Continuing Seizure and the Fourth Amendment: Conceptual Discord and Evidentiary Uncertainty in United States v. Dupree

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UNCERTAINTY IN UNITED STATES v. DUPREE

"No right is held more sacred, or is more carefully guarded, by the com-
mon law, than the right of every individual to the possession and control
of his own person, free from all restraint and interference . . . unless by
clear and unquestionable authority of law."—Horace Gray

I. INTRODUCTION

Since Justice Horace Gray articulated the paramount importance of
Fourth Amendment protections in 1891, the Supreme Court has consist-
ently recognized the significance of protecting individual rights in the ar-
ees of search and seizure. Though subsequent Fourth Amendment
jurisprudence has reaffirmed Justice Gray's sentiment, the meaning of
"clear and unquestionable authority of law" has evolved based on the need
to balance individual rights against the practical necessities of effective law
enforcement. The Supreme Court's holdings in Terry v. Ohio, and later
in United States v. Mendenhall, Florida v. Royer, and Michigan v. Chesternut,
provided clarity in assessing this balance by developing standards for de-
termining the reasonableness of a seizure. Specifically, the Court defined

2. See Terry v. Ohio, 392 U.S. 1, 9, 12-13 (1968) (quoting Justice Gray's pro-
nouncement of Fourth Amendment importance and noting exclusionary rule de-
veloped to deter police misconduct and protect individual rights).
3. See Terry, 392 U.S. at 10 (holding police officers may "stop and frisk" indi-
viduals suspected of criminal activity on less than probable cause where articulable
facts are present to aid in effective law enforcement); see also Stephen A. Saltzburg,
Terry and the Fourth Amendment: Marvel or Mischief?, 72 ST. JOHN'S L. REV. 911, 918
(1998) (examining unprecedented nature of Terry decision and discussing Court's
determination of need for greater flexibility than probable cause standard for law
enforcement provided).
5. 446 U.S. 544 (1980).
8. See Terry, 392 U.S. at 16 (defining test for seizure as "whenever a police
officer accosts an individual and restrains his freedom to walk away"). In United
States v. Mendenhall, the Court identified the following seizure standard:

(235)
seizure of the person to occur when, based on the "totality of the circumstances," a reasonable person would believe he or she is no longer free to terminate the encounter and leave. This standard was significantly altered, however, in the 1991 case California v. Hodari D., in which the Court held that seizure occurs only when an individual is subject to physical force or a show of authority and that person yields to such force or authority.

Commentators have discussed Hodari extensively in the context of how the decision impacted Fourth Amendment standards defining what constitutes a seizure. Absent from such discussion, however, is meaning-

We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon the person's liberty or privacy as would under the Constitution require some particularized and objective justification. 446 U.S. at 553-54 (plurality opinion); see also Chestermut, 486 U.S. at 574 (affirming Mendenhall standard and explaining "the test's objective standard... allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment [and] ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached"); Royer, 460 U.S. at 502 (plurality opinion) (holding that seizure occurred where police asked suspect to accompany them to police room while retaining his identification and plane tickets because "a reasonable person would have believed that he was not free to leave"); Richard A. Williamson, The Dimensions of Seizure: The Concepts of "Stop" and "Arrest," 43 Ohio St. L.J. 771, 772-73 (1982) (identifying Supreme Court's efforts since 1970s to effectively define seizure and reconcile individual rights with need for effective police investigations, though noting greater specificity is needed).

9. See Mendenhall, 446 U.S. at 554 (plurality opinion) (clarifying standard for seizure as when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").


11. See id. at 626 (concluding "reasonable person" seizure test is appropriate in determining whether show of authority occurred, but not dispositive in seizure analysis where common law arrest standards guide). In defining seizure, the Hodari Court stipulated that "with respect to a show of authority as with respect to application of physical force," a seizure does not occur when the subject has not yielded; rather, a seizure occurs through the application of physical force or an individual's submission to law enforcement show of authority. See id. (providing central holding of what constitutes seizure based on common law arrest standards).

ful analysis of how *Hodari* has complicated lower courts’ task of assessing the point at which a seizure occurs in the following scenario: an individual is initially subject to physical force or a show of authority and that person momentarily yields, but then subsequently resists or breaks free from police before eventually being subdued. *Hodari* offers conflicting guidance on this question of whether an individual is considered seized during the momentary submission and “continually seized” throughout the encounter, or seized only once ultimately apprehended. Consequently, this question has long divided federal courts of appeal.

The circuit split on the issue of “continuing seizure”—whether an individual has been “seized” before breaking free, and whether such seizure is deemed “continuous”—has tremendous implications for the application of the exclusionary rule. Specifically, *Terry* dictates that seizures of the person must be accompanied by reasonable suspicion for evidence obt...
tained during the seizure to be deemed admissible. Conversely, seizures conducted absent reasonable suspicion violate the Fourth Amendment and render evidence obtained inadmissible pursuant to exclusionary rule protections. 

Seizures generally fall within one of four categories: (1) seizure by physical force that subdues the suspect; (2) seizure by show of authority to which the suspect submits; (3) seizure by physical force from which the suspect breaks away before being ultimately apprehended; and (4) seizure by show of authority to which the suspect momentarily submits prior to flight and before being apprehended. In the former two categories, the seizure is a static event, and it is settled that evidence obtained during the encounter is admissible only if reasonable suspicion was present at the outset of the seizure. In the latter two categories, however, the admissibility of any evidence obtained hinges upon whether a court recognizes the concept of continuing seizure. If a court recognizes a continuing seizure, then a suspect is seized at the outset and throughout the encounter, and the evidence obtained is inadmissible unless reasonable suspicion existed at the outset. On the other hand, if a court rejects the concept of a continuing seizure, then a suspect is seized only once ultimately subdued and apprehended, and evidence obtained prior to the suspect’s apprehension is admissible regardless of whether reasonable suspicion applications of the exclusionary rule, see infra notes 81-116 and accompanying text.

17. See Terry v. Ohio, 392 U.S. 1, 29 (1968) (explaining that evidence obtained from seizure of person is inadmissible under exclusionary rule only if there was not reasonable suspicion to conduct seizure). For further discussion of the test for determining reasonable suspicion, see infra notes 40-41 and accompanying text.

18. See Terry, 392 U.S. at 29 (explaining that seizures of person without reasonable suspicion render evidence obtained from seizure inadmissible under exclusionary rule). For further discussion of Fourth Amendment exclusionary rule protections, see infra notes 37-41 and accompanying text.

19. See, e.g., Hodari, 499 U.S. at 626 (stating that “[t]he word ‘seizure’ readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . An arrest requires either physical force or, where that is absent, submission to the assertion of authority”); Baldwin, 496 F.3d at 218 (describing seizure scenario where suspect “halt[s] temporarily” in response to show of authority through order to stop then flees); Bradley, 196 F.3d at 768 (explaining that seizure occurs when application of physical force and/or show of authority causes suspect to stop).

20. See Hodari, 499 U.S. at 624-25 (concluding that seizure by physical force or show of authority requires suspect to yield and noting that evidence discarded pursuant to seizure without reasonable suspicion renders evidence inadmissible).

21. See United States v. Smith, 575 F.3d 308, 312-13 (3d Cir. 2009) (noting that ascertaining “the timing of the seizure is significant” to determining whether evidence is inadmissible under exclusionary rule).

22. See Terry, 392 U.S. at 29 (explaining that evidence obtained during seizure of person is inadmissible under exclusionary rule absent reasonable suspicion at outset of seizure). For further discussion of those circuits that interpret Hodari to endorse the concept of continuing seizure, and the resulting exclusionary rule implications, see infra notes 87-103 and accompanying text.
picion existed at that time.23 Thus, the circuit split over whether Hodari endorses or rejects the concept of continuing seizure has resulted in divergent applications of the exclusionary rule, and questions abound as to whether interpreting Hodari as rejecting continuing seizure thwarts or re-inforces exclusionary rule principles.24

Although the circuit split surrounding continuing seizure emerged in the mid-1990s following Hodari,25 the issue recently re-emerged in the district court case of United States v. Dupree.26 Relying on Third Circuit precedent, the U.S. District Court for the Eastern District of Pennsylvania applied the Third Circuit's concept of continuing seizure, and in so doing, further cemented the federal divide.27 This Note discusses the development of Fourth Amendment continuing seizure jurisprudence and concludes that although Dupree supports the individual rights concerns underlying the exclusionary rule, it is inconsistent with the Supreme

23. See Terry, 392 U.S. at 29 (explaining that evidence obtained during seizure of person is admissible when reasonable suspicion for seizure existed at outset of seizure). For further discussion of those circuits that interpret Hodari to reject the concept of continuing seizure, and the resulting exclusionary rule implications, see infra notes 104-16 and accompanying text.

24. See United States v. Swindle, 407 F.3d 562, 572-73 (2d Cir. 2005) (considering whether evidence obtained in continuing seizure scenario is inadmissible given policies underlying exclusionary rule). Specifically, the court in Swindle stated:

A substantial argument could be made that a broader definition of "seizure"—or some other remedy—is required to adequately protect Fourth Amendment values from harms flowing from police initiation of Terry stops without reasonable suspicion. Although the Hodari D. Court stated that "only a few of those orders [to stop], we must presume, will be without adequate basis," the possibility that unreasonable orders are infrequent does not necessarily make them acceptable. Even if the kind of order given in Swindle's case is rare—and we do not suggest that it is—we see no persuasive reason for the law to tolerate it. In view of what we believe to be the controlling cases, however, we must affirm a conviction that was achieved with evidence obtained by an abuse of police power. A remedy for Swindle's Fourth Amendment complaint can come only from a higher authority.

Id. at 573 (internal citation omitted). Ultimately, the court concluded that Hodari rejected the concept of continuing seizure, and accordingly held the evidence obtained prior to the defendant's apprehension to be admissible. See id. ("As we are compelled to hold that Swindle was seized only when the police physically apprehended him—at which time the officers had probable cause for an arrest—we must conclude that the drugs Swindle discarded prior to his apprehension were not the fruit of a Fourth Amendment seizure.").

25. For citation to cases comprising the circuit split, see supra note 15 and accompanying text.


27. See id. at *8 (holding that suspect physically grabbed by police officers for two seconds prior to breaking away and fleeing was seized at initial touching based on Third Circuit precedent stating "when a seizure is effected by even 'the slightest application of physical force,' it is immaterial whether the suspect yields to that force" (citing United States v. Brown, 448 F.3d 239, 245 (3d Cir. 2006))).
Court's Fourth Amendment precedent, Hodari, and prevailing interpretations of continuing seizure since 1991. Part II of this Note examines the legal landscape of Fourth Amendment seizure law prior to Hodari and explains Hodari's impact in this area. Part III discusses federal courts' interpretations of Hodari with respect to continuing seizure and articulates these courts' respective rationales. Part IV details the facts and the district court's reasoning in Dupree, and discusses the Third Circuit's existing approach to continuing seizure on which the district court relied. Part V argues that the holding in Dupree is inconsistent with both Fourth Amendment case law in general and Hodari in particular. Finally, Part VI evaluates Dupree's potential impact on the existing circuit split, and given the need for evidentiary uniformity under federal law, argues that the Third Circuit should reverse the district court's holding in Dupree.

