Duquesne Law Review

Volume 35 | Number 3 Article 7

1997

Commonwealth v. Matos: A Decision without Direction

Michael A. Agresti

Commonwealth v. Matos: A Decision Without Direction

I. INTRODUCTION

Suppose that in the middle of the day, you and your police partner are patrolling the streets of a Philadelphia neighborhood in your cruiser. A police radio broadcast indicates that unknown persons are selling narcotics in the vicinity of 2300 Reese Street. Since you are close to that location, you and your partner proceed to investigate. Upon approaching the location, you notice three men standing on the corner. These men look in your direction and immediately take flight. You and your partner have done nothing more than drive towards them on a public street. What do you do? Common sense and police training dictate that you follow the men and at least attempt to ascertain why they fled at the mere sight of your police car.

On April 8, 1991, this exact set of circumstances occurred in the case *Commonwealth v. Matos*.[1] The police officers in *Matos* decided to pursue the fleeing men.[2] During the chase, one of the officers saw a man discard a plastic baggy.[3] The officer recovered the bag, which contained what was later identified as twelve vials of crack cocaine.[4] Another officer arrested the man who discarded the cocaine.[5] During his trial on drug charges, the defendant successfully argued to suppress the twelve vials of crack cocaine as being the product of an illegal seizure.[6] The Pennsylvania Superior Court later reversed this suppression decision.[7] In 1996, on appeal, the Supreme Court of Pennsylvania held that the trial court properly suppressed the crack cocaine evidence discarded by the defendant.[8] The court reasoned that the incriminating evidence was properly suppressed because the defendant discarded it as a direct result of an illegal

1. 672 A.2d 769 (Pa. 1996).
2. *Matos*, 672 A.2d at 771.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Matos*, 672 A.2d at 771.
8. *Id.*

seizure perpetrated by the police officers who gave chase without reasonable suspicion.[9]

In an effort to protect the privacy rights of Pennsylvania citizens, the supreme court in *Matos* went beyond the privacy rights guaranteed under the United States Constitution without a convincing justification. The Pennsylvania Supreme Court has decided to retain the view that a seizure occurs when an individual is being pursued by police officers and no longer feels free to leave.[10] Although such a decision is permissible,[11] the court's overly broad definition of seizure in this case has led to an undesirable and unnecessary result. Specifically, the court in *Matos* has sent the following message to criminals in this Commonwealth: If you spot the police and are in possession of drugs, an illegal firearm, or anything suspicious — RUN — if you fear that you might be apprehended, throw down your contraband and keep running.

As crude as this may sound, this is the unfortunate result of *Commonwealth v. Matos.* This comment explores how the decision in *Matos* was reached and suggests some ways the results of the case could have been avoided. Section I of this comment examines the *Matos* case. Within this section, the United States Supreme Court decision in *California v. Hodari D.*,[12] the case defining the federal seizure standard, is discussed. The current movement in the Pennsylvania General Assembly to quell the Pennsylvania Supreme Court's recent expansion of privacy rights is reviewed in Section II of this comment. Finally, Section III discusses possible alternatives to the holding in *Matos.* Section III illustrates that the decision in *Matos* restrains police to an unacceptable degree, and hopefully, through legislative initiative, judicial restraint or a change in the make-up of the Pennsylvania Supreme Court, the practical results caused by *Matos* will change.

---

9. *Id.* at 776.

10. *Id.* at 774.

11. *See* Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)(holding the Pennsylvania Supreme Court free to reject conclusions of the United States Supreme Court as long as it remains faithful to the minimum guarantees established by the United States Constitution).

12. 499 U.S. 621 (1991)(holding that a Fourth Amendment "seizure" does not occur until police officers apply physical force to a citizen or a citizen submits to an officer's show of authority).

II. *COMMONWEALTH V. MATOS*

Commonwealth v. Matos was the consolidation of three appeals.[13] Each case involved situations in which individuals fled an area in apparent response to the presence of police, discarding incriminating evidence in the process.[14] The court in *Matos* faced a single issue: "[W]hether contraband discarded by a person fleeing a police officer are the fruits of an illegal *seizure* where the officer possessed neither probable cause[15] to arrest the individual nor reasonable suspicion[16] to stop the individual and perform a Terry Frisk."[17] The court held that the police conduct in this case, chasing after a fleeing person without reasonable suspicion, constitutes a seizure under Article I, Section 8 of the

---

13. *Matos*, 672 A.2d at 770. The *Matos* decision consolidated the cases of *Commonwealth v. Carroll*, 628 A.2d 398 (Pa. Super. Ct. 1993); *Commonwealth v. Matos*, 628 A.2d 419 (Pa. Super. Ct. 1993); and *Commonwealth v. McFadden*, 628 A.2d 420 (Pa. Super. Ct. 1993). *Id.*

14. *Id.* In *McFadden*, two uniformed Philadelphia police officers approached Andrew McFadden in their marked patrol car. *McFadden*, 628 A.2d at 420. When McFadden looked in the direction of the officers, he immediately ran. *Id.* One of the officers quickly gave chase. *Id.* Before the officers apprehended McFadden, he threw a handgun into some bushes. *Id.* After recovering the gun, the officers arrested McFadden, charging him with carrying an unlicensed firearm in public. *Id.* The trial court suppressed the evidence, but the superior court reversed this decision on appeal. *Id.*

In *Carroll*, two uniformed Philadelphia police officers exited their patrol car to speak with two men standing on a street corner. *Carroll*, 628 A.2d at 398. While one of the officers spoke with one of the men, Richard Carroll stood with his hands in his pockets. *Id.* Upon seeing this, the other officer, with his hand over his gun, asked Carroll to remove his hands from his pockets. *Id.* Carroll immediately turned and fled into an alley, where he slipped and fell to the ground. *Id.* One of the officers chasing Carroll saw him fall and observed two packets containing a white substance fall out of Carroll's pocket. *Id.* The officer quickly arrested Carroll at gun point. *Id.* A search of Carroll's coat pockets revealed an additional forty-five packets containing a white substance. *Id.* This evidence was subsequently suppressed by the court of common pleas in a trial against Carroll, but the superior court reversed this decision. *Id.*

15. Probable cause is defined as "facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information, sufficient in themselves to warrant a man of reasonable caution to believe an offense has been or is being committed, and the person to be arrested has committed the offense." Commonwealth v. Jefferies, 311 A.2d 914, 916 (Pa. 1973)(citing Beck v. Ohio, 379 U.S. 89 (1964)).

