop? That  
7 isn't in the record, that he stopped.

8 MR. LOZENSKI: He -- Justice Scalia, Officer  
9 Pertoso testified that Hodari continued right towards him.  
10 Officer Pertoso did not say he went to the left or he went  
11 to the right. Officer --

12 QUESTION: So that they just run into each other  
13 (inaudible)?

14 (Laughter.)

15 QUESTION: Or did they skid to a stop?

16 MR. LOZENSKI: I think they probably skidded to  
17 a stop, Your Honor.

18 QUESTION: Mr. Lozenski, they must have been  
19 running awfully slowly. As I understand it, he is looking  
20 behind him, and he turns around and he sees, he sees the  
21 policeman 11 feet away.

22 MR. LOZENSKI: Yes.

23 QUESTION: And he, and he still has time to  
24 throw away the rock of cocaine and somehow to stop from  
25 colliding with him? 11 feet away, and they are both

1 running towards each other?

2 MR. LOZENSKI: Yes.

3 QUESTION: It must be a misprint.

4 (Laughter.)

5 QUESTION: I mean, I'd like to see that. That's  
6 quite an accomplishment to do that within 11 feet while  
7 they're both running.

8 QUESTION: Of course in your view what Hodari  
9 should have done was to declared victory at that very  
10 moment, because he says, number one, I could continue  
11 running and if I get away you won't catch me, or, number  
12 two, I can elect to give you this rock and you can't do  
13 anything with it anyway. I am home free at this point.

14 MR. LOZENSKI: No, I don't think that is a  
15 correct analysis. I think that Hodari knew that --

16 QUESTION: Well, under your analysis you -- Mr.  
17 Hodari should have said, Mr. Police Officer, under the  
18 Fourteenth Amendment you have made a mistake. So you take  
19 this rock of cocaine and do what you want with it, but you  
20 can't introduce it against me at trial.

21 (Laughter.)

22 QUESTION: That's what he should have done?

23 MR. LOZENSKI: No. I don't think so.

24 QUESTION: Well, that's what he's claiming.

25 MR. LOZENSKI: Whatever Hodari did was a direct

1 consequence of that officer bearing down on him. If that  
2 officer wouldn't have been there blocking his path --

3 QUESTION: So you're arguing for this position  
4 that Justice Kennedy just stated right now.

5 MR. LOZENSKI: Well, maybe if Justice Kennedy  
6 would ask his question again, or propose his hypothetical  
7 -- there's another element here.

8 QUESTION: You're arguing that the police, by  
9 beginning to chase, have automatically granted immunity  
10 from introducing the evidence, because he either -- one,  
11 he can run away and be successful, or two, he can go to  
12 the officer and say you have made a mistake, here's the  
13 cocaine but you can't introduce it.

14 MR. LOZENSKI: Well, I don't think either one of  
15 those is the case. I think Hodari panicked. And I think,  
16 as a lot of these cases indicate, that when officers bear  
17 down with this show of authority like this, they will  
18 panic and discard the contraband. And I think that is  
19 exactly what happened here. I don't think Hodari gave  
20 thought to anything, because this all happened so fast in  
21 this 11-foot scenario. And I think he panicked and  
22 abandoned the contraband, without any reflection on his  
23 part.

24 QUESTION: Well, do you take the position that  
25 the word "seizure" in the Fourth Amendment includes

1 attempted seizure?

2 MR. LOZENSKI: No, I don't believe that is the  
3 case at all. No, I don't take that position, Your Honor.  
4 I think that here in this 11-foot scenario when the  
5 officer was bearing down on him there was a seizure.

6 QUESTION: What makes it a seizure?

7 QUESTION: What do you think a seizure includes  
8 in normal parlance? Any element of control there? I mean  
9 how can, how can it be a seizure if the person never stops  
10 running, and in fact is never controlled by the police?  
11 How can that be a seizure? And yet under your theory it  
12 is.

13 MR. LOZENSKI: Well, there may be a seizure, but  
14 if the person keeps running then the seizure stops. But  
15 initially there is a seizure. Hodari here was effectively  
16 stopped when the officer confronted him. The court of  
17 appeal also said that even though Officer Pertoso didn't  
18 have physical control of him, the officer's conduct of  
19 blocking his path was tantamount to a physical restraint.  
20 So I don't think that a physical -- that a physical  
21 acquisition of Hodari was necessary. The blocking of his  
22 path was tantamount to a physical restraint.

23 QUESTION: But I thought we have said otherwise.  
24 I thought, you know, if you put up a roadblock and the  
25 person -- you're blocking the road and the person doesn't

1 stop for it but tries to go around it, has he been seized?