II. CONTINUALLY SEARCHING FOR CLARITY: THE DEVELOPMENT OF FOURTH AMENDMENT SEIZURE LAW

Formulated in the post-American Revolution milieu, the Fourth Amendment was adopted to affirm a constitutional commitment to government restraint in the areas of search and seizure. Yet, as one commentator notes, the Amendment is "famously short on specifics" and, consequently, the breadth and scope of its parameters have been subject to ongoing Supreme Court interpretation. In the context of defining

28. For a discussion of Dupree's inconsistency with Fourth Amendment case law and holdings post-Hodari, see infra notes 150-75 and accompanying text.
29. For a discussion of Fourth Amendment case law prior to Hodari and an examination of Hodari's impact on seizure law, see infra notes 34-80 and accompanying text.
30. For a discussion of federal courts' interpretation of Hodari in the context of whether that decision supports the continuing seizure concept, see infra notes 81-116 and accompanying text.
31. For a discussion of the facts and holding in Dupree, see infra notes 117-35 and accompanying text. For a discussion of the Third Circuit's prevailing approach to continuing seizure cases, on which the district court in Dupree relied, see infra notes 136-49 and accompanying text.
32. For a discussion of how the Dupree holding and the Third Circuit's interpretation of continuing seizure departs from case law since Hodari, see infra notes 150-75 and accompanying text.
33. For a discussion of Dupree's impact, see infra notes 177-86 and accompanying text.
35. See David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1739 (2000) (stating that ambiguity in text of Fourth Amendment has required judicial interpretation by Supreme Court); see also Maclin, supra note 34, at 927 (noting Supreme Court holdings in Fourth Amendment cases evidence inconsistency and reflect conflict between Fourth Amendment and modern law enforcement techniques and "modern realities" of "interactions between the police and the citizenry"); Carol S. Steiker, Second Thoughts About First Principles, 107
whether a seizure occurs, five cases have been particularly instructive: "Terry, Mendenhall, Royer, Chesternut, and Hodari."36

A. Yielding to Law Enforcement Efficiency Concerns: The Supreme Court's Definition of a Seizure

Prior to the Supreme Court's 1968 decision in Terry, precedent dictated that, absent probable cause, individuals could not be seized without violating the Fourth Amendment.37 Adherence to this standard proved difficult for law enforcement officers who viewed suspicious activity but lacked the requisite probable cause necessary to conduct further investigation.38 The Supreme Court recognized such law enforcement concerns in Terry, and concluded that the interests of the public and law enforcement required lowering the threshold for constitutional seizures.39 As a caveat,
however, the Court articulated that such seizures—so-called "Terry stops"—must be premised on reasonable, articulable facts and limited to the time in which officers could confirm or dispel their suspicions. In all other cases, evidence obtained during a seizure must be suppressed in accordance with the exclusionary rule to protect Fourth Amendment rights. With this balance of individual rights and law enforcement concerns established, the Court defined seizures as occurring "whenever a police officer accosts an individual and restrains his freedom to walk away."

The Supreme Court further developed its standard for determining when a seizure occurs in Mendenhall and Royer by introducing the "reasonable person" and "totality of the circumstances" analyses. In Mendenhall, Drug Enforcement Agency agents questioned and searched the defendant, believing she fit the drug courier profile. In holding that the defendant was not seized, a plurality of the Court concluded that a person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave." The Court’s inclusion of the "reasonable person" and

See id. (same). Based on the officer’s thirty years of experience as a patrol officer, he believed that the three individuals were engaged in suspicious behavior and further investigation was required. See id. at 22 (same). It was on this conclusion that the officer initiated a "stop and frisk" of the three parties and recovered the weapon at issue. See id. at 6-7 (same).

40. See id. at 30 (concluding that "[w]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot and that the persons with whom he is dealing may be armed and presently dangerous," Terry stops can be constitutionally conducted).

41. See id. at 15 (stipulating that Court’s holding does not render exclusionary rule obsolete and noting that "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires").

42. See id. at 16 (describing when seizure occurs under Terry standard).

43. For further discussion of the "reasonable person" and "totality of the circumstances" aspects of the Court’s seizure standard, see infra notes 44-55 and accompanying text.

44. See United States v. Mendenhall, 446 U.S. 544, 547-48 (1980) (describing case facts and defining drug courier profile as "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs"). The Court detailed the respondent’s characteristics as noted by the DEA agents:

In this case the agents thought it relevant that (1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be a place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, "appeared to be very nervous," and "completely scanned the whole area where [the agents] were standing"; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.

Id. at 548 n.1.

45. See id. at 554-55 (plurality opinion) (explaining that Terry’s "free to leave" seizure standard now includes consideration of how reasonable person would view situation based on totality of circumstances and noting, "[i]n the absence of some such evidence" such as display of weapon or physical touching, "otherwise inoffen-
"totality of the circumstances" analyses provided objective standards to be applied to fact-specific scenarios.\textsuperscript{46} In the defendant's case, the incident occurred largely in public, no weapons were displayed, and the defendant was "expressly told" that she was "free to decline to cooperate with their inquiry."\textsuperscript{47} As a result, the Court held that a reasonable person would have felt free to leave and therefore no seizure occurred.\textsuperscript{48}

In contrast, in \textit{Royer}, the Supreme Court reasoned that a seizure had occurred because the defendant would not have felt free to leave based on the totality of the circumstances where: he was confined in a small area, confronted by officers who divulged the reason he was detained, and was compelled to turn over possession of his driver's license, luggage, and plane ticket.\textsuperscript{49} The Court cautioned, however, that the decision should be seen in the context of "presence of a police officer in circumstances  suggestive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person"). In particular, the Court offered the following examples of circumstances or elements that "might indicate a seizure, even where the person did not attempt to leave": "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." \textit{Id.} at 554 (citing Dunaway \textit{v. New York}, 442 U.S. 200, 207 (1979); \textit{Terry}, 392 U.S. at 19 n.16).

\textsuperscript{46} See, e.g., Thomas K. Clancy, \textit{The Supreme Court's Search for a Definition of Seizure: What Is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?}, 27 \textit{AM. CR!M. L. REv.} 619, 625-26 (1990) (indicating that \textit{Mendenhall} provided Supreme Court with first opportunity since \textit{Terry} to "attempt to formulate a test to measure when a seizure short of a physical restraint occurs" and recognizing test derived from this decision as "reasonable person standard").

\textsuperscript{47} See \textit{Mendenhall}, 446 U.S. at 555-57 (plurality opinion) (applying "reasonable person" and "totality of circumstances" test to facts of instant case to identify if reasonable person would not feel free to leave, and concluding that facts did not amount to seizure). Here, the alleged seizure consisted of two DEA agents identifying themselves to the defendant, requesting her identification and plane ticket—both of which were returned upon review of the items—and inquiring as to why she was traveling under a different name, and subsequently asking whether she would accompany them to the DEA office in the airport for further questions. \textit{See id.} at 548 (majority opinion) (describing facts of case). Once inside the DEA office, the agents requested to search her clothing, handbag, and person, but indicated that she "had the right to decline the search if she desired." \textit{See id.} (same). The defendant consented to a search, which yielded two packages of cocaine that the defendant later moved to suppress. \textit{See id.} (same).

\textsuperscript{48} See \textit{id.} at 555 (plurality opinion) (evaluating facts of case and concluding reasonable person would feel free to leave based on totality of circumstances).

\textsuperscript{49} See \textit{Florida v. Royer}, 460 U.S. 491, 501-02 (1983) (plurality opinion) (applying \textit{Mendenhall} standard to facts of case). In this case, two law enforcement officers confronted Royer because they believed that he fit the "drug courier profile"—defined here as carrying luggage that appeared to be heavy, dressing casually, appearing pale and nervous, looking around at other people, and paying for the plane ticket in cash, in addition to other factors. \textit{See id.} at 493 (describing facts of case). Upon the officers' request, Royer turned over his license and airline ticket without verbally consenting. \textit{See id.} at 494 (same). The officers identified a discrepancy between Royer's name on his license and plane ticket, and when they were unsatisfied with his explanation, they took Royer to a room away from the terminal for further questioning. \textit{See id.} (same). A plurality of the Court, in assessing these facts in relation to the \textit{Terry} and \textit{Mendenhall} standards, expressed concern...
not be considered a litmus test for seizure "even in the discrete category of airport encounters." Moreover, the Court reinforced that the seizure standard dictates that courts conduct fact-specific analyses in each case rather than assume any factor or combination thereof as dispositive.

Finally, in Chesternut, the Supreme Court reaffirmed its commitment to a flexible and totality of the circumstances standard. The Court declined to adopt a bright-line test to define what constitutes a seizure, reading about the nature of the questioning and the manner in which it took place, and ultimately determined that based on these facts he had been seized. See id. at 496-99 (applying Terry and Mendenhall standards to facts of Royer). Specifically, the Court noted:

Royer had “found himself in a small enclosed area being confronted by two police officers—a situation which presents an almost classic definition of imprisonment.” The detectives’ statement to Royer that he was suspected of transporting narcotics also bolstered the finding that Royer was “in custody” at the time the consent to search was given. In addition, the detectives’ possession of Royer’s airline ticket and their retrieval and possession of his luggage made it clear . . . that Royer was not free to leave.

Id. at 495-96.

50. See id. at 506-07 (concluding that seizure occurred here but cautioning that not all airport encounters between suspects and officers are seizures). In cautioning against the decision being applied too broadly, the Court stated: We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

Id.; see also Stephen E. Henderson, “Move On” Orders as Fourth Amendment Seizures, 2008 BYU L. Rev. 1, 12 (2008) (noting similarity between Royer’s refusal to generate bright-line seizure test with Terry’s “refusal to cabin what can constitute a ‘seizure’ more precisely than a restraint upon liberty”). Henderson also reiterates that the Royer decision "reflects a healthy realism regarding the fact-specific nature of the 'feel free to leave' inquiry." Id.

51. For a discussion of the Supreme Court’s rationale in framing a seizure definition based on the “reasonable person” and “totality of the circumstances” assessments, see infra notes 52-55 and accompanying text.

