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 RESPONDENTS

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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

ON JULY 15, 2014, TWO NEW MEXICO STATE POLICE OFFICERS WENT TO AN APARTMENT COMPLEX IN ALBUQURQUE TO ARREST A WOMAN NAMED KAYENTA JACKSON, WHO WAS "INVOLVED WITH AN ORGANIZED CRIME RING" AND WAS SUSPECTED OF HAVING BEEN INVOLVED IN DRUG TRAFFICKING, MURDER, AND OTHER VIOLENT CRIMES. JACKSON WAS ALSO ASSOCIATED WITH SEVERAL INDIVIDUALS WHO HAD VIOLENT HISTORIES. RESPONDENTS JANICE MADRID AND RICHARD WILLIAMSON WERE TWO OF THE OFFICERS INVOLVED IN ATTEMPTING TO ARREST JACKSON. THE TWO OFFICERS DROVE BY JACKSON'S APARTMENT COMPLEX AND WHEN THEY GOT THERE, THE OFFICERS SAW TWO INDIVIDUALS STANDING IN FRONT OF THE WOMAN'S APARTMENT NEXT TO A TOYOTA FJ CRUISER. THE CRUISER WAS BACKED INTO A PARKING SPOT, WITH CARS PARKED ON BOTH SIDES OF IT. THE TWO OFFICERS—WHO WERE WEARING TACTICAL VESTS WITH POLICE MARKINGS THAT CLEARLY IDENTIFIED THEM AS POLICE OFFICERS—DECIDED TO MAKE CONTACT WITH THE TWO INDIVIDUALS IN CASE ONE WAS THE SUBJECT OF THEIR ARREST WARRANT OR TO SEE IF THEY HAD ANY INFORMATION CONCERNING JACKSON'S WHEREABOUTS. AS THE OFFICERS APPROACHED THE CRUISER, ONE OF THE INDIVIDUALS RAN INTO THE APARTMENT, WHILE THE OTHER INDIVIDUAL, LATER IDENTIFIED AS ROXANNE TORRES, GOT INSIDE THE CRUISER AND STARTED THE ENGINE. AT THE TIME, TORRES WAS "TRIPPING OUT" FROM HAVING USED METHAMPHETAMINE FOR SEVERAL DAYS.

OFFICER RICHARD WILLIAMSON APPROACHED THE CRUISER'S CLOSED DRIVER-SIDE WINDOW AND TOLD TORRES SEVERAL TIMES, "SHOW ME YOUR HANDS," AS HE

PERCEIVED TORRES WAS MAKING "FURTIVE MOVEMENTS… THAT [HE] COULDN'T REALLY SEE BECAUSE OF THE TINTED WINDOWS ON THE CRUISER. OFFICER JANICE MADRID THEN JOINED OFFICER WILLIAMS AND TOOK UP A POSITION NEAR THE CRUISER'S DRIVER-SIDE FRONT TIRE. SHE COULD NOT SEE WHO THE DRIVER WAS, BUT SHE PERCEIVED THE DRIVER WAS MAKING "AGGRESSIVE MOVEMENTS INSIDE THE VEHICLE." PETITIONER THEN "FREAKED OUT" AND PUT THE CAR INTO DRIVE, THINKING THAT SHE WAS BEING CARJACKED.

WHEN THE PETITIONER PUT THE CAR IN DRIVE, OFFICER WILLIAMSON BRANDISHED HIS FIREARM. OFFICER MADRID ALSO DREW HER FIREARM, PERCEIVING THAT THE PETITIONER WAS DRIVING AT HER. SPECIFICALLY, OFFICER MADRID TESTIFIED THAT THE CRUISER "DROVE AT [HER]" OR "LUNG[ED] AT [HER]." TERRIFIED FOR HER LIFE, OFFICER MADRID FIRED AT THE DRIVER THROUGH THE WINDSHIELD "TO STOP THE DRIVER FROM RUNNING [HER] OVER." OFFICER WILLIAMSON ALSO SHOT AT THE PETITIONER BECAUSE HE FEARED BEING "CRUSH[ED]" BETWEEN THE CRUISER AND THE NEIGHBORING CAR, AS WELL AS "TO STOP THE ACTION OF [THE CRUISER] GOING TOWARDS [OFFICER] MADRID.