16. Reasonable suspicion is defined as the ability of a police officer to "point to articulated facts which give rise to a reasonable belief criminal activity is afoot." Commonwealth v. Hicks, 253 A.2d 276, 280 (Pa. 1969)(interpreting Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968)).

17. *Matos*, 672 A.2d at 771. The phrase "Terry Frisk" refers to the permissible amount of police intrusion into a persons privacy when an officer has "reasonable suspicion" that an individual may be armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). An officer is permitted to perform a limited search of an individual's outer clothing in an attempt to discover the presence of weapons that might endanger the safety of the officer and others. *Hicks*, 253 A.2d. at 279. The court's phrasing of the issue in *Matos* overlooks the subtle difference between the "Terry Stop" and the "Terry Frisk." The former is meant to be an investigatory tool, while the latter is designed to protect the officers and others. *See* Interest of B.C., 683 A.2d 919 (Pa. Super. Ct. 1996).

Pennsylvania Constitution.[18] Therefore, any incriminating evidence discarded by the fleeing individual during the chase is the result of an unreasonable seizure and inadmissible in court.[19]

In so holding, the Pennsylvania Supreme Court rejected the holding of the United States Supreme Court in *California v. Hodari D.*[20] In that case, a majority of the United States Supreme Court found that under the Fourth Amendment to the United States Constitution, a seizure does not occur until police officers either apply physical force or gain an individual's submission through their show of authority.[21] The facts of *Hodari D.* are virtually identical to those in *Matos*.[22] After seeing police approach in a unmarked cruiser, Hodari fled and discarded contraband during the ensuing chase.[23] The *Hodari D.* Court concluded that, assuming the officer's pursuit was a "show of authority," there was no seizure because Hodari did not submit.[24]

The reasoning of the *Hodari D.* Court was adopted and expanded upon by the Superior Court of Pennsylvania in *Commonwealth v. Carroll,*[25] one of the cases later consolidated under *Matos.*[26] The majority of the superior court in *Carroll* was satisfied that the nature of the encounter between the police and the citizen in that case was at all times controlled by the citizen.[27] Judge Cirillo, writing for the majority, stated "a citizen may demonstrate his or her objectively reasonable belief that he is free to leave, by leaving, as did both Hodari D. and, in the case at hand, Carroll."[28] Judge Cirrillo further opined that the citizen determines whether probable cause or reasonable suspicion

---

18. *Matos,* 672 A.2d at 771.

19. *Id.*

20. *Id. See Hodari D.*, 499 U.S. at 621.

21. *Hodari D.,* 499 U.S. at 626.

22. *Compare Hodari D.*, 499 U.S. at 626, *with Matos*, 672 A.2d at 771.

23. *Hodari D.,* 499 U.S. at 623. In *Hodari D.*, two officers were patrolling a "high crime" area in Oakland, California late in the evening when they approached a group of youths huddled around a car. *Id.* at 622. The officers were in an unmarked car and dressed in street clothes. *Id.* They were, however, wearing jackets with the word "police" emblazoned on the front and back. *Id.* Upon seeing the officers, the youths fled in different directions and the car exited at a high rate of speed. *Id.* at 632. The two officers chased defendant Hodari D. *Id.* During the chase, Hodari discarded what appeared to be a small rock. *Id.* Upon seeing this, one of the officers tackled Hodari and arrested him. *Id.* The rock turned out to be crack cocaine. *Id.* A motion to suppress this evidence was denied in Hodari's juvenile proceeding, but the California Court of Appeals reversed this decision. *Id.*

24. *Id.* at 629.

25. 628 A.2d 398 (Pa. Super. Ct. 1993).

26. *See Carroll*, 628 A.2d at 405. The *Hodari D.* reasoning was also adopted by the superior court in *Commonwealth v. Matos,* 628 A.2d 419 (Pa. Super. Ct. 1993), and *Commonwealth v. McFadden,* 628 A.2d 420 (Pa. Super. Ct. 1993).

27. *Carroll*, 628 A.2d at 405.

28. *Id.* at 403.

arises by choosing to discard contraband.[29] Flight, absent other factors, will not justify a "Terry Stop and Frisk."[30] In other words, if the individuals in the cases consolidated under *Matos* simply continued to run from the police and did not discard contraband, reasonable suspicion would never have surfaced. If the officers subsequently caught the men, the officers could not constitutionally search or even detain them.[31] Any search or arrest by the police would clearly have violated these individuals' Fourth Amendment rights.[32]

The superior court in *Carroll* agreed with the United States Supreme Court's modification of the so called "Mendenhall Test" in *Hodari D.*[33] Under this test, "a person is seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[34] The *Hodari D.* Court narrowed the Mendenhall Test when it held that a "show of authority" only amounts to a seizure if the citizen submits to the police, i.e., stops running.[35] The Court then reasoned that Hodari's flight from the police demonstrated his ability and willingness to end the encounter.[36] Similarly, the superior court in *Matos* found that Matos demonstrated his "objectively reason-

---

29. *Id.*

30. *Id.* at 404. Justice Cirillo stated: "Carroll always had his own legal protections in his own hands, and so long as he carefully exercised his right to privacy, that is did not throw away or drop contraband within the sight of the police, he would not create the probable cause necessary to justify his arrest." *Id.* at 403. *See In re* Barry, 621 A.2d 669 (Pa. Super. Ct. 1993) *aff'd sub nom.*, Commonwealth v. Biagini, 655 A.2d 492 (Pa. 1995), for the proposition that flight alone does not create reasonable suspicion.