52. See Michigan v. Chesternut, 486 U.S. 567, 573-74 (1988) (concluding Court adopted “reasonable person” standard because its lack of precision and flexibility in analyzing totality of circumstances factors ensured fact-specific inquiry). In particular, Justice Blackmun articulated:

The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to “leave” will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.

While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of the police. The test’s objective standard—looking to the reasonable man’s interpretation of the
soning that such approach would not properly balance the interests of individual rights protection and law enforcement. Instead, the Court reiterated its “clear direction” that in each case the seizure analysis is based on “all of the circumstances surrounding the incident.” Notably, this approach stands in sharp contrast to the standard adopted three years later in Hodari.

B. “Breaking Away” from Precedent: The Supreme Court’s Redefinition of Seizure in Hodari

Hodari represented a significant departure from precedent by redefining the seizure analysis through a bright-line standard applicable in “show of authority” and, arguably, “physical force” cases. In Hodari, the suspect conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. Id. (internal citations omitted); see also Clancy, supra note 46, at 627-28 (describing Justice Blackmun’s effort in Chesternut to explain reasonable person standard).

53. See Chesternut, 486 U.S. at 572-73 (discussing arguments that seizure defined by “a bright-line applicable to all investigatory pursuits, have failed to heed this Court’s clear direction that any assessment as to whether police conduct amounts to a seizure . . . must take into account ‘all of the circumstances surrounding the incident’” and rejecting Court’s “traditional contextual approach”). In particular, the Government forwarded the argument that an individual is not seized until “actually apprehend[ed]” and the respondent alleged that all police “chases” are seizures. See id. at 572 (describing facts and procedural posture of case). In rejecting the Government’s argument, the Court noted that such a rule would in essence endorse a holding in which “lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual.” Id. The Court also held that the defendant’s bright-line standard for what constituted a seizure was an inappropriate interpretation of precedent because it would dictate “that the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity.” Id.

54. See id. at 572 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)) (endorsing totality of circumstances standard in lieu of standard where one factor is dispositive). For further discussion of the parameters of the Court’s totality of the circumstances standard, see supra notes 52-53 and accompanying text.

55. For a discussion of the Supreme Court’s holding in Hodari and an examination of the seizure standard it adopted, see infra notes 56-80 and accompanying text.

56. See California v. Hodari D., 499 U.S. 621, 626 (1991) (holding seizure occurs in show of authority cases only when suspect submits to such assertion and noting that “[t]he word ‘seizure’ readily bears the meaning of a laying on of hands or application of physical force to restrain movement”); see also Renee Paradis, Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators, 103 COLUM. L. REV. 316, 331 (2003) (noting that Hodari “drew a sharp line between seizure by show of authority and seizure by physical force,” resulting in new standard whereby Mendenhall analysis was “a necessary, but not a sufficient” condition and submission to show of authority or application of physical force became dispositive); Richard W. Zahn, California v. Hodari D.: An Evolving Definition of Seizure Under the Fourth Amendment, 27 NEW ENG. L. REV. 447, 469-70 (1992) (concluding that Hodari redefined seizure standard as “termination of movement” test in both show of authority and physical force cases).
fled after seeing a police cruiser.\footnote{57}{See Hodari, 499 U.S. at 622-23 (describing facts of case). The record indicated that the two officers involved in the case were patrolling in a high-crime area of Oakland, California. See id. (same). The officers were driving in an unmarked police car and dressed in plain clothes, but were wearing jackets with "Police" written on the front and back. See id. (same). As the officers turned onto 63rd Avenue, they witnessed Hodari standing with three or four other individuals around a red parked car. See id. (same). As soon as the individuals saw the police car they "panicked, and took flight." See id. (same).} Suspicious of the suspect's unprovoked flight, one officer exited the vehicle and pursued the suspect on foot.\footnote{58}{See id. (describing encounter between police and defendant).} The suspect was unaware he was being followed until he saw the officer running toward him.\footnote{59}{See id. (describing encounter between police and defendant).} At that moment, the suspect discarded crack cocaine onto the ground and was subsequently tackled by the officer.\footnote{60}{See id. (describing police officer's capture of defendant). When Hodari observed the officer, he tossed what appeared to be a small rock, and a moment later the officer tackled him. See id. (same).} At trial, the suspect moved to suppress the cocaine as illegally seized evidence based on the theory that his seizure occurred when he saw the officer running toward him.\footnote{61}{See id. at 623-24 (describing police officer's capture of defendant).} Specifically, the suspect argued that because the officers did not possess reasonable suspicion until \after he discarded the cocaine, the evidence was obtained pursuant to an illegal seizure and therefore subject to exclusionary rule protections.\footnote{62}{See id. at 623-24 (describing facts and procedural posture of case).} Granting certiorari, the Supreme Court defined the question as "whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield."\footnote{63}{See id. at 626 (stating question on review and including assessment of seizure by physical force standard despite considering show of authority factual scenario).} The \textit{Hodari} Court held that it does not.\footnote{64}{See id. (providing central holding of case).} In arriving at this conclusion, \textit{Hodari} diverged from precedent by employing common law arrest standards to assess when a seizure occurs.\footnote{65}{See id. at 624-28 (examining common law arrest standards in response to respondent's motion to suppress rather than employing Fourth Amendment pre-}

57. See Hodari, 499 U.S. at 622-23 (describing facts of case). The record indicated that the two officers involved in the case were patrolling in a high-crime area of Oakland, California. See id. (same). The officers were driving in an unmarked police car and dressed in plain clothes, but were wearing jackets with "Police" written on the front and back. See id. (same). As the officers turned onto 63rd Avenue, they witnessed Hodari standing with three or four other individuals around a red parked car. See id. (same). As soon as the individuals saw the police car they "panicked, and took flight." See id. (same).

58. See id. (describing encounter between police and defendant).

59. See id. (describing encounter between police and defendant). The officer who pursued Hodari on foot ran north on 63rd and then west to cut off the suspect's path as he ran south on 62nd Avenue. See id. (same). Hodari was looking behind him as he ran and did not realize that he was being pursued until the officer "was almost upon him." See id. (same).

60. See id. (describing police officer's capture of defendant). When Hodari observed the officer, he tossed what appeared to be a small rock, and a moment later the officer tackled him. See id. (same).

61. See id. at 623-24 (describing facts and procedural posture of case). Hodari, a minor, moved to suppress the evidence against him in the juvenile proceeding. See id. at 623 (describing procedural posture of case). His motion rested on the proposition that he was seized when he saw the officer running toward him because a reasonable person in his position would not believe that they were free to leave. See id. (describing facts and procedural posture of case).

62. See id. at 623-24 (explaining argument in support of motion to suppress). The Court notes that the Government conceded that the officer did not have reasonable suspicion until Hodari discarded the cocaine. See id. at 624 n.1 (describing procedural posture of case). Therefore, if the Court determined that Hodari was seized at that moment, the evidence would be inadmissible. See id. at 624 (describing nature of seizure standard and implications if Hodari was seized without reasonable suspicion).

63. Id. at 626 (stating question on review and including assessment of seizure by physical force standard despite considering show of authority factual scenario).

64. See id. (providing central holding of case).

65. See id. at 624-28 (examining common law arrest standards in response to respondent's motion to suppress rather than employing Fourth Amendment pre-
Specifically, the Court endorsed common law arrest as the "quintessential 'seizure of the person'" and noted that arrest requires either physical touching or submission to show of authority. In view of this standard, the Court concluded that while the Mendenhall assessment identified whether a show of authority occurred, it represented a "necessary" but "insufficient" condition of seizure.

As a "show of authority" case, Hodari was clear in its articulation of the seizure standard in this context. Specifically, if a court determines that an officer made a show of authority based on Mendenhall, a seizure occurs when the individual submits to the assertion. Thus, the Court in Hodari ceded from Terry, Mendenhall, Royer, and Chesternut, and holding "[w]e do not think it desirable, even as a matter of policy, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges"); see also Paradis, supra note 56, at 332 (explaining that Hodari was based not on recent precedent but on "nineteenth-century treatises and cases discussing the common law of arrest"); Urbonya, supra note 12, at 1406 (noting that Justice Scalia, writing for the majority in Hodari, "used his view of the common law to reconsider the stop-and-frisk doctrine" of Terry and redefined seizure by common law standards). For further discussion of Fourth Amendment seizure precedent prior to Hodari, see supra notes 37-55 and accompanying text.

66. See Hodari, 499 U.S. at 624-27 (holding common law arrest standards are appropriate in assessing Fourth Amendment seizure). In particular, after establishing arrest as the "quintessential 'seizure of the person,'" Justice Scalia continued that "under our Fourth Amendment jurisprudence . . . the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient" and, with respect to show of authority:

Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or submission.

Id. at 626-27 (quoting Rollin M. Perkins, The Law of Arrest, 25 IOWA L. REV. 201, 206 (1940)).

67. See id. at 628 (rejecting Mendenhall standard as appropriate test for seizure and concluding that Mendenhall Court intended to create "a necessary, but not a sufficient, condition for seizure" based on decision's stipulation "that a person has been seized 'only if,' not that he has been seized 'whenever'" a reasonable person "would have believed he was not free to leave"). Specifically, the Court clarified that as a "necessary," but not a "sufficient" condition, "Mendenhall establishes that the test of existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." Id.

68. See id. at 625-27 (concluding show of authority seizure does not occur when suspect does not yield and applying this standard to determine that Hodari was not seized until tackled).

69. See id. at 626 (referencing common law arrest principles in defining show of authority seizure standard). In arriving at its conclusion that an individual must submit to a show of authority for a seizure to occur, the Court explained:

[Seizure] . . . does not remotely apply . . . to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure. Nor can the result respondent wishes to achieve be produced—indirectly, as it were—by suggesting that [the officer's] un-complied-with show of authority was a common law arrest . . . [a]n arrest.
concluded that because the suspect did not initially submit, he was not seized until he was tackled, and therefore the cocaine was admissible evidence because reasonable suspicion was present at the time of the seizure. 70

Despite Hodari's clarity with respect to seizures in the show of authority context, ambiguity surrounds Hodari's physical force seizure standard. 71 The Court in Hodari addressed the question of whether an individual is seized upon "application of physical force, if he does not yield" and responded that in this scenario there is no seizure—but the facts of the case only related to show of authority. 72 Therefore, the Court's discussion of what constitutes a seizure in the context of physical force is, arguably, only dicta. 73

In addition, Hodari's guidance with respect to the concept of continuing seizure remains unclear because the opinion equated seizure with common law arrest—noting that arrest occurs by "the mere grasping or application of physical force . . . whether or not it succeeded in subduing the arrestee" 74—but later hypothesized that had the suspect been touched

requires either physical force or, where that is absent, submission to the assertion of authority.