A TOTAL OF TWO BULLETS STRUCK THE PETITIONER, HOWEVER SHE DID NOT STOP OR EVEN SLOW HER DRIVING AFTER BEING SHOT. INSTEAD, THE PETITIONER CONTINUED FORWARD UNTIL SHE DROVE OVER A CURB, THROUGH SOME LANDSCAPING, AND ONTO A STREET. AFTER COLLIDING WITH ANOTHER VEHICLE,

SHE STOPPED IN A PARKING LOT, EXITED THE CRUISER, LAID DOWN ON THE GROUND, AND ATTEMPTED TO "SURRENDER" TO THE "CARJACKERS." THE PETITIONER, WHO WAS STILL UNDER THE INFLUENCE OF NARCOTICS, ASKED A BYSTANDER TO CALL POLICE, BUT SHE DID NOT WANT TO WAIT AROUND BECAUSE SHE HAD AN OUTSTANDING ARREST WARRANT. SO THE PETITIONER PROCEEDED TO STEAL A KIA SOUL THAT WAS LEFT RUNNING WHILE ITS DRIVER LOADED MATERIAL INTO THE TRUNK.

AFTER HAVING 1) FLED FROM THE INITIAL SCENE OF THE SHOOTING AND 2) STOLEN ANOTHER INDIVIDUAL'S RUNNING VEHICLE, THE PETITIONER DROVE APPROXIMATELY 75 MILES TO GRANTS, NEW MEXICO, AND WENT TO A HOSPITAL, WHERE SHE IDENTIFIED HERSELF AS "JOHANNARAE C. OLGUIN." PETITIONER WAS LATER AIRLIFTED TO A HOSPITAL IN ALBUQUERQUE, PROPERLY IDENTIFIED, AND ARRESTED BY POLICE ON JULY 16, 2014. SHE ULTIMATELY PLEADED NO CONTEST TO THREE CRIMES: (1) AGGRAVATED FLEEING FROM A LAW-ENFORCEMENT OFFICER (OFFICER WILLIAMSON); (2) ASSAULT UPON A POLICE OFFICER (OFFICER MADRID); AND (3) UNLAWFULLY TAKING A MOTOR VEHICLE.

TWO YEARS LATER, IN OCTOBER OF 2016, TORRES FILED A CIVIL-RIGHTS COMPLAINT IN FEDERAL COURT AGAINST OFFICERS WILLIAMSON AND MADRID. PETITIONER ASSERTED ONE EXCESSIVE- FORCE CLAIM AGAINST EACH OFFICER, ALLEGING THAT THE "INTENTIONAL DISCHARGE OF A FIREARM EXCEEDED THE DEGREE OF FORCE WHICH A REASONABLE, PRUDENT LAW

ENFORCEMENT OFFICER WOULD HAVE APPLIED." SHE ALSO ASSERTED A CLAIM AGAINST EACH OFFICER FOR CONSPIRACY TO ENGAGE IN EXCESSIVE FORCE, ALLEGING THAT THE OFFICERS HAD "FORMED A SINGLE PLAN THROUGH NON-VERBAL COMMUNICATION TO USE EXCESSIVE FORCE."

THE DISTRICT COURT CONSTRUED THE PETITIONER'S COMPLAINT AS ASSERTING THE EXCESSIVE-FORCE CLAIMS UNDER THE FOURTEENTH AMENDMENT, AND THE COURT CONCLUDED THAT THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY. IT REASONED THAT THE OFFICERS HAD NOT SEIZED THE PETITIONER AT THE TIME OF THE SHOOTING, AND WITHOUT A SEIZURE, THERE COULD BE NO FOURTH AMENDMENT VIOLATION.

ON MAY 2, 2019, THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AFFIRMED THE DISTRICT COURT'S RULING, FINDING THAT PETITIONER'S CLAIMS FAILED UNDER THE FIRST PRONG OF THE QUALIFIED IMMUNITY ANALYSIS. THE TENTH CIRCUIT AGREED WITH THE DISTRICT COURT THAT PETITIONER FAILED TO SHOW SHE WAS SEIZED BY THE OFFICER'S USE OF FORCE. DESPITE BEING SHOT, TORRES DID NOT STOP OR OTHERWISE SUBMIT TO THE OFFICERS' AUTHORITY. FOR THE REASONS DISCUSSED, THIS COURT SHOULD AFFIRM THE TENTH CIRCUIT'S RULING.

SUMMARY OF ARGUMENT

The case presented deals with the issue of whether a Fourth Amendment "seizure" occurs when police unsuccessfully attempt to restrain an

individual by using physical force. This court in *United States v. Mendenhall,* and as recently as *Brooks v. Gaenzle,* explained that a seizure occurs if, in view of the totality of circumstances, a reasonable person would have believed that they were not free to leave. This Court has before it a clear case of a seizure not taking place. In view of the totality of the circumstances the Petitioner was not deprived of their liberty as she was never restrained. The Petitioner was able to travel approximately 75 miles after her account with the Respondents and was successfully able to transport herself to a hospital where she could get treated. Accordingly, this Court should hold that the Petitioner's 4th Amendment was not violated.

