No. 19-292

In the Supreme Court of the United States

ROXANNE TORRES, *PETITIONER*,

v.

JANICE MADRID AND RICHARD WILLIAMSON, *RESPONDENTS*.

On Writ of Certiorari to the
U.S. Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

Makaylia Askew & Elizabeth Adeoye

QUESTION PRESENTED

Is an unsuccessful attempt to detain a suspect by use of physical force a "seizure" within the meaning of the Fourth Amendment or must physical force be successful in detaining a suspect to constitute a "seizure"?

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Statement of the Case

In 2014 New Mexico State Police officers went to an apartment complex in Albuquerque to arrest a woman. The officers saw two individuals standing in front of the women's apartment next to a Toyota Cruiser. One of the officers approached the Cruiser's closed driver side window and attempted to tell Torres to show her hands. According to Torres, she did not know that Williamson and Madrid were officers and in fact thought that she was being carjacked, which resulted in her "stepping on the gas" to get away. The officers then shot at Torres as soon at the Cruiser moved a little bit. Two of the bullets struck Torres, but she continued forward and was not detained until later when she was admitted to the hospital. In October 2016 Torres filed a civil rights complaint in federal court against the officers, claiming that the "intentional discharge of a firearm… exceed[ed] the degree of force which a reasonable law enforcement officer would have applied." The circuit court held that the officers were entitled to qualified immunity and reasoned that the officers had not seized Torres and therefore no Fourth Amendment violation occurred. The appeals court affirmed that decision and the Supreme Court granted certiorari to determine on the sole question of whether the facts of the case constituted a seizure within the ambit of the 4th Amendment.

Statement of the Argument

Roxanne Torres' Fourth Amendment rights were violated by the police officers' shooting her in an attempt to detain her because the moment physical force was applied to Torres, she was seized. California v. Hodari is the appropriate precedent to look to when determining whether the Common Law includes seizures that occur regardless of whether or not it was successful. When comparing false imprisonment to a Fourth Amendment seizure, physical force still constitutes a seizure.

Argument

1. In accordance with the Common Law, the use of physical force to restrain movement

does constitute a seizure even when it is unsuccessful.

In evaluating the scope of the Fourth Amendment's protections, *Wyoming v. Houghton, 526 U.S. 295, 299 (1999), citing Wilson v. Arkansas, 514 U.S. 927, 934 (1995)* states that it "inquire[s] first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed." *James Madison, "Bill of Rights as Proposed" (March 4, 1789)* states "Article the sixth. 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." At the time the Fourth Amendment was drafted and ratified, it was already well established that at common law an arrest was complete as soon as a person applied physical force to another with the intent to detain them, even if the application of physical force did not immediately secure control over the other person. Before the Fourth Amendment's ratification, court decisions only occasionally relied on Founding era common law rules. And when they did, they described the significance of those rules as shedding light on… what the Framers of the Amendment might have thought to be reasonable, a question that itself was relevant but not dispositive. *Payton v. New York, 445 U.S. 573, 591 (1980); see Carroll v. United States, 267 U.S. 132, 149 (1925).* Unlike in some instances, adapting the traditional common law rule to the contemporary policing context and the modern technological era does not distort the practical implications of that rule in a way that undermines its appropriateness or relevance. Adhering to that rule will also help avoid a disparity that might otherwise result between the Fourth Amendment's protections for property and its protections for a person's own body.

A wealth of historical sources confirm that the Fourth Amendment protects individuals from the unreasonable use of physical force by law enforcement in undertaking arrests, regardless of whether that force immediately brings those individuals within an officer's control. *Hodges v. Marks 79 Eng. Rep. 414, 414 (1618)* found that "before and during the founding era, arrests occurred when officers touched a person with the intent to arrest them, even if they did not succeed in studying them. Contemporary sources also confirm that the Framers and their audience understood seizures of persons to encompass common-law arrests. "We say, to arrest a person, to seize goods." *Noah Webster, An American Dictionary of the English Language 67 (1828); see also Samuel Johnson, A Dictionary of the English Language(1755).* The term seizure was widely understood to encompass the common law term arrest. *See, e. G., Mass Decl. of Rights of 1780, art XIV.*

The police officers in this case acknowledge that they shot Torres in an attempt to stop her flight. The officers, therefore, applied physical force in an attempt to detain her. Torres' subsequent fight is therefore analogous to "escape" at common law; although she avoided detention, she was nevertheless arrested the moment the physical force was used against her. Therefore, she was seized under the Fourth Amendment. *United States v. Mendenhall, 46 U.S. 544, 553 (1980)* furthers this conclusion by stating: "Put another way, use of physical force to apprehend a suspect itself demonstrates the requisite exertion of physical control over the person.