Id. 70. See id. at 629 (holding that if officer made show of authority and Hodari did not yield to it, then Hodari was not seized until later tackled, thereby rendering evidence admissible because officers possessed reasonable suspicion after cocaine was discarded).

71. For a discussion of Hodari's inconsistent commentary on the definition of seizure by physical force, see infra notes 74-78 and accompanying text.

72. See Hodari, 499 U.S. at 626 (stating that "[t]he narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield" despite fact-set involving only show of authority scenario).

73. See, e.g., United States v. Dupree, Crim. No. 08-280, 2009 U.S. Dist. LEXIS 68127, at *9 (E.D. Pa. Aug. 4, 2009) (recognizing that "the putative seizure in Hodari involved a show of police authority" and agreeing with Government's argument that physical force seizure definition is dicta); Paradis, supra note 56, at 332 (noting that "technically" Hodari Court discussed definition of physical force seizure in dicta because facts of case involved show of authority scenario).

74. Hodari, 499 U.S. at 624 (citing Whithead v. Keyes, 85 Mass. (1 Allen) 495, 501 (1862)). The Court examined common law arrest standards and concluded that arrest was affected even through unsuccessful applications of physical force that fail to stop a suspect. See id. (connecting common law arrest standard with seizure definition by stating "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful"). In defining the common law arrest standards as applicable, the Court reinforced its conclusion by noting:

There can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant; as where the bailiff had tried to arrest one who fought him off by a fork, the court said, "If the bailiff touched him that had been an arrest."
by police and broken away before discarding the cocaine, there would not have been a "continuing arrest during the period of fugitivity." Although this hypothetical supported the Court's ultimate conclusion that seizure does not occur unless the suspect actually yields to force, the hypothetical conflicts with the Court's definitions of seizure derived from common law arrest, which provide that seizure occurs with the slightest application of physical force.

As a result of such inherent inconsistencies, the Hodari decision has generated confusion as to whether the application of physical force alone constitutes a seizure, or whether submission is required. Regardless of which definition the Court supported, both embody a significant departure from Fourth Amendment precedent in which physical force once constituted one of several factors comprising the totality of the circumstances analysis. Likewise, the show of authority seizure definition contradicts prior standards by making submission dispositive. Combined, Hodari's internal inconsistency and break from precedent has led federal

Id. at 625 (quoting A. Cornelius, SEARCH AND SEIZURE 163-64 (2d ed. 1930)).

75. See id. (providing hypothetical based on current facts to articulate that "[a] seizure is a single act, and not a continuous fact" and rejecting notion of continuing arrest during "period of fugitivity" even if arrestee is touched (quoting in part Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 471 (1874))).

76. For a discussion of Hodari's analogy of common law arrest standards with the definition of physical force seizure, as well as its emphasis on the fact that an arrest can be affected by even unsuccessful application of physical force, see supra note 74 and accompanying text.

77. See, e.g., United States v. Brown, 448 F.3d 239, 245 (3d Cir. 2006) (noting seizure occurs even if application of physical force is unsuccessful and concluding that momentary compliance with show of authority constitutes arrest despite subsequent resistance or struggle); United States v. Bradley, 196 F.3d 762, 768 (7th Cir. 1999) (defining seizure as sum of two parts: (1) "the arresting officer must apply physical force or display a show of authority"; and (2) "the physical force or show of authority must cause the fleeing subject to stop"); United States v. Hernandez, 27 F.3d 1403, 1407 (9th Cir. 1994) (declining to adopt rule that suspect was seized when he paused momentarily on show of authority and was touched by police officer but subsequently fled); Cole v. Bone, 993 F.2d 1328, 1392-33 (8th Cir. 1993) (holding that even though police applied physical force by shooting defendant's vehicle, defendant was not seized "because they failed to produce a stop").

78. See United States v. Mendenhall, 446 U.S. 544, 554-55 (plurality opinion) (explaining that standard for determining what counts as seizure in Terry included consideration of how reasonable person would view situation based on totality of circumstances); see also Paradis, supra note 56, at 331 (explaining that before Hodari separated seizure standard into discrete physical force and show of authority categories, "physical force was considered one factor of many to be weighed in the all-encompassing 'free to leave' test").

79. See Paradis, supra note 56, at 331-32 (noting that Hodari "drastically limited seizure by show of authority" by concluding that submission is dispositive in assessing seizure). For a discussion of the prior standards, particularly the factors emphasized in Mendenhall, see supra notes 44-48 and accompanying text.
courts to struggle in interpreting the decision—particularly in the realm of continuing seizure. 80

III. THE CONTINUING SEIZURE CONCEPT AFTER HODARI: CONTINUALLY SEIZED BY CONFLICTING INTERPRETATIONS

Though a number of federal and state courts have expressed concern that Hodari is inconsistent with precedent and detrimental to individual rights, its definition of seizure as applied to its narrow facts is clear: in show of authority cases, seizure occurs on submission. 81 Hodari is less clear, however, about how to assess when a seizure occurs if a suspect momentarily yields to a show of authority or is physically touched before breaking away. 82 Although Hodari did not directly address these scenarios, its definition of seizure and the factually similar hypothetical contained in the opinion have led federal courts to employ the decision in assessing continuing seizure cases. 83 In this context, the circuit courts diverge as to whether Hodari endorsed or rejected the concept of continuing seizure. 84 The Second, Seventh, Eighth, Ninth, and D.C. Circuits conclude that the concept of continuing seizure is inconsistent with Hodari. 85 Conversely, the Third and Tenth Circuits recognize the concept of continuing seizure. 86

80. For a discussion of how federal courts diverge in interpreting the concept of continuing seizure in view of Hodari, see infra notes 81-116 and accompanying text.

81. For a discussion of the show of authority seizure standard articulated in Hodari and its application to the facts of that case, see supra notes 68-70 and accompanying text.

82. For a discussion of Hodari's definition of seizure by application of physical force, and an examination of its conflicting discussion of that standard, see supra notes 71-76 and accompanying text.

83. See, e.g., United States v. Goines, 604 F. Supp. 2d 533, 541 (E.D.N.Y. 2009) (holding that even if initial seizure was not supported by reasonable suspicion, court must consider whether there was sufficient reasonable suspicion at time of subsequent seizure); United States v. Williams, 608 F. Supp. 2d 325, 330 (E.D.N.Y. 2008) (concluding that where officer grabbed suspect's arm and suspect broke away and fled, legality of officer's first seizure was irrelevant). For a discussion of the manner in which federal appellate courts have applied Hodari in assessing continuing seizure scenarios, see infra notes 85-116 and accompanying text.

84. For a discussion of conflicting circuit court interpretations of Hodari specifically with respect to whether the concept of continuing seizure is constitutional, see infra notes 87-116 and accompanying text.

85. For a discussion of case law from the Second, Seventh, Eighth, Ninth, and D.C. Circuits rejecting the concept of continuing seizure, see infra notes 87-103 and accompanying text.

86. For a discussion of case law from the Third and Tenth Circuits endorsing the concept of continuing seizure, see infra notes 104-16 and accompanying text.
A. The Majority View: Resisting “Submission” to the Continuing Seizure Doctrine

Since 1991, a majority of federal courts have rejected the concept of continuing seizure on grounds that it is inconsistent with the holding and policy concerns articulated by the Supreme Court in Hodari.87 In United States v. Hernandez,88 the Ninth Circuit addressed the issue of continuing seizure in response to a defendant’s motion to suppress evidence he discarded while fleeing, but before being apprehended by police.89 Prior to taking flight, the defendant stopped momentarily when the officer asked to speak with him, was grabbed by the officer while attempting to run, but broke away before ultimately being apprehended by police.90 The defendant based his suppression motion on the theory that he submitted to the officer’s show of authority, and therefore was seized when he initially stopped—albeit momentarily.91

The Ninth Circuit rejected the defendant’s argument, and held that although the defendant had paused and the officer applied physical force, the defendant was not seized until ultimately apprehended.92 In arriving at this conclusion, the court determined that Hodari did not endorse the

87. See, e.g., United States v. Baldwin, 496 F.3d 215, 218 (2d Cir. 2007) (holding suspect not seized when he “halt[s] temporarily” in response to show of authority through order to stop, but then flees); United States v. Bradley, 196 F.3d 762, 768 (7th Cir. 1999) (defining seizure as sum of two parts: (1) “the arresting officer must apply physical force or display a show of authority”; and (2) “the physical force or show of authority must cause the fleeing subject to stop”); United States v. Hernandez, 27 F.3d 1403, 1407 (9th Cir. 1994) (declining to adopt rule that suspect was seized when he paused momentarily on show of authority and was touched by police officer but subsequently fled); United States v. Washington, 12 F.3d 1128, 1132 (D.C. Cir. 1994) (concluding defendant was not seized when he momentarily complied with order to pull car over to side of road but then sped away before officers approached, despite defendant’s momentary submission to authority).

88. 27 F.3d 1403 (9th Cir. 1994).

89. See id. at 1406 (describing facts and procedural posture of case).

90. See id. at 1405 (describing facts of case). The record indicated that police officers saw the defendant jump over a fence in dark clothing and run to an apartment building gate. See id. (same). Concerned that the defendant was engaged in illegal activity, one of the officers approached him, identified himself as a police officer, and stated that he needed to talk to him. See id. (same). As the officer approached the defendant, however, he saw the defendant reach into his waist band “in a drawing motion.” See id. (same). The defendant paused when he saw the officer, then turned and attempted to climb over a gate. See id. (same). The officer then grabbed the defendant while he attempted to climb the gate and, as the two struggled, the gate “burst open,” causing the officer to fall. See id. (same). As the defendant fled, he discarded the handgun at issue before eventually being tackled and apprehended by the officer. See id. (same).

91. See id. at 1406 (describing facts and procedural posture of case as well as defendant’s contention that evidence should be inadmissible because police lacked reasonable suspicion when police initially attempted to detain defendant for questioning).

92. For a discussion of the Ninth Circuit’s rationale in arriving at its holding in Hernandez, see infra notes 93-96 and accompanying text.
concept of continuing seizure. The court derived this interpretation from Hodari's emphasis on submission and concluded that momentary compliance or the ineffective application of physical force cannot, without more, constitute seizure. Rather, the Ninth Circuit viewed Hodari as requiring actual submission absent a subsequent attempt to resist. Consequently, the court reasoned that the defendant's argument was incongruous with Hodari and, if adopted, would encourage flight "after the slightest contact with an officer in order to discard evidence.