ARGUMENT

I. The Tenth Circuit was correct in concluding that petitioner was not seized for purposes of the fourth amendment.

A. Under this Court's *Mendenhall Test*, the petitioner was not seized.

The use of the Fourth Amendment dates back to 1776 with the Massachusetts Declaration of Rights stating, "Every subject has a right to be secure from all

unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions." *Massachusetts Declaration of Rights* The Fourth Amendment protects against both unreasonable searches and unreasonable seizures. U.S. Const. amend. IV. Past Supreme Court cases have dealt with the extent of what a seizure is with *Skinner v. Ry, Labor Executives' Ass'n, 489 U.S. 602, 618 (1989)* holding that "not every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person." The interaction between police and citizens does not always include a seizure. *Terry v. Ohio, 392 U.S. 602, 618 (1989)* A seizure occurs only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. A seizure requires control rather than a mere touch contact and otherwise, it may be an arrest. The analysis of a seizure has also been formed into a test called the Mendenhall Test in *United States v. Mendenhall, 446 U.S. 544 (1980).*

The Mendenhall Test provides that the police can be said to have seized an individual "only if, in

view of the totality of circumstances, a reasonable person would have believed that they were not free to leave." *Mendenhall* This test was widely used in future cases, most notably *California v. Hodari D. 499 U.S. 621 (1991)* and provided a basis for determining when an individual has been seized in a certain incident.

This test also takes into account the setting an individual is put in as described in *Chesternut, 486 U.S. 573* The Tenth Circuit has successfully followed what has been held in *Mendenhall.* In the case presented, the petitioner's movement was never restrained and the Petitioner was able to leave the situation as the police did not have absolute control over her. Furthermore, the Petitioner was able to leave the scene as she fled with another vehicle, later being found a day later. The Tenth Circuit looked to its prior case in *Brooks v. Gaenzle,* and found that the officers' use of force against Petitioner failed to control her ability to evade capture or control. Despite the Respondents' attempt to stop the vehicle heading towards them, the Respondents' gunshots did not stop or seize the Petitioner. The Petitioner was successful in escaping after being shot twice and the Respondents

never restrained the liberty of the Petitioner. Even after being shot in Albuquerque, New Mexico, the Petitioner was able to steal a vehicle that was left running and successfully drove herself to Grants, New Mexico, driving approximately 75 miles in distance. She was then able to go to a hospital where she identified herself as "Johannarae C. Olguin."

Considering the totality of the circumstances and the Petitioner's testimony on the events that occurred on July 15, 2014, the Petitioner felt free to leave the scene and was not restrained by the Respondents. Petitioner did not stop after she was shot, and therefore was not seized.

Furthermore, the Respondents clearly identified them as police and it was reasonable for the officers to respond with gunfire when Petitioner drove toward them with her vehicle. Respondents were dressed in tactical gear with police badges that clearly identified them as police. The gunshots were fired as self-defense from the Respondent as the car the Petitioner drove was heading towards them and they felt that they were in danger of being run over. The

Petitioner was never seized as she was able to flee from the scene and was able to move to a different city after her encounter with the officers.

B. A seizure requires acquisition of control

For a seizure to occur, there must be an acquisition of control from law enforcement. The person's liberty must be restrained to where a reasonable person believes that they can't leave. *Terry v. Ohio* When a person is "seized" by law enforcement, they are entitled to challenge the government's action under the Fourth Amendment. Additionally under this analysis, a seizure occurs only if the suspect actually submits to the police officer's use of force or assertion of authority; mere physical contact by the officer is not enough to effectuate the seizure. *Brendlin v. California, supra, 551 U.S. at 254;* see also *United States v. Smith, 575*

In *Brower v. County of Inyo,* this Court held that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, but only when there is a governmental termination of freedom of

movement. In *Brower,* the petitioner's descendant, William James Caldwell was killed when the stolen car he was driving crashed into a police roadblock. He had been driving at high speeds in an effort to elude the police when he crashed into a police roadblock created by an 18-wheel truck. These trucks were placed across both lanes of a highway and behind a blind curve so that Caldwell could not see it as he approached. The Ninth Circuit affirmed the dismissal of the Petitioner's Fourth Amendment claim on the basis that no seizure had occurred. However, in *Brower v. Inyo County 489 U.S. at 593 (1989)* the Supreme Court reversed the Ninth Circuit and analyzed the seizure issue before this Court with Justice Scalia noting that "a roadblock is not just a significant show of authority to induce a voluntary stop, but it is designed to produce a stop by physical impact if voluntary compliance does not occur." Therefore, the Court held that this was in fact a seizure and that the Fourth Amendment was violated as the police intentionally acquired physical control of a person or possessions.