When an officer applies physical force to detain a suspect, the suspect's "freedom of movement is restrained." The officers' use of force restrains the suspect by hindering or impending her movement, even of only temporarily. There is no requirement that the force successfully terminate the suspect's movement. *Brendlin v. California, 551 U.S. 249, 254 (2007).*

Carpenter v. United States 138 S Ct. 2206, 2213 (2018) held that the Amendment is designed to shield the "security of individuals against arbitrary invasions by government officials." The instant case is a prime example of the government's failing to protect its citizens Fourth amendment rights within the Amendment's original meaning: officers shot a fleeing person twice. The Framers adopted the Fourth Amendment in part to protect the American people from unreasonable applications of physical force by government officers seeking to detain them, and the Framers viewed the ability to vindicate that right in court as a key safeguard against the type of abusive government practices against which they revolted at the Founding. Applying the common law's traditional definition of "arrest" to seizures of the person under the Fourth Amendment will simply facilitate the ability of people like Torres to present their claims in court, where the reasonableness of police officers' decision to shoot them may be assessed.

2. In accordance with the precedent of this Court's ruling in California v. Hodari., the use of physical force to restrain movement does constitute a seizure even when it is unsuccessful.

California v. Hodari D., 499 U.S. 621 (1991) states that the 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. Writing for the majority, Justice Scalia found that the analysis for seizures by physical force is pretty straightforward: "an arrest is affected by the slightest application of physical force, despite the arrestee's escape." This conclusion was not a stray comment by Justice Scalia, but rather was repeated in different ways throughout the opinion ("[W]ith respect to application of physical force, a seizure occurs even though the subject does not yield."); *id*. ("The 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."); *id*. ("An arrest requires either physical force (as described above) or, where that is absent, submission to the assertion of authority."); *id*. *at 626 n.2* ("the mere touching of a person would suffice"); see also *id. at 645 (Stevens, J., dissenting)* ("If an officer effects an arrest by touching a citizen, apparently the Court would accept the fact that a seizure occurred, even if the arrestee should thereafter break loose and flee.") *Hodari* has been the law of the land for thirty years, nothing in the instant case distinguishes it fr]om the penumbra of *Hodari 's* ruling, and no great societal change has occurred which would compel this court to overturn *Hodari*.

Hodari divided efforts by police to stop citizens into two distinct categories. One, those based on the application of physical force to the individual's body, which are always seizures and, two, those based on a mere show of authority, such as an order to stop, which become a seizure only if the individual actually submits to the authority and stops. The court explained that an arrest requires either physical force or, where that is absent, submission to the assertion of

authority. With respect to the physical force, the court explained, the 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. Because of this definition The Tenth Circuit court's decision is widely inconsistent with *Hodari.*

The Tenth Circuit's requirement that the laying on of hands by the agents of the state must successfully terminate a person's movement to trigger 4th Amendment scrutiny is exactly the kind of rigid all or nothing model of justification and regulations that the court in *Terry v. Ohio 392 U.S. at 17* warned would obscure the utility of limitations upon the scope as well as the initiation of police action as a means of constitutional regulation. It is inconsistent with this Court's precedent which respondent has provided no sufficient justification for either ignoring or overturning.

3. The similarities between a Fourth Amendment seizure and False imprisonment at Common Law support the conclusion that the use of physical force to restrain movement does constitute a seizure even when it is unsuccessful.

Hodari's dichotomy between seizure by physical force and seizure by show of authority is parallel to the way other analogous claims are treated. For example, the common-law tort of false imprisonment recognizes a distinction between restraint by force and restraint by fear of force (as the Supreme court of North Carolina observed in *Hales v. McCrory-MccLEllan Corp., 133 S.E.2d 225 (N.C. 1963)).* Similarly, this Court has recognized that a common-law trespass— i.e., a physical intrusion— qualifies as a Fourth Amendment search, but that an expectation-of-privacy test supplements that baseline protection. These related analytical frameworks reinforce the methodology employed in *Hodari.* These insights reinforce the appropriate methodological structure for analyzing a seizure, particularly when the court has already recognized false imprisonment as a proper common law analogue for Fourth Amendment false arrest claims. *Wallace v. Kato, 549 U.S. 384, 388-89 (2007).*

To be sure, 4th amendment seizures and false imprisonment may not be directly equivalent in all aspects. As commentators have cautioned, "restraint might not be exactly the same under 4th amendment doctrine and private law. *William Baude & James Y. Stren, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1886 (2016)*. For example, physical contact may not be enough under the 4th amendment, but not enough under tort law. Whatever the differences between the necessary elements for these claims, the analytical models are analogous. Like common law arrest discussed in *Hodari* the common law tort of false imprisonment also draws a line between restraint by force and restraint by fear. Specifically, a plaintiff asserting a common law claim of false imprisonment must demonstrate that the restraint of her person liberty or freedom of movement resulted either from force or from fear. *35 C.J.S. False Imprisonment § 14 (2019)*. As the Supreme Court of North Carolina observed in *Hales v. McCrory-McLellan Corp., 133 S.E.2d 225 (N.C. 1963)*, a different standard applies in cases where the alleged restraint was accomplished through fear as opposed to force.