Similarly, in United States v. Baldwin, the Second Circuit held that Hodari does not support the continuing seizure concept. In Baldwin, the court considered whether an individual is seized if they pause—and therefore momentarily submit—prior to breaking away. Rejecting this argument, the court reasoned that, although Hodari provided that an

93. See Hernandez, 27 F.3d at 1406 (interpreting Supreme Court's Hodari holding as rejecting continuing seizure).
94. See id. (citing California v. Hodari D., 499 U.S. at 621, 626 (1991)) (assessing Hodari's seizure standard language as well as Ninth Circuit case law and concluding that actual submission is required in show of authority and physical force seizure cases). Specifically, the court noted that Hodari precedent prescribed for lower courts that "[a] seizure occurs either when a suspect is physically forced to stop or when the suspect submits to the officer's show of authority." Id.
95. See id. (concluding Hodari supports Ninth Circuit's conclusion that "[a] seizure does not occur if, in response to a show of authority, the subject does not yield; in that event, the seizure occurs only when the police physically subdue the subject").
96. See id. at 1407 (reviewing facts of case in view of Hodari to determine that Hernandez was not seized until tackled, and supporting this conclusion with Hodari's policy argument of encouraging cooperation with police). In particular, the Ninth Circuit clarified the rationale of its holding, stating:

We decline to adopt a rule whereby momentary hesitation and direct eye contact prior to flight constitute submission to a show of authority. Such a rule would encourage suspects to flee after the slightest contact with an officer in order to discard evidence, and yet still maintain Fourth Amendment protections. A seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective. Id. (citing Hodari, 499 U.S. at 625).
97. 496 F.3d 215 (2d Cir. 2007).
98. For further discussion of the Second Circuit's holding in Baldwin, as well as its interpretation of Hodari as rejecting the concept of continuing seizure, see infra notes 99-103 and accompanying text.
99. See Baldwin, 496 F.3d at 216 (describing facts of case). In Baldwin, police officers, acting on an anonymous tip, pulled over the defendant's car because it matched the description of a recent police report. See id. at 216-17 (same). When the police car activated its patrol lights, the defendant pulled over on the side of the road and the police vehicle pulled in behind him. See id. at 217 (same). As the officers approached the defendant's vehicle, the defendant "simply stared back" at the officers and refused to comply with their demand that he show his hands. See id. (same). The officers then drew their guns, but before they were able to approach the vehicle, the defendant sped away, only later to be apprehended. See id. (same). At trial, the defendant sought to suppress the evidence obtained during his seizure, including weapons, drugs, and drug paraphernalia. See id. (describing facts and procedural posture of case).
individual is seized upon submission to a show of authority, mere momentary compliance followed by resistance proves insufficient. Relying on similar holdings of the Seventh, Eighth, and D.C. Circuits, the Second Circuit concluded that “the import of Hodari . . . [is] that ‘an order to stop must be obeyed or enforced physically to constitute a seizure.’” Therefore, because the defendant’s actions reflected “evasion” rather than submission, his momentary compliance did not render him seized. Importantly, although the Second Circuit had earlier questioned whether Hodari provides adequate individual rights protections, in Baldwin the court echoed Hodari’s argument that the submission requirement discourages flight from law enforcement.

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100. See id. at 218 (interpreting Hodari as requiring actual submission rather than momentary hesitation not indicative of compliance). Specifically, the Second Circuit noted that “[w]e have understood the import of Hodari to be that ‘an order to stop must be obeyed or enforced physically to constitute a seizure.’” Id. (quoting United States v. Swindle, 407 F.3d 562, 572 (2d Cir. 1996)).

101. Id. at 218 (quoting Swindle, 407 F.3d at 572); see also United States v. Bradley, 196 F.3d 762, 768 (7th Cir. 1999) (holding no continuing seizure takes place when initial show of authority did not cause defendant to stop, and that individual is not seized until physical force is applied); United States v. Hernandez, 27 F.3d 1403, 1407 (9th Cir. 1994) (holding no continuing seizure occurs when suspect momentarily complies with show of authority even if physically touched before breaking away); United States v. Washington, 12 F.3d 1128, 1130 (D.C. Cir. 1994) (holding that because defendant did not submit to officer’s order, he was not seized).

102. See Baldwin, 496 F.3d at 219 (applying Hodari standard to facts of case and holding defendant was not seized when he initially pulled over because “[h]is conduct, all circumstances considered, amounted to evasion of police authority, not submission” as required in seizure cases). In addition, the court rejected the defendant’s second argument that he was seized according to Mendenhall by reiterating Hodari’s conclusion that the Mendenhall standard does not define seizure. See id. (discussing defendant’s argument that he was seized because reasonable person in his situation would not have felt free to leave, but concluding that argument fails because Hodari distinguished Mendenhall as “necessary, but not sufficient” condition for seizure).

103. See id. (indicating that Hodari’s seizure standard appropriately “appl[ies] the deterrent to [police officers’] genuine, successful seizures” rather than encouraging suspects to not comply with officers’ requests to stop). Despite quoting the Hodari language here, the Second Circuit has in the past expressed concern with the policy implications of the court’s seizure definition. See Swindle, 407 F.3d at 573 (expressing policy concerns with Hodari standard). In particular, the Second Circuit noted in Swindle:

A substantial argument could be made that a broader definition of “seizure”—or some other remedy—is required to adequately protect Fourth Amendment values from the harms flowing from police initiation of Terry stops without reasonable suspicion. Although the Hodari Court stated that “only a few of those orders [to stop], we must presume, will be without adequate basis,” the possibility that unreasonable orders are infrequent does not necessarily make them acceptable. Even if the kind of order given in Swindle’s case is rare—and we do not suggest that it is—we see no persuasive reason for the law to tolerate it. In view of what we believe to be the controlling case, however, we must affirm a conviction that was achieved with evidence obtained by an abuse of police power. A
B. The Minority View: Exhibiting "Compliance" with the Continuing Seizure Concept

Since 1991, two circuit courts have diverged from the majority interpretation of Hodari to find that the decision supports the continuing seizure concept.\textsuperscript{104} In United States v. Morgan,\textsuperscript{105} the Tenth Circuit addressed the question where the defendant momentarily yielded and responded "[w]hat do you want" to an officer's request for him to "hold up."\textsuperscript{106} Despite his subsequent flight, the Tenth Circuit held that the defendant was seized during this initial encounter.\textsuperscript{107} Specifically, the court relied on language from Hodari indicating that an individual is seized upon submission to a show of authority.\textsuperscript{108} According to its strict interpretation of this language, the court found that because the defendant complied with the officer's initial request, such yielding—albeit temporary—constituted submission, and thus rendered the defendant seized as of that moment.\textsuperscript{109}

Likewise, the Third Circuit held in United States v. Coggins\textsuperscript{110} that Hodari supports the continuing seizure concept.\textsuperscript{111} In Coggins, the defen-

\begin{itemize}
  \item \textit{Id.} (quoting California v. Hodari D., 499 U.S. 621, 627 (1991)). Nonetheless, the Second Circuit ultimately concluded in Swindle that Hodari "compelled" a rejection of the concept of continuing seizure. \textit{See id.} (rejecting continuing seizure and, accordingly, ruling evidence obtained to be admissible).
  \item \textit{104. See, e.g., United States v. Brown, 448 F.3d 239, 243-44 (3d Cir. 2006) (endorsing continuing seizure doctrine for application in show of authority and physical force cases); United States v. Coggins, 986 F.2d 651, 653-54 (3d Cir. 1993) (adopting continuing seizure doctrine in show of authority cases); United States v. Morgan, 936 F.2d 1561, 1567 (10th Cir. 1991) (endorsing continuing seizure as concept allowed by Hodari).
  \item \textit{105. 936 F.2d 1561 (10th Cir. 1991).}
  \item \textit{106. See id. at 1565 (describing facts of case). Here, the defendant argued that he momentarily yielded to police show of authority because he stopped his vehicle after being followed by a police car with its lights activated for several blocks. \textit{See id.} (same).
  \item \textit{107. For a discussion of the Tenth Circuit's holding in Morgan and an analysis of its rationale, see infra notes 108-09 and accompanying text.}
  \item \textit{108. See Morgan, 936 F.2d at 1567 (citing language from Hodari indicating that show of authority seizures occur when law enforcement officers assert legitimate authority and suspect submits).
  \item \textit{109. See id. (applying show of authority seizure definition from Hodari to facts of case and concluding that defendant was seized based on defendant's temporary submission).
  \item \textit{110. 986 F.2d 651 (3d Cir. 1993).}
  \item \textit{111. See id. at 651 (adopting continuing seizure doctrine in show of authority cases based on Hodari); see also United States v. Smith, 575 F.3d 308, 313-16 (3d Cir. 2009) (affirming that seizure can occur solely through application of physical force and relying on Brown to establish that individual who submits to show of authority by "more than 'momentary compliance'" is seized despite subsequent flight); United States v. Brown, 448 F.3d 239, 243-44 (3d Cir. 2006) (endorsing continuing seizure doctrine for show of authority and physical force cases).
Dant asked to use the restroom while he was detained for questioning. When officers denied his request, he sat back down only to later flee and discard evidence before the police tackled him. In his motion to suppress, the defendant argued that he was seized when he initially complied with the officers' request to remain for questioning. The Third Circuit agreed, and in so doing, rejected the Government's contention that compliance followed by resistance does not reflect actual submission. Rather, the court held that the defendant's initial compliance satisfied Hodari's submission requirement, and thus the court concluded that absent reasonable suspicion at the time of initial submission, any evidence subsequently discarded or discovered is inadmissible as fruit of the poisonous tree.

IV. DUPREE: EMBRACING CONTINUING SEIZURE AND CEMENTING THE CIRCUIT SPLIT

The issue of continuing seizure recently re-emerged in United States v. Dupree. In Dupree, the defendant was charged with possession of a fire-
arm by a convicted felon. Dupree was stopped by two officers who received a radio report that a shooting had occurred at Tenth and Oxford Streets in Philadelphia, Pennsylvania. The radio report indicated that the suspect—who was a five foot, eight inch tall African American male wearing blue jeans and a black hooded sweatshirt—had fled east on Oxford.

While patrolling in the vicinity, the officers noticed Dupree, who was riding a bicycle on Marshall Street and wearing clothing similar to the reported suspect. After stopping their car, one officer exited the vehicle and approached Dupree, who was still on his bicycle. The officer, without first speaking to Dupree, "grabbed Dupree with both hands, one holding [his] right elbow, the other gripping [his] right upper arm," and then asked Dupree if he could speak with him "for a minute." The officer held Dupree for approximately two seconds before Dupree twisted out of the officer's grip, jumped off of the bicycle, slid it into the officer's legs, and fled. The officers chased Dupree for several minutes and witnessed him discard a gun before they tackled and ultimately arrested him.