31. *Barry W.*, 621 A.2d at 678 (holding that an anonymous tip broadcast over a police radio, coupled with flight on the part of individuals in a generalized area, does not justify a forcible "Terry Stop").

32. *Carroll*, 628 A.2d at 405.

33. *Id.* at 400. The Mendenhall Test comes from the case of *United States v. Mendenhall*, 446 U.S. 544 (1980).

34. *Mendenhall*, 446 U.S. at 554. The United States Supreme Court has in some instances found ways of avoiding this standard. *See* Florida v. Bostick, 501 U.S. 429 (1991). In *Bostick*, the Court stated:

> The state court erred, however, in focusing on whether Bostick was "free to leave" rather than on the principle that those words were intended to capture. When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Bostick, 501 U.S. at 435-36.

35. *Hodari D.*, 499 U.S. at 629. Since *Hodari D.*, the intermediate federal courts have adhered to an interpretation of the Mendenhall Test that not only requires a person to feel restricted from leaving, but also to submit to the police officer's show of authority. *See* United States v. Wood, 981 F.2d 536 (App. D.C. Cir. 1992); Tom v. Voida, 963 F.2d 952 (7th Cir. 1992).

36. *Hodari D.*, 499 U.S. at 629.

able belief that he was free to leave" when he decided to run from the area.[37]

Despite the reasoning set forth by the superior court, the Pennsylvania Supreme Court in *Matos* decided to reject the rationale of *Hodari D.* and retain the original Mendenhall Test.[38] The court premised its refusal to follow the United States Supreme Court on the "greater privacy rights" enjoyed by Pennsylvanians under Article I, Section 8 of the Pennsylvania Constitution.[39]

After briefly discussing *Hodari D.*, the Pennsylvania Supreme Court supported its departure from the United States Supreme Court utilizing the analysis set forth in *Commonwealth v. Edmunds.*[40] Under *Edmunds*, a Pennsylvania court may use the following four factors in determining whether to depart from federal precedent on a matter of constitutional law: 1) the text of the Pennsylvania constitutional provision in issue and of the corresponding federal constitutional provision; 2) the history of the state constitutional provision, including Pennsylvania case law; 3) the related case law from other states; and 4) policy considerations unique to Pennsylvania.[41]

In reviewing the text of Article I, Section 8 of the Pennsylvania Constitution, the *Matos* court acknowledged that it is almost identical to its federal counterpart.[42] The court dismissed the textual similarities, however, by reasoning that it is not bound "to interpret the two provisions as if they were mirror images of one another."[43] Justice Cappy, writing for the majority, noted that the court has "traditionally regarded Article I, Section 8 as providing different, and broader, protections than its federal

---

37. *Carroll*, 628 A.2d at 403.

38. *Matos*, 672 A.2d at 776.

39. *Id.* at 770.

40. *Id. See* Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)(holding there is no good faith exception to search warrant requirement, thus rejecting *United States v. Leon*, 468 U.S. 897 (1984)).

41. *Matos*, 672 A.2d at 772 (citing *Edmunds*, 586 A.2d at 895).

42. *Id.* Article I, Section 8 of the Pennsylvania Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. I, § 8.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

43. *Matos*, 672 A.2d at 772 (citing *Edmunds*, 586 A.2d at 896).

counterpart."[44] In support of this conclusion, the court cited the origin of the state constitutional provision and the fact that the provision has remained the same for over two hundred years.[45]

The above rationale, however, falls short of providing sufficient justification for rejecting the holding of the United States Supreme Court in *Hodari D.* Only ten years before the decision in *Matos*, the Pennsylvania Supreme Court cited textual similarities between the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution as support for interpreting the two provisions in a consistent manner.[46]

The *Matos* court next cited the "history" and "context" of the state constitutional provision as support for a greater privacy right in Pennsylvania.[47] This reasoning, however, is also flawed. Both the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution were created around the same time, and both sought to eliminate the same evil, general warrants.[48] In fact, Pennsylvania's search and seizure provision was amended after the passage of the Fourth Amendment to reduce textual differences between the two provisions.[49] Furthermore, although Article I, Section 8 dates back more than two hundred years, friction between the federal and state high courts, in the context of enforcing freedom from unreasonable searches and seizures, appears to be of recent vintage. The Pennsylvania Supreme Court did not abandon a holding of the United States Supreme Court concerning search and seizure until 1979.[50]

To further support the notion that Pennsylvania has a "strong preference for the rights of the individual in the face of coercive state action," the court in *Matos* also cited Pennsylvania case law including *Commonwealth v. Jefferies*,[51] *Commonwealth v.*

---

44. *Id.*

45. *Id.* at 772-73. The court noted that Article I, Section 8 was written before passage of the Fourth Amendment. *Id.*

46. *See* Commonwealth v. Gray, 503 A.2d 921, 926 (Pa. 1985).

47. *Matos*, 672 A.2d at 772.

48. *See* Commonwealth v. Schaeffer, 536 A.2d 354 (Pa. Super. Ct. 1987)(Kelly, J., dissenting) for a cogent analysis of the similarities between the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution.

"General warrant" refers to a warrant issued in England prior to the American Revolution that allowed for searches of unnamed persons and unnamed premises. BLACK'S LAW DICTIONARY 1585 (6th ed. 1990).

49. *See Schaeffer*, 536 A.2d at 384 (Kelly, J., dissenting).

50. *See* Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979)(refusing to follow *United States v. Miller*, 425 U.S. 435 (1976), which held that a person has no standing to object to the seizure of his or her bank records).

51. 311 A.2d 914 (Pa. 1973)(holding when a police officer chases an individual without probable cause or reasonable suspicion, there is a seizure in violation of the Fourth Amendment).