2 MR. LOZENSKI: If, from the totality of the  
3 circumstances, if you apply the reasonable person test, if  
4 a reasonable person would feel, in that person's -- in the  
5 person who goes around the roadblock's position, would --  
6 if a reasonable person would view that as a --

7 QUESTION: An attempt to stop him, he would. He  
8 would. But so would the reasonable person, when the  
9 policeman says stop or I'll shoot, and he keeps running.  
10 Is that a seizure? A reasonable person knows he's trying  
11 to seize him. But I thought you said an attempted seizure  
12 is not a seizure?

13 MR. LOZENSKI: No, I don't believe attempted  
14 seizure is a seizure. I think that in this case there is  
15 either a detention or there is not.

16 QUESTION: But that -- doesn't that depend on  
17 whether the person stops or not? He either stops at the  
18 roadblock or he doesn't. He either stops when the  
19 policeman says stop or I'll shoot or he doesn't.

20 MR. LOZENSKI: No, I believe that there can be a  
21 seizure without an actual stopping of the person. The  
22 seizure may terminate as long as the person -- but, if the  
23 person gets going again.

24 QUESTION: He's still seized while he's running?  
25 He's still running, but he's seized?

1 MR. LOZENSKI: Well, if he escapes from the  
2 police officer he is no longer seized, Your Honor. But if  
3 the police officer is chasing him and there is a  
4 sufficient show of authority, some imitating and -- some  
5 intimidating course of conduct, yes, I believe that that  
6 person has been seized.

7 QUESTION: And that, that -- you see a scenario,  
8 policeman running down the street and the suspect running  
9 ahead of him, and the policeman shouting stop, stop,  
10 thief. That has been a seizure, while he --

11 MR. LOZENSKI: Yes.

12 QUESTION: Even while he's running he is seized?

13 MR. LOZENSKI: Yes.

14 QUESTION: Well --

15 QUESTION: But at a certain point if he starts  
16 running faster than the officer and gets away, the seizure  
17 ceases?

18 MR. LOZENSKI: Yes. If he gets away from the  
19 officer I believe that the seizure terminates.

20 QUESTION: How do we determine when it  
21 terminated?

22 MR. LOZENSKI: When he gets away from the  
23 officer.

24 QUESTION: A certain number of feet, or  
25 something like that?

1 MR. LOZENSKI: When the officer lose sights --  
2 Mr. Chief Justice, when the officer lose sight -- loses  
3 sight of him.

4 QUESTION: Looses sight?

5 MR. LOZENSKI: Yes.

6 QUESTION: But if he drops the cocaine when the  
7 officer might have had some hope of catching him, then  
8 there's a seizure and that can't be introduced if you  
9 later find him 3 weeks later and try him and arrest him?

10 MR. LOZENSKI: That's correct, Your Honor.

11 QUESTION: Mr. Lozenski, can I clear up  
12 something on the facts, especially about this 11 feet? Is  
13 it not correct that the testimony of the officer indicates  
14 that he was 11 feet away when the fellow threw the rock to  
15 the ground, but it does not tell us how far away when he,  
16 he was when he saw the police officer? As I read it, I  
17 don't think it tells you just what that distance was.

18 MR. LOZENSKI: Hodari was looking over his  
19 shoulder. He turned around and saw the officer bearing  
20 down on him. During the suppression hearing this, this  
21 distance element came up and the trial judge said well,  
22 that's 11 feet.

23 QUESTION: No, he said it's just about the same.  
24 When he threw the stuff away he was about the same  
25 distance as he is from me right now.

1 MR. LOZENSKI: And the judge --

2 QUESTION: But he did not say how far he was  
3 when he turned around and saw him. Isn't that correct? I  
4 think it is, anyway.

5 MR. LOZENSKI: Well, I think when Hodari turned  
6 around and saw the officer, the abandonment of the  
7 contraband was simultaneous with the sighting of the  
8 officer.

9 QUESTION: The testimony doesn't say that.

10 MR. LOZENSKI: This Court has held that, in  
11 Terry v. Ohio, that a police officer may not restrain the  
12 freedom of a citizen unless they have a reasonable basis  
13 for doing so. And in justifying the intrusion, the police  
14 officers must point to specific and articulable facts to  
15 justify the intrusion on one's freedom of movement. And  
16 as I have stated earlier here, these officers could point  
17 to no justifiable and articulable facts to terminate or to  
18 chase after and then confront Hodari.

19 Post-Terry cases such as United States v.  
20 Mendenhall have said that a detention occurs if in view of  
21 all the circumstances a reasonable person would not feel  
22 free to leave. And in this 11-foot scenario it is clear  
23 that a reasonable person would not have felt free to  
24 leave. The State here contends that the Mendenhall test  
25 that was also enunciated in Chesternut is not the complete

1 test now, and want this Court to hold that as long as a  
2 person is fleeing there is no -- there is no detention  
3 until he is physically controlled.