A. Dupree's Two-Second Seizure: The District Court Endorses the Concept of Continuing Seizure

Dupree filed a motion to suppress the firearm, arguing that he was seized without reasonable suspicion when the officer initially grabbed him. The Government did not challenge the lack of reasonable suspicion.

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119. See id. at *2 (describing facts of case).
120. See id. (describing facts of case). The record indicated that no additional information was provided with respect to the suspect's appearance or method of travel. See id. at *2-3 (same).
121. See id. at *3-4 (describing facts of case). According to the record, Officer Mabry—the officer who grabbed Dupree during the initial encounter at issue in the case—noticed Dupree on Marshall Street, north of Oxford where the alleged shooting occurred. See id. (same). Mabry's partner, Officer Shippen, had also noticed Dupree but "had not pa[id] attention" to him because the flash report did not indicate that the suspect had fled on a bicycle. See id. at *4 (same). The officers decided to pursue Dupree in their vehicle when Mabry informed Shippen that he had identified an individual matching the description of the suspect. See id. (same).
122. See id. (describing police encounter with Dupree).
123. See id. at *4-5 (describing police officer's show of authority).
124. See id. at *5 (describing two-second seizure).
125. See id. at *6 (describing police pursuit and ultimate capture of Dupree).
126. See id. (describing facts and procedural posture of case). Specifically, Dupree argued that he was seized when the officer involved grabbed his arm, rather than when he was tackled after he fled and had discarded the handgun at
cision, but argued instead that Dupree was not seized for evidentiary purposes until he was tackled. 127 According to the Government, because the officers possessed reasonable suspicion at the time they tackled Dupree based on his flight and discarding of evidence, the weapon must be admitted as abandoned. 128

Upon reviewing the motion, the Government’s response, and conducting an evidentiary hearing and oral argument, the U.S. District Court for the Eastern District of Pennsylvania granted Dupree’s suppression motion. 129 The Government filed a motion for reconsideration, contending that the court manifested a “clear error of law” when it endorsed the concept of continuing seizure. 130 To this end, the Government cited holdings of the Seventh and Ninth Circuits, as well as those of numerous district courts, supporting an interpretation of Hodari wherein momentary submission or the unsuccessful application of physical force does not constitute a

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127. See id. at *5-6 (noting Government did not dispute that reasonable suspicion was not present at outset).

128. See id. at *8 (stipulating that Government argued that Dupree was seized only once he ultimately “came under the officers’ control” and therefore weapon was not illegally seized).

129. See id. (adopting Third Circuit’s definition of physical force seizure articulated in Brown and concluding definition should be applied to facts of current case to adjudicate motion). In arriving at this conclusion, the district court relied on the Third Circuit’s opinion in Brown, which held that a seizure occurs when “there is a ‘laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.’” Id. (quoting United States v. Brown, 448 F.3d 239, 245 (3d Cir. 2006)) (describing district court’s initial decision to grant motion to suppress). The district court also noted that in addition to the definition quoted here, the Third Circuit further articulated in Brown that, “[p]ut another way, when a seizure is effected by even the ‘slightest application of physical force,’ it is immaterial whether the suspect yields to that force.” Id. (quoting Brown, 448 F.3d at 245) (referencing language from Brown defining physical force seizure and recognizing that Brown definition quoted directly from Hodari). According to this language, which the Third Circuit had in turn quoted from Hodari, the court determined that Dupree was seized when the officer grabbed him, despite his subsequent flight. See id. (applying Brown physical force seizure definition to facts of case and concluding that because Brown indicated that seizure occurs even with unsuccessful applications of physical force, Dupree was seized when initially grabbed). Therefore, the court held that, because the officers lacked reasonable suspicion at that time, the handgun was rendered inadmissible as the fruit of an unlawful seizure. See id. at *10-13 (conducting assessment of whether officers possessed reasonable suspicion, despite Government’s concession, and concluding reasonable suspicion was lacking).

130. See id. at *1-2 (describing procedural posture of case and noting premise of Government’s motion). For a discussion of the Government’s rationale in concluding that the district court manifested a “clear error of law” in its May 27, 2009 order, see infra notes 131-32 and accompanying text.
final seizure. In addition, the Government asserted that the court’s interpretation of Hodari resulted from a selective quoting of the decision that failed to encapsulate both the legal holding and policy concerns articulated by the Court.

Despite these arguments, the district court affirmed its earlier holding requiring suppression, and further held that the Third Circuit’s definition of physical force seizure in United States v. Brown, though arguably dicta, established that Dupree was seized at the outset and thus continually seized throughout the encounter. In view of the prevailing circuit court interpretation of Hodari since 1991, however, and based on the fact that the Third Circuit has addressed continuing seizure in the context of physical force only in dicta, the Government is currently appealing the district court’s decision to the Third Circuit.


132. See Dupree, 2009 U.S. Dist. LEXIS 68127, at *6-7 (recognizing Government’s position that language in Brown related to physical force seizure is dicta and unrepresentative of Hodari holding); see also Motion for Reconsideration of Gov’t, supra note 131, at 9-12 (arguing that Brown selectively quoted Hodari and failed in considering full meaning of Hodari outside the context of two cited quotes, as well as quoting Hodari’s policy argument as support for rejection of continuing seizure position). In particular, the Government quoted the following passage from Hodari in which the Supreme Court articulated its underlying policy rationale:

We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges. Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are not obeyed. Since policemen do not command “Stop!” expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.

Motion for Reconsideration of Gov’t, supra note 131, at 12 (quoting California v. Hodari D., 499 U.S. at 621, 627 (1991)).

133. 448 F.3d 239 (3d Cir. 2006).

134. For a discussion of the court’s determination to employ the Third Circuit’s physical force seizure definition and apply it to the instant case, see supra note 136-43 and accompanying text.

B. Adoption by Submission: The Dupree Court Applies the Third Circuit’s Concept of Continuing Seizure

In reaffirming its earlier order requiring suppression of the seized evidence, the district court employed the Third Circuit’s definition of seizure in *Brown*, which provides that in application of physical force cases, a seizure occurs with the “slightest application” of force, irrespective of whether such force ultimately restrains the suspect. Although the district court acknowledged that the quoted language in *Brown* is considered dicta because that case involved only a show of authority scenario, it nevertheless noted that the Third Circuit “expressly interpreted and relied” on *Hodari* in developing its definitions of seizure. Specifically, the Third Circuit determined that the defendant in *Brown* was seized when he submitted to a show of authority by “staying put” and complying with the officer’s request to turn and place his hands on the patrol car, despite his later attempt to resist. In so doing, the court concluded that *Hodari* provides for continuing seizure if a seizure can be found during the first encounter.

136. See *Brown*, 448 F.3d at 245 (citing *Hodari*, 499 U.S. at 626). For further discussion of the Third Circuit’s decision in *Brown*, see infra notes 137-39 and accompanying text.

137. See *Dupree*, 2009 U.S. Dist. LEXIS 68127, at *7-8 (recognizing that physical force seizure definition stated in *Brown* served as dicta because *Brown* is show of authority case, but noting that *Brown*’s definition directly quotes sections of *Hodari*). In addition, the district court concluded that *Brown* developed standards for physical force and show of authority seizure cases that are “operative” and should be applied. See id. at *9 (discussing holding of *Brown* and assessing applicability of physical force seizure definition to current case). To the parties’ disagreement as to the applicability and precedential value of *Brown*, the court stated, “[s]uffice it to say that the cases marshaled by the parties on the issue evince less that the earlier-noted language from *Brown* was errant dictum by the Third Circuit, and more that discord exists in the federal courts over this significant issue of Fourth Amendment law.” Id.

138. See *Brown*, 448 F.3d at 243-44, 246 (holding that based on *Hodari* and Fourth Amendment precedent, where suspect placed his hands on police car—or made attempt to do so but did not touch the car—in response to officer’s request to frisk him and had engaged in polite dialogue with officers prior to this request, suspect submitted to officer’s show of authority and was seized, despite attempting to escape).

139. See id. at 245-46 (concluding that suspect in *Brown* was seized despite subsequent attempt to flee because he had “demonstrated more than momentary compliance with the arresting officers demands,” thereby effecting initial seizure and rendering it valid irrespective of later attempted break from submission). The Third Circuit in *Brown* then continued its discussion of show of authority seizure and distinguished the current case and *Coggins* from *Valentine* in which it found that a seizure did not occur. See id. at 246 (assessing *Brown* suspect’s actions as compared to suspect actions in other Third Circuit cases). In particular, the court stipulated that for an individual to be seized in a show of authority case they must exhibit “more than ‘momentary’ compliance” with the officer’s assertion of authority. See id. (quoting United States v. *Valentine*, 232 F.3d 350, 359 (3d Cir. 2000)) (articulating show of authority seizure standard). According to this standard, the court determined that the suspect in *Valentine* was not seized because he merely took two steps toward the officers which did not signify this level of compli-
The *Dupree* court concluded that, in *Brown*, the Third Circuit offered a clear definition of physical force seizure that it was not free to reject in favor of the “opposite understanding” espoused by other circuits that continuing seizure is inconsistent with *Hodari*. Further, the district court noted that *Brown* was decided after a number of such contrary circuit decisions and, therefore, it was reasonable to assume that the Third Circuit was cognizant of opposing interpretations. As further evidence of the Third Circuit’s awareness of contrary holdings in other circuits, the district court cited the 2009 Third Circuit opinion *United States v. Smith*, where the court again endorsed and clarified its continuing seizure standard. In *Smith*, the defendant argued that he complied with police officers’ show of authority—and therefore was seized—when he took two steps toward the officers’ vehicle in response to their request that he place his hands on the patrol car. After his momentary submission, the defendant immediately

See id. (examining application of show of authority seizure standard in Valentine to explain standard’s parameters). For further discussion of how the Third Circuit’s definition of show of authority seizure and the Third Circuit’s application of it in future cases evidence the court’s adoption of the concept of continuing seizure, see infra notes 140-47 and accompanying text.

140. See *Dupree*, 2009 U.S. Dist. LEXIS 68127, at *8-11 (concluding that although application of physical force seizure language in *Brown* is dicta, “this Court does not consider itself free to disregard the clear definition of ‘seizure’ that *Brown* provides, including as to circumstances of seizure through physical force, and to adopt and apply instead the nearly opposite understanding, as relevant here, espoused by other circuits” and determining that “*Brown* means what it says, and . . . provides the operative definition of ‘seizure,’ whether through application of force or show of authority, that [it] must apply”).

141. See id. at *10 n.20 (recognizing that *Brown* holding was issued subsequent to numerous cases rejecting continuing seizure, and concluding “[i]t is not unreasonable to consider that the Third Circuit was cognizant of the positions on the question adopted in other circuits at the time it decided *Brown*”).