Jones[52] and *Commonwealth v. Barnett*.[53] Specifically, the court found that *Jones*, the "precursor" to *Mendenhall*, was dispositive of the definition of seizure in Pennsylvania.[54] Under *Jones*, the standard for determining when a seizure has occurred is "whether a reasonable person innocent of any crime, would have thought he was being restrained had he been in the defendant's shoes."[55]

The cases cited by the *Matos* court, however, are factually distinguishable from *Matos* and present much clearer examples of seizure.[56] Furthermore, as the dissent in *Matos* noted, both *Jefferies* and *Barnett* were decided under the Fourth Amendment.[57] As such, they were overruled by the holding in *Hodari D.*, which held that a police chase does not constitute a Fourth Amendment seizure.[58]

The *Matos* court next examined how other states have dealt with *Hodari D.*[59] The court concluded that while many states have adhered to the *Hodari D.* holding, these states did so because they do not have a history of providing greater privacy rights under their respective state constitutions.[60] Those jurisdictions declining to follow *Hodari D.*, the court noted, refuse to abandon the *Mendenhall* "free to leave test" because they have a history of providing greater privacy rights under their own constitutions.[61] The *Matos* court then likened Pennsylvania to these states by reiterating its "emphatic" recognition of a stronger right of privacy enjoyed by the citizens of this Commonwealth.[62]

---

52. 378 A.2d 835 (Pa. 1977)(holding that a "Terry Stop" is initiated "when a reasonable person innocent of any crime, would have thought he was being restrained had he been in the defendant's shoes").

53. *Matos*, 672 A.2d at 774. *See* Commonwealth v. Barnett, 398 A.2d 1019 (Pa. 1979)(following the holding announced in *Jefferies,* 311 A.2d at 914).

54. *Matos*, 672 A.2d at 774.,

55. *Jones,* 378 A.2d at 840.

56. *See* Commonwealth v. Lewis, 636 A.2d 619 (Pa. 1994)(finding that the defendants were seized when officers continued to approach them until their backs were up against wall); Commonwealth v. Lovett, 450 A.2d 975 (Pa. 1982)(finding the defendant seized when the defendant and companions were placed in a police cruiser without consent for the purpose of transport to the crime scene).

57. *Matos,* 672 A.2d at 777 n.1 (Castille, J., dissenting).

58. *Id.*

59. *Id.* at 775.

60. *Id.* (citing State v. Aqundis, 903 P.2d 752 (Idaho 1995); Johnson v. State, 864 S.W.2d 708 (Tex. App. 1993); State v. Cronin, 509 N.W.2d 673 (Neb. App. 1993); Henderson v. Maryland, 579 A.2d 486 (Md. App. 1991)).

61. *Id.* (citing State v. Tucker, 642 A.2d 401 (N.J. 1994); *In re* E.D.J., 502 N.W.2d 779 (Minn. 1993); New York v. Madera, 624 N.E.2d 675 (N.Y. 1993); State v. Oquendo, 613 A.2d 1300 (Conn. 1992); State v. Quino, 840 P.2d 358 (Haw. 1992); State v. Holmes, 813 P.2d 28 (Or. 1991)).

62. *Matos*, 672 A.2d at 775.

While examining the holdings of sister states may be instructive, these cases obviously have no precedential value. Furthermore, if any other court is looked upon for guidance, our courts should look first to the highest court in the land. Of course, for the current supreme court, decisions that come from the United States Supreme Court are given no deference at all.[63]

In a final attempt to justify its rejection of *Hodari D.*, the *Matos* court proceeded to the fourth prong of the *Edmunds* analysis and discussed public policy considerations.[64] Initially, the court noted that Pennsylvanians are under no duty to stop or respond to an officer's inquiry and are free to leave an inquiry at any time.[65] The court then held that adopting the position taken in *Hodari D.* would require a "narrowing" of the definition of seizure that is "contrary to the protections afforded by Article I, Section 8 of the Pennsylvania Constitution."[66]

The court's reasoning as to the public policy matter, however, should not form the basis for refusing to follow *Hodari D.* As Justice Cavanaugh noted in his concurrence to *Carroll,* "while we can interpret our own constitution to afford defendants greater protections than the federal constitution does . . . there should be a compelling reason to do so."[67]

If the court could provide compelling reasons for breaking from federal precedent, it could better justify any lack of uniformity between prosecutions in federal court and those in state court. The *Matos* court, however, does not provide any reasons, let alone compelling reasons, for departing from *Hodari D.*

Ten years prior to *Matos*, a majority of the state supreme court seemed to be receptive to the need for compelling reasons to

---

63. *See* Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)(rejecting United States v. Leon, 468 U.S. 897 (1984), which held that there is a "good faith exception to constitutionally invalid search warrants"); Commonwealth v. Chambers, 598 A.2d 539 (Pa. 1991) (applying a stricter interpretation of the "knock and announce" rule than that required under federal precedent); Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992) (implicitly rejecting Michigan v. Summers, 452 U.S. 692 (1981), which held that a temporary seizure of occupants of a house lawfully searched was reasonable); Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) (holding probable cause required before a canine sniff of a person, rejecting United States v. Place, 462 U.S. 696 (1983), which held that a canine sniff is not a "search" under the United States Constitution); Commonwealth v. White, 669 A.2d 896 (Pa. 1995) (rejecting New York v. Belton, 453 U.S. 454 (1981), which established the "automobile exception" to search warrants).

64. *Matos*, 672 A.2d at 775.

65. *Id.* (citing Commonwealth v. Douglass, 539 A.2d 412 (Pa. Super. Ct. 1988), *alloc. den.*, 552 A.2d 250 (Pa. 1988)).

66. *Id.* at 776.