4 The State urges this Court to adopt a bright  
5 line rule, however, we feel that under the State's --  
6 under the State's proposed rule that coercive police  
7 action that is sufficiently intimidating that a reasonable  
8 person would not free to leave should not be subject to  
9 the actual physical restraint rule. If this Court adopts  
10 the physical restraint rule as urged by the -- by the  
11 state, many of these cases would be freed from the  
12 strictures of Terry and its progeny. And moreover, the  
13 focus -- the focus would then -- if the Court adopts this  
14 bright line rule, the focus would then be on the  
15 subjective reactions of the individual to the police  
16 action rather than an objective review of the police  
17 conduct.

18 QUESTION: Well, we might say you'll need both.  
19 That is that there has to be an objective show of  
20 authority, that any reasonable person would take as a show  
21 of authority, and in addition there has to be submission  
22 to that authority. What -- what's the matter with that?  
23 That wouldn't abandon the requisite objective standard of  
24 show of authority.

25 MR. LOZENSKI: The show of authority, a

1 submission to the show of authority is fine, Your Honor.  
2 What we object to is establishing a bright line rule that  
3 says the submission has to result in the physical  
4 restraint of the suspect, otherwise he is not detained,  
5 and anything that he does prior to this physical -- prior  
6 to his becoming physical restrained, is therefore not  
7 suppressible.

8 QUESTION: Well, I understand you object to it.  
9 I'm just suggesting that a basis for your objecting to it  
10 is not that we would be abandoning the objective test of a  
11 show of authority. We would still require that.

12 MR. LOZENSKI: Well, in Chesternut it was -- it  
13 is my understanding that this Court eschewed bright line  
14 rules. The court that the state is offering now, that  
15 there is no detention until someone is physically  
16 restrained, is essentially the position that, or the  
17 proposition that this Court refused to adopt in Michigan  
18 v. Chesternut. This Court also refused to adopt the --  
19 Mr. Chesternut's proposed rule, a bright line rule that  
20 all chases are detentions. It appears to me that the  
21 decision in Michigan v. Chesternut was kind of a  
22 compromise of these two positions. And I think the  
23 opinion in Chesternut made it clear that the facts that  
24 give rise to these cases are so varied and different that  
25 each case must be decided on a case-by-case basis. For

1 this proposition --

2 QUESTION: What do you think about the opinion  
3 in Brower?

4 MR. LOZENSKI: Well, I think Brower is  
5 distinguishable from the facts of this case here. I think  
6 the issues in Brower are unrelated to the issues here.  
7 For example, Brower was --

8 QUESTION: There was a car instead of a foot  
9 chase. But we did say that seizure requires an  
10 intentional acquisition of physical control.

11 MR. LOZENSKI: Yes. And indeed there was an  
12 acquisition of physical control there of the most dramatic  
13 kind, Your Honor. There was a fatal collision into a  
14 roadblock. But what -- what even distinguishes Brower  
15 more is that Brower was decided after Mendenhall, Terry,  
16 and Chesternut made no mention of any of those cases.  
17 Moreover, Brower did not involve any question of the  
18 moment that the show of police force or use of authority  
19 constitutes a detention. So I think Brower was kind of  
20 analyzed on its own facts, and we would urge this Court  
21 not to buy this Brower -- bright line rule that they are  
22 relying on Brower for.

23 It seems to me that the State is urging this  
24 Court to overrule Chesternut with Brower, without having  
25 -- without Brower having made any mention of these other

1 cases.

2 QUESTION: It wouldn't be overruling Chesternut.  
3 Chesternut was decided the same way as it would be under  
4 this theory, but on a different ground. That other ground  
5 isn't available here. It wouldn't be overruling the case.  
6 It would be just using a theory that Chesternut found it  
7 unnecessary to use. That's really not overruling it, I  
8 don't think.

9 MR. LOZENSKI: Maybe supplementing or refuting  
10 part of Chesternut with this rule in Brower. Maybe not  
11 entirely overruling it, but supplementing it or --

12 Continuing, Your Honor, Mr. Chief Justice, the  
13 court of appeal here relied upon Chesternut in its  
14 analysis of the facts. Under the totality of the  
15 circumstances here it was reasonable for the court of  
16 appeal to conclude that a person in Hodari's position was  
17 not free to leave, because the court of appeal found a  
18 detention in this 11-foot scenario where the officer was  
19 blocking his path, and they also said that was tantamount  
20 to a physical restraint. This opinion is consistent with  
21 the cases that we have mentioned in our brief, so there is  
22 no dispute that the right standard was applied here.

23 We urge this Court to give deference to the  
24 decision of the court of appeal here, just as this Court  
25 did in the most recent case of Minnesota v. Olson.