142. 575 F.3d 308 (3d Cir. 2009).

143. See *Dupree*, 2009 U.S. Dist. LEXIS 68127, at *11 n.21 (noting that *Brown* remains precedential in Third Circuit seizure cases); see also *Smith*, 575 F.3d at 314-16 (reaffirming that seizure can occur solely through application of physical force and relying on *Brown* to establish that individual who submits to show of authority by more than “momentary compliance” is seized despite subsequent flight).

144. See *Smith*, 575 F.3d at 311-12 (describing facts and procedural posture of case). In *Smith*, the defendant was stopped by police who were patrolling in a “high crime” area and were instructed by their lieutenant to “stop and identify anyone that was out walking in the area” to make the police presence known. See id. at 311 (describing facts of case). The officers asked the defendant for identification. See id. (same). When the defendant indicated that he did not have identification with him, the officers inquired as to where the defendant was headed and received only “I am heading to my girl’s house” as the defendant’s repeated response. See id. (same). The officers repeatedly asked the defendant where “his girl’s house” was located, and when they received no reply, requested that the defendant place his hands on the patrol car. See id. (same). The defendant responded by taking two steps toward the vehicle before fleeing. See id. (same). In his motion to suppress the handgun he discarded during his subsequent flight from the officers, the defendant argued that he was seized when he submitted to the officers’ show of authority by walking toward the vehicle. See id. at 311-12 (describing procedural posture of case and noting that district court granted de-
ately fled and discarded evidence.\textsuperscript{145} The Third Circuit rejected the argument that the defendant’s actions constituted the level of submission necessary to effectuate a seizure.\textsuperscript{146} Rather, relying on its earlier decisions in \textit{Coggins} and \textit{Brown}, the court held that a suspect is continually seized in show of authority cases when “more than momentary compliance” precedes resistance.\textsuperscript{147} Thus, in view of the Third Circuit’s endorsement of continuing seizure in \textit{Smith} and definition of physical force seizure in \textit{Brown}, the district court concluded in \textit{Dupree} that although “discord exists in the federal courts over this significant question of Fourth Amendment law,” there was no clear error of law.\textsuperscript{148} Accordingly, the court held that Dupree was seized when he was first grabbed, and reaffirmed its earlier order granting Dupree’s motion to suppress.\textsuperscript{149}

V. \textsc{Dupree Resists the Supreme Court’s “Show of Authority” in \textit{Hodari}}

In \textit{Dupree}, the district court granted the motion to suppress based on its conclusions—derived primarily from the Third Circuit’s interpretation of \textit{Hodari} in \textit{Brown}—that: (1) a suspect who is touched by a law enforcement officer or momentarily submits to a show of authority prior to resistance or flight is continually seized during the entire course of the encounter, and (2) in this scenario, evidence discarded during flight is inadmissible unless the officer possessed reasonable suspicion at the outset.\textsuperscript{150} These conclusions arguably support the individual rights protection of the defendant’s motion to suppress because reasonable suspicion was not present during initial encounter).

\textsuperscript{145} See id. at 311 (describing facts of case). After taking two steps toward the patrol car, the defendant fled when the officers opened their car doors. See id. (same). The officers then pursued the defendant on foot through a parking lot and witnessed him drop the handgun at issue in the case. See id. (same).

\textsuperscript{146} See id. at 315-16 (noting that show of authority seizure requires “more than momentary compliance” and concluding that, as compared to defendants in \textit{Coggins} and \textit{Brown}, two steps toward police car by defendant here did not constitute requisite level of compliance).

\textsuperscript{147} See id. (articulating Third Circuit standard for submission in show of authority continuing seizure cases).


\textsuperscript{149} See id. at *8-11 (discussing \textit{Brown} physical force seizure standard and concluding that on these facts Dupree was seized when grabbed). Though the district court concluded that Dupree was seized during his first encounter with the officers, it also recognized that “the facts of this case, involving a police officer’s brief and unsuccessful grasp of a citizen’s arm, may place this matter near the outer limits of the rule articulated in \textit{Brown}.” Id. at *10. Based on the standard of review for clear error and \textit{Brown}’s reference to “the ‘slightest application of physical force,’” however, the court concluded that the seizure standard encompassed the facts at issue and it could not adopt an alternative definition of seizure to the one provided in \textit{Brown}. See id. at *10-11 (describing rationale behind decision to suppress evidence against Dupree).

\textsuperscript{150} See id. at *6-11 (adopting Third Circuit seizure definition from \textit{Brown} and reasoning that \textit{Brown} standard requires finding seizure even with ineffective application of physical force, and concluding that evidence was inadmissible without...
tions underlying the exclusionary rule. They are also, however, difficult to justify in view of Hodari and prevailing interpretations of that decision. In light of these considerations, the Dupree decision, and by extension, the Third Circuit’s interpretations of Hodari, are questionable and should be given meaningful consideration on appeal.

A. Hodari and the Concept of Continuing Seizure

The district court in Dupree faithfully applied the Third Circuit’s interpretations of Hodari in Coggins and Brown and concluded that Dupree was seized when the officer initially touched him. This conclusion was based strictly on the Third Circuit’s determination that Hodari defines seizure by common law arrest standards. Viewing the Hodari opinion in its entirety, however, it is evident that the court’s interpretation was in fact derived from a selective quoting of that decision. In particular, although Hodari defined seizure by common law arrest standards, the Third Circuit failed to recognize the Supreme Court’s emphasis on submission as a central component of that standard.

reasonable suspicion at outset). In particular, the district court noted that Brown’s definition of seizure clearly encapsulates the instant case because “a ‘seizure’ occurs for Fourth Amendment purposes when there is . . . ‘[a] laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.’” Id. at *6 (quoting United States v. Brown, 448 F.3d 239, 245 (3d Cir. 2006)). Based on this language, the court concluded that because Dupree was touched by the officer at the outset of the encounter, he must have been seized at that juncture despite the ineffectiveness of the officer’s force. See id. (applying Brown’s definition of physical force seizure to facts of case).

151. For further discussion of policy arguments in favor of extending exclusionary rule protections in the context of continuing seizure, see supra note 103 and accompanying text.

152. For further discussion of how Dupree fails to reflect the central holding and policy arguments in Hodari, see infra notes 154-75 and accompanying text.

153. For a discussion of the district court’s application of Hodari in Dupree, as well as recommendations regarding how the Third Circuit should rule on appeal, see infra notes 154-68 and accompanying text.

154. For a discussion of the district court’s faithful application of the Coggins and Brown seizure definition to the facts of Dupree’s case, see supra notes 136-49 and accompanying text.

155. See Dupree, 2009 U.S. Dist. LEXIS 68127, at *10-11 (noting that Third Circuit derived its seizure definition by “expressly” relying on Hodari’s common law arrest definitions of seizure and concluding it should apply Third Circuit’s definition of physical force seizure to facts of Dupree).

156. For a discussion of the conflicting definitions of seizure provided by the Court in Hodari, along with references to specific common law arrest seizure standards, see supra notes 68-80 and accompanying text.

157. See United States v. Brown, 448 F.3d 239, 245 (3d Cir. 2006) (citing Hodari’s common law arrest definitions of seizure but referencing neither Hodari’s conclusion that seizure does not occur unless suspect yields or its continuing seizure hypothetical focusing on ultimate apprehension); see also United States v. Morgan, 936 F.2d 1561, 1566-67 (10th Cir. 1991) (holding Hodari’s definition of seizure requires submission but concluding that submission is strictly inter-
Specifically, by focusing exclusively on common law arrest language, the Third Circuit neglected to consider the implications of Hodari's central holding, its hypothetical, or the policy argument pertaining to its seizure definition. First, the Hodari opinion explicitly stated that a person is not seized by physical force or a show of authority unless that individual yields to the show of force or authority. Second, the parameters of this holding were further articulated through the Court's hypothetical wherein it determined that evidence discarded after a suspect breaks away would not be the product of a continuing arrest. Finally, although it did not directly address continuing seizure, the Court's policy argument in Hodari is nevertheless instructive in this context as well. The Court rejected the notion that the exclusionary rule can be applied to situations in which the suspect does not yield, and concluded that evidence should be suppressed only in successful seizure scenarios.

In view of these considerations, the majority of the circuit courts addressing the issue of continuing seizure have concluded that such a concept is inconsistent with Hodari. Although the Third Circuit in Brown and Coggins seemingly endorsed continuing seizure, those cases involved suspects exhibiting more than momentary compliance prior to flight. Nevertheless, even if the court has not squarely encountered a momentary compliance case, the court's definition of physical force seizure indicates rendered—rendering individuals seized for Fourth Amendment purposes even during momentary submission).

158. For a discussion of Dupree's inconsistency with the central holding and policy arguments articulated in Hodari, see infra notes 169-75 and accompanying text.

159. See California v. Hodari D., 499 U.S. 621, 626 (1991) (stating question presented as "whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield" and concluding it does not).

160. See id. at 625 (providing hypothetical based on current facts to articulate that "[a] seizure is a single act, and not a continuous fact" and rejecting notion of continuing arrest during "period of fugitivity" even if arrestee is touched (quoting Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 471 (1874))). For further discussion of the continuing seizure hypothetical presented in Hodari, see supra notes 74-76 and accompanying text.

161. For a discussion of how Hodari's policy argument is instructive in evaluating whether the Court accepted or rejected the concept of continuing seizure, see infra notes 169-75 and accompanying text.

162. See Hodari, 499 U.S. at 624-27 (reasoning from common law arrest standards). For a discussion of the policy argument embraced by the Supreme Court in Hodari and its implications for the exclusionary rule, see infra notes 169-75 and accompanying text.

163. For a discussion of circuit court decisions rejecting the concept of continuing seizure and an examination of the rationales asserted by those courts, see supra notes 87-103 and accompanying text.