67. *Carroll*, 628 A.2d at 405 (Cavanaugh, J., concurring)(citing Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985)). Justice Cavanaugh stated: "To rule without compelling reason that the two Constitutions differ erodes public confidence in the Rule of the Law." *Id.*

depart from the United States Supreme Court as to what constitutes an unreasonable search or seizure.[68] Despite inclinations toward a "compelling reason" standard by the superior court,[69] however, apparently the current supreme court does not agree with the standard. In *Matos*, the court fails to give any compelling reasons for a broad definition of seizure, such as evidence of police abusing their power by routinely harassing innocent citizens in Pennsylvania. The supreme court fails to provide us with any compelling evidence that would necessitate rejection of the United States Supreme Court's holding in *Hodari D.* As Justice Castille noted, the majority seemed to fear that following *Hodari D.* would place this state on a "slippery slope," leading eventually to a police state.[70] Such a fear, however, is not justified, considering the lack of such "police states" in those jurisdictions that have adopted the holding of *Hodari D.*

Although individuals certainly have a right to avoid encounters with police who possess no justification to detain them, the police fail in their duties if they do not chase individuals who flee from them and attempt to ascertain why the individuals decided to flee. Police officers are not simply hired to investigate a crime after it has occurred; they are hired to attempt to prevent crime.[71] Of course, the fact that one flees from a police officer's sight, without more, may not be enough to justify the police officer forcibly halting his or her flight.[72] It should, however, suffice to justify the police officer's attempt to maintain observation of the person's actions while in public. While there may be an innocent reason for a person's flight, the police should not shrug their shoulders and assume that every person who runs is innocent. Such a policy is offensive to our

---

68. *See Gray*, 503 A.2d at 926 (adopting "totality of circumstances" approach posited by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983)). In *Gray*, the Pennsylvania Supreme Court stated:

> While we can interpret our own constitution to afford defendants greater protections than the federal constitution does, there should be a compelling reason to do so. . . . Besides, there is no substantial textual difference between the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution that would require us to expand the protections afforded under the federal document.

Gray, 503 A.2d at 926.

69. *See* Interest of B.C., 683 A.2d 919, 927 (Pa. Super. Ct. 1996)(holding that "plain feel" doctrine pronounced in *Minnesota v. Dickerson*, 508 U.S. 366 (1993) was acceptable under Pennsylvania Constitution).

70. *Matos*, 672 A.2d at 776 (Castille, J., dissenting).

71. *Id.* Justice Castille stated: "[P]art of a police officer's duty is to investigate crime before it occurs, not simply stand by idly and wait for an offense to be committed before taking action." *Id.*

72. Interest of Barry, 621 A.2d 669 (Pa. Super. Ct. 1993) (holding flight from police presence, absent other factors, does not justify reasonable suspicion).

common sense. Furthermore, the occasional innocent person who flees at the mere sight of a police cruiser is still protected. As the majority of the superior court noted in *Carroll*, as long as the individual never discards contraband, reasonable suspicion will not surface.[73] Any search of that person, based solely on his or her flight, would be unreasonable, and the fruits of the search would be suppressed.[74]

Under the holding in *Matos*, the police are forced to sit back and watch while individuals flee from their presence. If the police are lucky, the fleeing individuals will discard something within the officer's sight. If not, the police must let possibly dangerous criminals, who otherwise might be apprehended, freely roam the streets.

Clearly, the Pennsylvania Supreme Court can expand the rights of state citizens beyond those protected by the federal courts.[75] The question remains, however, should the court expand those rights? Implicit in this question is the balancing of two very important interests: (1) the citizen's right to be free from unwarranted intrusion by the police; versus (2) the interests of the citizen to be free from individuals who "roam the streets, destroy the neighborhood and threaten the fabric of our lives and the public safety with contraband and weapons on public streets and byways."[76]

While the supreme court in *Matos* may have refused to consider the seriousness of the crime in question in that case, the considerable damage that the drug trade has caused this Commonwealth is difficult to ignore.[77] When balancing the interests of individual rights and the good of the community, perhaps the court should consider the damage caused by the drug trade. If the court had articulated concrete reasons, even if not compelling, for departing from *Hodari D.*, citizens might better understand the need for greater protection from intrusive police conduct in Pennsylvania. Instead, we are left asking why Pennsylvania is different.

---

73. *Carroll*, 628 A.2d at 404.
74. *Barry*, 621 A.2d at 680.
75. *See Edmunds*, 586 A.2d at 894-95.
76. *Matos*, 672 A.2d at 776 (Castille, J., dissenting).
77. The court in *Matos* stated:

> The seriousness of criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime, can never be used as justification for ignoring or abandoning the constitutional right of every individual in this Commonwealth to be free from intrusions upon his or her personal liberty absent probable cause

Matos, 672 A.2d at 776 (citing Commonwealth v. Rodriquez, 614 A.2d 1378, 1383 (Pa. 1992)).

The court in *Matos* hangs its hat for distinguishing Pennsylvania from those states that follow *Hodari D.* on the "history and tradition" of Article I, Section 8.[78] While history and tradition are certainly important, of equal importance is the ever increasing problem of street crime. Without providing a sufficient explanation for its decision in *Matos*, the court remains more open than ever to claims of being overly sympathetic to criminals in this state.[79]

While it is very unlikely that the Pennsylvania Supreme Court is purposefully attempting to aid criminals from escaping prosecution, the court's decision to retain the Mendenhall Test has improved a criminal's chance of suppressing incriminating evidence. Furthermore, the "free to leave" standard of *Mendenhall* makes it difficult for a police officer to determine at what point in time his or her approach of an individual becomes a pursuit.[80] This difficulty can be seen by applying the Mendenhall Test to a case such as *Matos*. In that case, the police officers' actions of patrolling the street in a police cruiser near Matos cannot reasonably be said to constitute a seizure. Thus, at what point did the *Matos* incident escalate into a full blown seizure? Was it the moment the officer got out of his cruiser, or the moment he followed Matos? Maybe it was the moment the officers began to catch up to Matos. The point is that the court's analysis under *Mendenhall* does not provide us with a clear answer. The problem with the Mendenhall Test, therefore, is that it requires police officers to know how their actions will be perceived and it does not give them clear rules on how to do their job. The better approach is to follow the test posited by the United States Supreme Court in *Hodari D.*, under which a seizure is defined as the time when a citizen submits to a show of authority.[81] The *Hodari D.* test of physical force or submission to a show of authority provides a clear line, since the nature of a police/citizen encounter is measured under this test at the time of approach. This bright line test is preferable to *Mendenhall* because it allows police officers to rely on their proper intentions when encountering citizens, and to react appropriately as uncertain

78. *See supra* notes 41-44 and accompanying text for a discussion of the *Matos* court's reliance on history and tradition.