1 Minnesota v. Olson demonstrates that when a reviewing  
2 court has applied the proper standard, that this Court  
3 will decline invitations to micromanage the application of  
4 the standard to the facts, even if this Court does not  
5 endorse the outcome of the lower intermediate court's  
6 decision. Here and in Hodari the court of appeal applied  
7 the correct standard to the facts, a fact-specific  
8 application. And they were reasonable in concluding that  
9 Hodari was detained in this 11-foot scenario.

10 Thus we would ask for the same consideration of  
11 Federal-State comity here that this Court gave in  
12 Minnesota v. Olson. And we would urge this Court to leave  
13 the case-by-case management or administration of these  
14 lower -- intermediate court decisions to the lower courts  
15 rather than try to micromanage them in this Court. This  
16 Court has broad powers, but it would be very difficult to  
17 micromanage all State intermediate -- all State  
18 intermediate appellate court opinions or decisions.

19 We agree with the Solicitor General that the  
20 discarding of contraband as a result of police action is a  
21 reoccurring one. The proliferation of State cases reflect  
22 that. But the State and the Solicitor General want to  
23 take all of these cases out of the Fourth Amendment with  
24 this bright line rule.

25 Inherent in this bright line rule is an element

1 of harassment. It is our feeling that if this bright line  
2 rule were adopted by the Court it would give the police  
3 too much discretion. The State assumes that the police  
4 will not overreach. The State assumes that the police  
5 will not abuse their discretions. The State assumes that  
6 the police will not harass people by chasing them without  
7 a reasonable suspicion of wrongdoing. This bright line  
8 rule proposed by the State would essentially insulate the  
9 police from all wrongdoing, such as harassment,  
10 overreaching, and abuses of discretion.

11 And in essence the State's test would reward  
12 police misconduct. For example, here the police did not  
13 have any reasonable suspicion of any wrongdoing, yet they  
14 engaged in this pincer movement that was designed to cut  
15 Hodari off, find out who he was and what he was up to. In  
16 the bright line rule, under the bright line rule any  
17 abandonment prior to the actual physical restraint would  
18 then not be suppressible.

19 Since Terry v. Ohio this Court has recognized  
20 that while an officer needs flexibility on the street,  
21 there must be some limits on what the police officers can  
22 do. This Court has also recognized that in police-  
23 citizen -- that in police-citizen encounters -- that  
24 police-citizen encounters need some constitutional  
25 protection. So based -- for these reasons we believe that

1 this Court in Chesternut refused to adopt the bright line  
2 rule that would remove all these cases from scrutiny.

3 QUESTION: Where is Hodari now?

4 MR. LOZENSKI: Hodari is 19 years old, Justice  
5 Blackmun. He resides in Oakland, California, and he has a  
6 young child. So he is alive and well.

7 When Hodari was confronted by the officer, he  
8 was effectively detained. Instantaneous with the  
9 detention, with the illegal detention, was the discard of  
10 this contraband. The issue here is whether or not this  
11 evidence was come at by the exploitation of the illegal  
12 detention. And it is our position that it is because the  
13 abandonment of the contraband was a direct consequence of  
14 the illegal police action. The abandonment was not a  
15 product of Hodari's free will. He had no time for  
16 reflection. There were no intervening circumstances. And  
17 the abandonment was a direct result of a show of authority  
18 and the panic on the part of Hodari.

19 Under Brown v. Illinois, Wong Sun v. United  
20 States, Taylor v. Alabama, and Dunaway v. New York, unless  
21 there are some intervening circumstances, some time delay  
22 indicating reflection, the abandonment will not be an act  
23 of free will.

24 In conclusion, we urge that this Court adhere to  
25 the Mendenhall-Chesternut standard as the proper test.

1 The court of appeal applied the proper test here. We urge  
2 this Court to defer to the court of appeal's application  
3 of the proper standard to this fact-specific situation.  
4 The objective characteristics of this pincer movement  
5 which resulted in the blocking of Hodari's path meets the  
6 standards this Court has set forth to define a seizure by  
7 a show of authority. We urge this Court not to repudiate  
8 the Mendenhall-Chesternut standard with a bright line  
9 rule. We respectfully request that this Court affirm the  
10 court of appeals' decision. I have nothing further, Mr.  
11 Chief Justice.

12 QUESTION: You don't necessarily win if we don't  
13 abandon the Chesternut rule.

14 MR. LOZENSKI: Well --

15 QUESTION: I know you think you do, but --

16 MR. LOZENSKI: I have no response to that,  
17 Justice White.

18 CHIEF JUSTICE REHNQUIST: Very well. The case  
19 is submitted.

20 (Whereupon, at 12:00 noon, the case in the  
21 above-entitled matter was submitted.)

22  
23  
24  
25

**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. 89-1632 - CALIFORNIA, Petitioner V. HODARI D.

-----

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

BY *Roger A. Harte*  
(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'91 JAN 22 P1:54