164. For a discussion of the factual scenarios in Coggins and Brown and an examination of the Third Circuit's holdings in those decisions, see supra notes 110-16, 138-43, and accompanying text.
that it would recognize continuing seizure in such a case.\textsuperscript{165} Indeed, this is precisely what the district court concluded in \textit{Dupree} when it held, based on Third Circuit precedent, that Dupree was seized when the officer grabbed him for those first two seconds.\textsuperscript{166} Although \textit{Hodari} supports this conclusion in selectively quoted passages, the entirety of the opinion and its factually similar hypothetical indicate the Court's rejection of the concept of continuing seizure.\textsuperscript{167} Accordingly, \textit{Dupree} is difficult to justify in light of \textit{Hodari}.\textsuperscript{168}

B. \textit{The Policy Implications of Continuing Seizure}

Both \textit{Brown} and \textit{Dupree} fail to expressly address the policy implications implicit in recognizing the continuing seizure concept.\textsuperscript{169} To adequately evaluate \textit{Dupree} in light of Fourth Amendment precedent, it is necessary to compare the policy implications of the decision with the policy arguments articulated by the Court in \textit{Hodari}. In practice, \textit{Dupree} would render evidence discarded during flight inadmissible and extend exclusionary rule protections to the entire course of the encounter—even if the defendant flees and the seizure is ultimately unsuccessful.\textsuperscript{170} \textit{Hodari}, however, specifically rebutted such an approach.\textsuperscript{171} In particular, \textit{Hodari} concluded that exclusionary rule protections should only be applied to situations where a

\textsuperscript{165}. See United States v. Brown, 448 F.3d 239, 245 (3d Cir. 2006) (holding that defendant was seized upon submission to police authority, but noting that substantial time had elapsed between officer informing defendant he was not free to leave and defendant's subsequent resistance); United States v. Coggins, 986 F.2d 651, 654 (3d Cir. 1993) (concluding suspect was seized by initial compliance with show of authority even though suspect eventually ran from police, but recognizing that suspect was detained for brief period before flight); \textit{cf. Brown}, 448 F.3d at 245 (defining seizure as occurring upon application of physical force regardless of its ineffectiveness and thus concluding continuing seizure is legally valid based on definition providing for seizure despite flight).

\textsuperscript{166}. See United States v. Dupree, Crim. No. 08-280, 2009 U.S. Dist. LEXIS 68127, at *8-11 (E.D. Pa. Aug. 4, 2009) (discussing \textit{Brown} physical force seizure standard and concluding that on these facts Dupree was seized when grabbed). For further discussion of the court's reasoning, see supra notes 129-50 and accompanying text.

\textsuperscript{167}. For an analysis of \textit{Dupree}'s inconsistency with the Supreme Court's reasoning in \textit{Hodari}, see supra notes 154-66 and accompanying text.

\textsuperscript{168}. For a discussion of the district court's application of the \textit{Hodari} seizure standard in \textit{Dupree} and an examination of \textit{Dupree}'s inconsistency with Fourth Amendment precedent, see supra notes 154-66 and accompanying text.

\textsuperscript{169}. See \textit{Dupree}, 2009 U.S. Dist. LEXIS 68127, at *7-11 (establishing that based on Third Circuit precedent and its interpretation of \textit{Hodari}, continuing seizure is valid concept, but neglecting to address policy considerations); \textit{see also Brown}, 448 F.3d at 245-46 (deriving physical force seizure definition from \textit{Hodari}'s common law arrest standard discussion, but failing to cite or reference policy concerns).

\textsuperscript{170}. For further discussion of the evidentiary ramifications resulting from the concept of continuing seizure, see supra notes 16-24, 87-116, and accompanying text.

\textsuperscript{171}. For a discussion of \textit{Hodari}'s policy rationale for its seizure standard, see infra notes 172-74 and accompanying text.
suspect yields to law enforcement authority.\footnote{See California v. Hodari D., 499 U.S. 621, 627 (1991) (clarifying that despite adoption of new seizure standard, exclusionary rule protections should not be extended to unsuccessful seizures).} The Court noted that police orders to stop are generally legitimate and compliance with such orders should be encouraged in the interest of public safety.\footnote{See id. ("Only a few [police orders to stop], we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the reasonable course to comply.").} Moreover, the Court reasoned that because police "do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun," the deterrent effect of the exclusionary rule should apply to "genuine, successful seizures."\footnote{Id.} Based on this policy rationale, Dupree's extension of the exclusionary rule to evidence obtained during a continuing seizure, and the Third Circuit's endorsement of this position, is inconsistent with \textit{Hodari}.\footnote{For a discussion of \textit{Dupree}'s inconsistency with the policy argument set forth in \textit{Hodari}, and for a comparative analysis of \textit{Dupree}'s policy implications with \textit{Hodari}'s policy objectives, see supra notes 169-74 and accompanying text.}

\section{VI. Conclusion}

The district court's adoption of the continuing seizure concept in \textit{Dupree} is consistent with the common law arrest definition of seizure, but inconsistent with the Supreme Court's holding in \textit{Hodari} and Fourth Amendment case law.\footnote{For a discussion of \textit{Dupree}'s reliance on the Third Circuit's adoption of the \textit{Hodari} common law arrest definition of seizure, and a comparison of these isolated definitions with the entirety of the \textit{Hodari} holding, see supra notes 154-68 and accompanying text.} Although the Third Circuit defined physical force seizure in \textit{Brown}, it has not provided such definition in a precedential opinion.\footnote{See United States v. Dupree, Crim. No. 08-280, 2009 U.S. Dist. LEXIS 68127, at *8-9 (E.D. Pa. Aug. 4, 2009) (noting Third Circuit's physical force seizure definition was in dicta, and stipulating that there are no precedential Third Circuit decisions on dispositive issue in \textit{Dupree}).} The appeal of \textit{Dupree}, therefore, will provide the Third Circuit with a first impression case directly addressing the issue of what constitutes physical force seizure, as well as allow the court to rule on the concept of continuing seizure.\footnote{For a discussion of \textit{Dupree}, see infra notes 179-85 and accompanying text.} If the Third Circuit adheres to the interpretation of \textit{Hodari} that it pronounced in \textit{Brown}—and accordingly endorses continuing seizure—its decision will further cement the circuit split and will contribute to greater inconsistency in federal courts' application of the exclusionary rule in seizure cases.\footnote{For a discussion of circuit court cases opposing the concept of continuing seizure and an overview of the evidentiary ramifications surrounding the concept of continuing seizure under the majority approach, see supra notes 87-103 and accompanying text.} This holding would strengthen Fourth Amendment individual rights through greater exclu-
sionary rule protections, but at the expense of efficient law enforce-
ment. 180 Officers who view suspicious behavior but lack the adequate
level of suspicion to seize an individual may refrain from initiating a Terry
stop at the expense of public safety due to evidentiary concerns. 181 This
result would be inconsistent with both the policy rationale articulated in
Hodari, as well as the Supreme Court’s emphasis on law enforcement effi-
ciency in Terry. 182

Conversely, rejecting continuing seizure would lead to greater con-
tinuity in federal courts’ application of the exclusionary rule. 183 Arguably,
this result could weaken individual rights protections by encouraging po-
lice officers to pursue suspects on less than reasonable suspicion. 184 How-
ever, the Supreme Court established in Hodari that it believed such
instances of police abuse would be few and, in any event, did not super-
sede the need for efficient law enforcement. 185 Therefore, a Third Circuit
holding that continuing seizure is invalid would support Hodari’s policy
rationale. 186

It is clear that Hodari evidences internal inconsistency that has led
federal courts to reach opposite conclusions as to whether continuing

180. For a discussion of the manner in which Dupree would potentially impact
evidentiary rights by extending exclusionary rule protections, see supra notes 16-
24, 87-116, and accompanying text.

181. For a discussion of the policy implications implicit in extending the pro-
tections of the exclusionary rule, see supra notes 24, 40-42, and accompanying text.

182. For a discussion of the policy rationale underlying the Supreme Court’s
decision to extend constitutional seizures in Terry, see supra notes 37-42 and ac-
companying text.

183. For a survey of federal circuit courts accepting and rejecting the concept
of continuing seizure, see supra notes 87-116 and accompanying text.

184. See United States v. Swindle, 407 F.3d 562, 573 (2d Cir. 2005) (rejecting
concept of continuing seizure, but nevertheless expressing policy concerns about
decision). Specifically, the court noted:

A substantial argument could be made that a broader definition of
"seizure"—or some other remedy—is required to adequately protect
Fourth Amendment values from harms flowing from police initiation of
Terry stops without reasonable suspicion. Although the Hodari Court
stated that "only a few of those orders [to stop], we must presume, will be
without adequate basis," the possibility that unreasonable orders are in-
frequent does not necessarily make them acceptable. Even if the kind of
order given in Swindle’s case is rare—and we do not suggest that it is—we
see no persuasive reason for the law to tolerate it. In view of what we
believe to be the controlling case, however, we must affirm a conviction
that was achieved with evidence obtained by an abuse of police power. A
remedy for Swindle’s Fourth Amendment complaint can come only from
a higher authority.

Id. (quoting California v. Hodari D., 499 U.S. 621, 627 (1991)).

185. For a discussion of Hodari’s policy rationale with respect to limiting ex-
pansion of exclusionary rule protections, see supra notes 169-75 and accompanying
text.

186. For a discussion of how the district court’s holding in Dupree is inconsis-
tent with the policy concerns articulated in Hodari, see supra notes 169-75 and ac-
companying text.
seizure is a valid legal concept.\textsuperscript{187} It is equally clear, however, that the majority of circuit courts reject the concept of continuing seizure.\textsuperscript{188} To resolve the current circuit split and provide uniformity in federal courts' application of the exclusionary rule in this context, clearer guidance from the Supreme Court is needed.\textsuperscript{189} In the interim, however, circuit courts should apply \textit{Hodari} in a manner most consistent with its central holding and policy concern.\textsuperscript{190} At present, the Third Circuit can meet this task by rejecting the continuing seizure concept and reversing the district court's holding in \textit{Dupree}.\textsuperscript{191}

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\textsuperscript{187} For a discussion of \textit{Hodari}'s internal inconsistency with respect to its seizure standard and the circuit split that has resulted from this ambiguity, see \textit{supra} notes 71-116 and accompanying text.

\textsuperscript{188} For a survey of federal circuit courts rejecting the concept of continuing seizure, see \textit{supra} notes 87-103 and accompanying text.

\textsuperscript{189} See, e.g., Paradis, \textit{supra} note 56, at 332 (explaining that \textit{Hodari} was based not on precedent but on "nineteenth-century treatises and cases discussing the common law of arrest" and concluding that Supreme Court needs to remedy current confusion regarding \textit{Hodari}'s seizure standard).

\textsuperscript{190} See United States v. Dupree, Crim. No. 08-280, 2009 U.S. Dist. LEXIS 68127, at *7-8 (E.D. Pa. Aug. 4, 2009) (recognizing that \textit{Hodari} is still valid law and must be followed in seizure cases). For a discussion of how the district court's holding in \textit{Dupree} is inconsistent with \textit{Hodari} and Fourth Amendment case law generally, see \textit{supra} notes 150-75 and accompanying text.

\textsuperscript{191} For a discussion of \textit{Dupree}'s—and by extension, the Third Circuit's—inconsistency with \textit{Hodari}, see \textit{supra} notes 150-75 and accompanying text.