79. *See infra* notes 87 and 91 and accompanying text for remarks made by the current court's opponents.

80. *Carroll*, 628 A.2d at 405. The court in *Carroll* reasoned that the Mendenhall Test, also called "coerced abandonment," leaves both the citizen and officer without clear guidance as to when a seizure occurs. *Id.* The court asks: "what is coercion? Following in the car? Chasing at a walk? Chasing at a run? Chasing with a hand on a holstered gun?" *Id.*

81. *Hodari D.*, 499 U.S. at 626.

events unfold without the need to simultaneously assess the subjective mindset of the individual they attempt to observe and investigate.

III. Legislative Response to the Pennsylvania Supreme Court's Expansive Interpretation of Article 1, Section 8 of the Pennsylvania Constitution

While the *Matos* decision may mark the end of the analysis for the current supreme court on the issue of what constitutes a seizure, there is movement in the Pennsylvania Legislature that could profoundly effect *Matos* as well as several other decisions concerning search and seizure law in Pennsylvania.[82] Senate Bill 806, introduced in March of 1995, would require all Pennsylvania courts, via amendment to the Pennsylvania Constitution, to follow the mandates of the United States Supreme Court on matters involving search and seizure.[83] Although such a proposition is an affront to the ideals of federalism and state autonomy to many people,[84] similar amendments to Senate Bill 806 have passed in California and Florida.[85] If Senate Bill 806 becomes law, it would necessarily overturn *Matos* and require the Pennsylvania Supreme Court to adhere to *Hodari D.*[86]

Senate Bill 806 was prompted by a string of decisions by the Pennsylvania Supreme Court in which the court rejected United States Supreme Court precedent by holding that there is an increased right to privacy in Pennsylvania as compared to that enjoyed by citizens under federal law.[87] Justice Castille has

---

82. *See* S. 806, 179th Leg., Reg. Sess. (Pa. 1995).

83. *Id.* Specifically, Senate Bill 806 would add the following to the text of Article 1, Section 8 of the Pennsylvania Constitution:

> [T]he rights and procedural restrictions mandated by this section shall be identical to those mandated by the Fourth Amendment to the Constitution of the United States, as interpreted by the United States Supreme Court. The rights and procedural restrictions respecting searches and seizures shall not be judicially expanded by decisional law or court rule to exceed the rights and procedural restrictions mandated by this section.

Id.

84. Justice Brandeis is noted as supporting the proposition that states should serve as laboratories to try novel social and economic experiments without risk to the rest of the country. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S 262 (1932)(Brandeis, J., dissenting). While Justice Brandeis indeed favored the states acting as laboratories, he did not advocate the state courts as precipitating such experiments, but rather advocated that it should be the citizens' choice. *Id.*

85. *See* Cal. Const. art. 1, § 28(d); Fla. Const. art. 1, § 12.

86. The Senate Appropriations Committee is currently considering Senate Bill 806.

87. The cases often cited as the impetus for Senate Bill 806 are: Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)(rejecting United States v. Leon, 468 U.S. 897 (1984), which held that there is a "good faith" exception to constitutionally invalid search warrants); Commonwealth v. Chambers, 598 A.2d 539 (Pa. 1991) (applying stricter interpretation of "knock and announce" rule than required under federal precedent);

described the recent court's decisions as shielding criminal defendants from responsibility for their crimes.[88] *Commonwealth v. Matos,*[89] decided almost one year after the introduction of Senate Bill 806, has only provided ammunition for those who support the bill.[90]

Many of those who support the passage of Senate Bill 806 have directly criticized the supreme court for supporting the criminal element in our state.[91] While it is difficult, if not impossible, to imagine that our supreme court has the intent of aiding criminals in Pennsylvania, the frustration of those who oppose the court's recent decisions is understandable. The court's refusal to follow the holding in *Hodari D.* has led to the suppression of more evidence in criminal trials, which, in turn, results in less convictions.[92]

As with any proposed constitutional amendment, the likelihood that Senate Bill 806 will pass is very much uncertain. Passage of the amendment depends a great deal upon whether the proponents or opponents of the bill persuade the voters through their respective lobbying efforts. If the amendment does pass the

---

Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992) (implicitly rejecting Michigan v. Summers, 452 U.S. 692 (1981), which held that temporary seizure of occupants of a house lawfully searched was reasonable); Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) (holding probable cause required before canine sniffs person, rejecting United States v. Place, 462 U.S. 696 (1983), which held that canine sniff is not a "search" under United States Constitution); Commonwealth v. White, 669 A.2d 896 (Pa. 1995) (rejecting New York v. Belton, 453 U.S. 454 (1981), which established "automobile exception" to search warrants)). Representative Al Masland of Carlise, Pennsylvania stated: "Senate bill 806 was the only response possible to reign [sic] in the Pennsylvania Supreme Court which has, through a continued course of conduct, demonstrated its disdain for law enforcement and its support for drug trafficking defendants." Letter from Al Masland, Pennsylvania Representative, to Interested Constituents (July 3, 1996).