When a false imprisonment claim is instead based on restraint by fear, courts require the plaintiff to prove more—namely, that the plaintiff submitted to imprisonment because of a reasonable fear that failing to do so would lead to the use of force. Generally, a plaintiff alleging restraint through fear must make an additional showing that the defendant "induce[d] a reasonable apprehension" in the plaintiff "that force [would] be used if the plaintiff [did] not submit." *35 C.J.S. False Imprisonment § 17 (2019) Marcus v. Liebman, 375 N.E.2d 486, 488 (Ill. App. Ct. 1978)*. Cases typically examine whether the defendant's words, acts, and gestures put the plaintiff "in fear of personal difficulty or personal injuries" if she does not comply with the defendant's commands. *Todd v. Byrd, 640 S.E.2d 652, 659 (Ga. Ct. App. 2006)*

These requirements for restraint by fear are consistent with this Court's analysis of a Fourth Amendment seizure through a show of authority. As in the false-imprisonment context, this species of seizure includes an additional objective element regarding a subject's submission to the officer's show of authority— more particularly, whether a reasonable person "would have believed that he was not free to leave." *Hodari D., 499 U.S. at 628 (quoting Mendenhall, 446 U.S. at 554).* This objective inquiry, too, looks to factors nearly identical to those examined in false-imprisonment cases, including "the threatening presence of several officers," "the display of a weapon," "some physical touching of the person of the citizen," and "the use of language or tone of voice." *Kaupp v. Texas, 538 U.S. 626, 630 (2003) (quoting Mendenhall, 446 U.S. at 554)*. Specifically, when comparing *United States v. Jacobsen (1984)* and *California v. Hodari*, there are obvious conceptual similarities between the restraint that a plaintiff must demonstrate to prevail on the common law tort of false imprisonment and the restraint that plaintiff must demonstrate to prevail on a 4th amendment seizure claim. Indeed, the linguistic formulations of the relevant 4th amendment and false imprisonment test both focus on whether there has been a restraint on the person's personal liberty or freedom of movement.

Based on those factors outlined above, there is a supportable argument that the facts of Ms. Torres's case rise to the level of restraint by fear without even resorting to restraint by force. Under the totality of the circumstances, multiple officers wearing tactical vests with police markings approached Ms. Torres's vehicle, ordered Ms. Torres to show her hands, brandished and discharged their weapons, and struck Ms. Torres with two bullets. Regardless of how Ms. Torres actually perceived and responded to each of these acts, it is conceivable that a reasonable person in her position would have feared personal injury or difficulty if she did not comply. generally *35 C.J.S. False Imprisonment § 17 (2019).*In short, there are numerous connections between the way that courts treat arrests and false imprisonment under the common law. The close resemblance between the analytical frameworks for these two acts further underscores the utility in recognizing the distinction between cases involving physical restraints and those involving psychological restraints.

Hodari then made it clear that this intricate analysis is not necessary when an officer applies physical force in an attempt to apprehend a suspect. The common law on arrest leaves no doubt that, in this scenario, a seizure has occurred. *See Hodari D., 499 U.S. at 624-26* This mode of analysis has the additional benefit of simplifying straightforward cases. *See Florida v.*

Jardines, 569 U.S. at 11. It is indisputable that an officer conducts a search when she physically intrudes on a private citizen's property to gather evidence. It should be equally indisputable that an officer commits a seizure when she applies physical force to apprehend a suspect. Both of these actions infringe on the peoples right "to be secure in their persons, house papers and effects." *U.S. Const. Amend. IV.* Just as a common law trespass qualifies as a 4th amendment search, so too should a common-law arrest qualify as a 4th Amendment seizure, as the court in *Hodari* has already recognized.

Conclusion

Under the original meaning for the 4th Amendment and the common law, although the application of physical force in an attempt to restrain Roxanne Torres was unsuccessful, it did in fact constitute a seizure under the 4th Amendment because "If the slightest application of physical force is enough to effect an arrest, then the use of deadly force must certainly be a Fourth Amendment seizure" as stated in *Tennessee v. Garner 471 U.S. 1 (1985).* Under *Hodari,* at common law a seizure does encompass an arrest that applies physical force*:* "the mere grasping or application of physical force with intent to restrain constituted an arrest the quintessential seizure of the person- whether or not it succeeded in subduing the arrestee." When comparing a common law arrest to false imprisonment, it is clear that in this circumstance, a seizure has occurred.

Prayer

It is for these reasons that we pray that the court rule in favor of the Petitioner, Roxanne Torres, and reverse the lower court ruling.