88. *See* Commonwealth v. Roebuck, 681 A.2d 1279, 1288 (Pa. 1996)(Castille, J., dissenting). The majority in *Roebuck* held that in the absence of countervailing considerations produced by the Commonwealth, the Commonwealth must disclose the identity of a confidential informant to a criminal defendant. *Id.* at 1284-85. Justice Castille opined that such a rule will lead to a dramatic decrease in the number of informants due to their fear of retaliation. *Id.* at 1287 (Castille, J., dissenting).

89. 672 A.2d 769 (Pa. 1996).

90. *Matos* is cited throughout inter-office memoranda and letters written to constituents by those who support the passage of Senate Bill 806.

91. *See supra* note 87 and accompanying text for a discussion of one legislator's response to constituents. Philadelphia District Attorney Lynne Abraham stated: "The Pennsylvania Supreme Court has embarked on a campaign to give criminals new, expanded rights to suppress the evidence of their activity, and to tie the hands of police attempting to investigate and control crime in our neighborhoods." Letter from Lynne Abraham, Philadelphia District Attorney, to Hon. Thomas P. Gannon, Chairman Pennsylvania House Judiciary Committee (June 4, 1996).

92. Interview with Anthony Himes, Assistant District Attorney of Erie County, in Erie, Pennsylvania (Sept. 14, 1996). Mr. Himes stated that within his office, four cases were dropped because evidence was inadmissible under *Matos. Id.*

General Assembly, however, it may also be passed by the voters, particularly if they see the bill as an anti-crime measure.

IV. Alternatives to a Constitutional Amendment

The idea of forcing a state's highest court to follow the rulings of the United States Supreme Court can reasonably be viewed as offensive to the notion of federalism and state autonomy.[93] After all, states are free to expand the minimum guarantees provided under the federal Constitution if they base such decisions on "adequate and independent state grounds."[94] Furthermore, if the federal minimums drop, a constitutional amendment that forces the state to follow federal mandates would leave our courts with no remedy even if the federal minimums are truly offensive to Pennsylvanians.

If Senate Bill 806 is not enacted, is the *Matos* decision the last word on what constitutes a seizure by the Pennsylvania Supreme Court? Although it is unlikely that the supreme court will reverse the *Matos* decision, there are alternative theories under which the court can ponder the issue of when a police officer's show of authority becomes a seizure of an individual.

A. Reasonable Suspicion - The Importance of Flight from Police Presence

As people become aware of the holding in *Commonwealth v. Matos*, their first reaction may be to ask: "[I]sn't the mere fact that a person runs from the police enough for the police to form a reasonable suspicion?" To these people, common sense dictates that if an individual runs from the police, he or she must be guilty of something. The harsh realities of our urban centers, however, paints a much different reality.[95] As Justice Stevens noted in his dissent to *Hodari D.*, the notion that flight alone may be enough for reasonable suspicion ignores the experience of many citizens, particularly minorities, in our society.[96]

---

93. The court in *Edmunds* observed: "[T]he United States Supreme Court has repeatedly affirmed that states are not only free to go, but also encouraged to engage in independent analysis in drawing meaning from their own state constitutions." *Edmunds*, 586 A.2d at 893.

94. Michigan v. Long, 463 U.S. 1032 (1983).

95. *See generally* David Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked,* 69 Ind. L. J. 659 (1994), for a cogent analysis of innocent reasons for flight.

96. *Hodari D.*, 499 U.S. at 630 n.4 (Stevens, J., dissenting)(citations omitted). Justice Stevens stated: "[T]he Court's gratuitous quotation from Proverbs 28:1, mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously reconsidered, and rejected, this ivory towered analysis of the real

While flight alone may not be enough to raise a reasonable suspicion, should it not be an important factor for an officer on the street to consider when he or she is making the split second decision of whether or not to chase a fleeing individual? The California Supreme Court is at least one court that has responded to this question in the affirmative. In *People v. Souza*,[97] the court held that despite a possibly innocent excuse for fleeing the police, flight "is a proper consideration - and indeed can be a key factor- in determining whether in a particular case the police have sufficient cause to detain."[98] Without denying that a person has a right to avoid police contact, the court considered the manner in which that person chooses to avoid contact a proper consideration for an officer.[99]

The *Souza* court chose to adopt a "totality of the circumstances" approach in determining whether reasonable suspicion exists in a possibly criminal situation.[100] Among the circumstances to be considered are the area's reputation for crime, the time of day and the evasive conduct of those whom the officer approaches.[101] This holding allows police the ability to use their unique training, experience and insight in making a determination of reasonable suspicion.[102] Furthermore, the court insisted that the "reasonable suspicion" determination, when made after the fact, should be viewed from the eyes of the law enforcement officer at the scene rather than legal scholars.[103]

---

world for it fails to describe the experience of many residents, particularly if they are members of a minority." *Id.*

97. 885 P.2d 982 (Cal. 1994).

98. *Souza,* 885 P.2d at 988.

99. *Id.* The court stated:

> [T]here is an appreciable difference between declining to answer a police officer's questions during a street encounter and fleeing at the first sight of a uniformed police officer. Because the latter shows not only unwillingness to partake in questioning but also unwillingness to be observed and possibly identified, it is a much stronger indicator of . . . guilt.

Id.

100. *Id.* at 992.

101. *Id.* David Harris criticizes these factors in his article concerning minority status and its relationship to stop and frisks. *See* note 95 and accompanying text.

102. *Id.* The court in *Souza* states:

> Consequently, we must allow those we hire to maintain our peace as well as to apprehend criminals after the fact, to give appropriate consideration to their surroundings and to draw rational inferences therefrom, unless we are prepared to insist that they cease to exercise their senses and their reasoning abilities the moment they venture forth on patrol.

Id. (citing People v. Holloway, 221 Cal. Rptr. 394 (Cal. App. 1985)).

103. *Souza,* 885 P.2d at 992. The court stated that justification for a seizure "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* (quoting United States v. Cortez, 449 U.S. 411 (1981)).

If the Pennsylvania Supreme Court adopted the same reasoning as the California Supreme Court as to reasonable suspicion, the decision in *Matos* may have been different. Whether the issue of reasonable suspicion was ever litigated in the *Matos* case, however, is unclear. Utilizing the *Souza* analysis, one can argue that the particular facts of *Matos* gave rise to reasonable suspicion. After all, two officers were on patrol when they received a radio call that unknown persons were selling narcotics at a particular location.[104] When the officers arrived at that location, they observed three men standing on a corner, who scattered at the first sight of the officers.[105] These three men did not just walk from the officers, but ran.[106] When viewed from the perspective of a police officer, these factors arguably give rise to reasonable suspicion. If the officers did not chase the individuals, many would have argued that they were failing in their duties.

Deference to the judgment of police officers who are experienced in the war on narcotics when assessing whether or not reasonable suspicion exists would maximize their efforts. The Pennsylvania Supreme Court, however, has rejected such an "ends justify the means analysis" by declining the opportunity to adopt a more expansive approach to reasonable suspicion in drug investigations.[107] While this author does not seek to abandon the constitutional protections afforded to the citizens of this state, the *Souza* court's rationale is more in tune with the balance of interests at stake; that is, the right to be free from unreasonable seizures versus the right to be free from the infestation of illegal drugs. The result reached under *Matos* unfortunately leaves the criminal with the easy way out. All the criminal has to do to evade a successful prosecution is run and discard incriminating evidence during flight from a police officer in order to be home free.

See also Commonwealth v. DeWitt, 608 A.2d 1030 (Pa. 1992)(McDermott, J., dissenting). Justice McDermott stated:

> These are facts [referring to the facts of the case] which only ingenious gamesmanship can dismiss as insufficient for an investigative stop. The Majority, cool, speculative, safely distant, can always be wiser, more indulgent in their quiet lucubrations. Their adrenaline is controlled, their hearts ticking away on a soft afternoon. However, police officers who are patrolling the front lines of the battlefield of crime must contend with the realities of their environment, and must be free to read and react to those signs which their experience tells them portends felonious activity.

Id. at 1035.

104. *Matos,* 672 A.2d at 770-71.

105. *Id.*

106. *Id.*

107. *See generally* Commonwealth v. Rodriquez, 614 A.2d 1378 (Pa. 1992).

B. An Exception to the Exclusionary Rule

A second option to *Matos* available to the current supreme court is to create an exception to the Exclusionary Rule that allows evidence discarded by an individual fleeing a police officer to be admitted in court.[108] Professor Michelle Ghetti, a proponent of such an exception, has noted that there is a real problem in the war on drugs with so called "throw down" cases; that is, cases where the person charged with possession of illegal drugs successfully has the drug evidence suppressed since he or she discarded the evidence while fleeing the police. Without the damaging drug evidence, successful prosecution is unlikely.[109]

Instead of narrowing the definition of seizure and thus affecting individuals innocent of any crime, the Pennsylvania Supreme Court could create a simple exception to the exclusionary rule providing that evidence abandoned during a police chase is not to be excluded from admission at trial. As Professor Ghetti states, such a rule would eliminate the shielding of criminals who discard contraband during a police chase and also protect citizens searched by the police without reasonable suspicion.[110]

Such an exception to the exclusionary rule would both satisfy the debate over *Matos* and also the goals sought under Senate Bill 806. The exception would also allow prosecutors to bring to justice those who have previously avoided the ramifications of disarming contraband. Additionally, by retaining the *Mendenhall* "free to leave test," those who do not discard contraband during a police chase will be protected by the Exclusionary Rule since any prosecution would not benefit from the illegally seized evidence.

V. Conclusion

While it is difficult to imagine that the Pennsylvania Supreme Court will redefine what constitutes a seizure, it may be forced, in the near future, to accept the mandates of the United States Supreme Court as to this issue. Instead of passing an amendment that ties the hands of the Pennsylvania Supreme Court this way, however, perhaps those who oppose the current court should seek redress for *Matos* by exercising their ability to vote the incumbent members of the court out of office. Although per-

---

108. The Exclusionary Rule excludes evidence seized in violation of an individual's Fourth Amendment rights, and was adopted by the United States Supreme Court in *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

109. *See* Michelle Ghetti, *Seizure through the Looking Glass: Constitutional analysis in Alice's Wonderland*, 22 S. U. L. Rev. 231 (1995).

110. *Id.* at 252-53.

suading the electorate to do this would be difficult to say the least, it is a much more reasonable solution to the confining effects of the proposed constitutional amendment.

Under the current state of the law, Pennsylvanians are left with the following possibilities. If a person is approached by FBI agents and takes flight with the agents in pursuit, any contraband discarded by the person during flight can be used against them during their criminal prosecution in federal court.[111] Conversely, if the same person is pursued by Pennsylvania state troopers, any evidence he or she discards will be suppressed as the fruit of an illegal seizure.[112]

While the former situation provides officers with clear guidance in their daily activities, the latter rewards criminals for running from the police. If criminals think they might get caught during a police chase, all they have to do is discard their contraband, or worse, a loaded weapon. If the criminals believe they can evade the officers, they can keep their drugs and guns for another day.

As Justice Castille pointed out in dissent in *Matos*, "that a person voluntarily chooses to flee from the mere presence of a police officer should not immunize that person when he abandons contraband, weapons, or any other evidence during the course of his flight and a police officer's pursuit."[113] Unfortunately, without giving us concrete reasons for doing so, this is precisely what a majority of the Pennsylvania Supreme Court in *Matos* has allowed to happen.

Michael A. Agresti

111. *Hodari D.*, 499 U.S. at 629. *Id.*

112. *Matos*, 672 A.2d at 770. Assuming the police do not have reasonable suspicion, any evidence discarded is the direct result of the troopers coercive conduct, i.e., giving chase. *Id.*

113. *Id.* at 781 (Castille, J., dissenting).