Following what has been held in *Brower* of a

seizure requiring an intentional acquisition of physical control, the case presented today had no seizure. The Respondents never gained control of the Petitioner and although gunshots were fired it did not stop the Petitioner from driving and thus the Respondents never seized Ms. Torres or the vehicle she was driving. Additionally, by following the precedent set by Justice Scalia on the roadblocks having a purpose of inducing a voluntary stop, the method used by the Respondents, which were gunshots, didn't require direct contact and is disproportionate to the method that was used in *Brower v. Inyo County*. Therefore, the Petitioner here was not seized under the *Brower* standard.

II. The outcome of this case should not follow the common law of arrest in *Hodari D*

For nearly 30 years *California v. Hodari D.* has provided a clear and administrable rule to determine when physical contact between an officer and a citizen implicated the Fourth Amendment. However, the common law rule suggesting that an unsuccessful use of force is nonetheless an "arrest" is inapplicable to the case presented.

First, *Hodari D.* is factually inapposite from this case. In *Hodari D.* there was a chase after a juvenile fled upon seeing a police officer. The Respondent, Hodari, then tossed away something that looked like a small rock just before the officer tackled him and handcuffed him. The officer retrieved the rock, which turned out to be crack cocaine. The state court held that Hodari was seized when he saw the officer running towards him, even though the officer did not have absolute control over the juvenile's movements. However, this court disagreed.

Analyzing the recitation of common law principles on which Petitioner Torres heavily relies, she contends 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." *California v. Hodari D.* In the case of Hodari, the seizure did not occur until the officers actually tackled the Respondent. *Hodari D.* has made it clear that merely to grasp or apply physical force does not constitute a seizure but rather when the law enforcement actually brings an object within physical control. Following the standards set in

California v. Hodari D., the Petitioner Torres was not seized.

A. The evaluation of the court in *Hodari D* must be read in context and in its entirety

When facially looking at *Hodari D.* the Court may be inclined to find that a seizure has occurred when an officer slightly touches an individual. However, *Hodari D.* must be read in context for it to be applied in this case. Additionally, it is essential to look at *Hodari D.* in its entirety as it contains dicta and that should not be confused with its holding.

When interpreting *Hodari D.* in its entirety, the court makes a clear distinction between an arrest and a seizure. The Supreme Court in *Hodari D.* held that a Fourth Amendment seizure requires some sort of physical force with lawful authority, or submission to an assertion of authority. In *Hodari D.,* the two police officers were clearly wearing jackets with the word "police." Moreover, Hodari had not been touched when he discarded the cocaine, and had not submitted to authority because he was still attempting to escape. Therefore, the Court held that there was no seizure

and that it was merely an arrest.

The Petitioner Torres takes this Court's language out of context and uses dicta from the Hodari case. It is essential that the court looks to what is binding, the holding of the case of what happened in Hodari. The cases are very similar in that both suspects were attempting to escape. With *Hodari D.* holding that there was no seizure as Hodari never submitted to authority, a seizure did not occur with Torres' case. The only approach that makes sense is that a seizure occurs with submission to authority, voluntarily or involuntarily. Since the Petitioner was able to escape and was able to drive to a different city a seizure did not happen because she did not stop.

B. The language used by the Petitioner in *Hodari D.* is dicta

The Petitioner relies heavily on dicta from *Hodari D.* that references common law principles. The definition of seizure has been clearly identified through many different cases stating that a seizure occurs whenever law enforcement restrains the liberty of a citizen. *Graham v. Connor 490 U.S. 386 (1989) Hodari D.* did not look to overturn the holding in

Brower or *Graham*, but instead added on to the meaning of seizure.

The holding of *Hodari D.* was limited to the proposition that a show of authority coupled with submission to that authority constituted an arrest. As the holding is always binding, the holding of the case is what is essential. However, as the Petitioner uses dicta claiming seizure bearing the meaning of an application of a physical force to restrain movement, it is not applicable in the instant case.

The totality of the circumstances must be evaluated and thus the common law in *Hodari* brought up by the Petitioner is not relevant nor is it binding.

III. An excessive force claim must be proven to prove an unreasonable seizure.

Through the original meaning of the 4th amendment, it affects our case by holding that this court must find not only that a seizure took place, but that an unreasonable seizure took place. "For what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States.* "This is necessary because to have excessive force, a seizure must have occurred since

excessive force is simply an unreasonable seizure of a person by force" *Reed v. Clough.* To successfully prove an excessive force claim, all four prongs of the *Johnson v. Glick* test must be considered. If even one prong is disproved, the claim is unsuccessful. An excessive force claim can arise in the context of an arrest or an investigatory stop of a free citizen. The majority endorsed that the four-factor test is generally applicable to all "excessive force" claims. Additionally, the excessive force must be found to be "objectively unreasonable" through analysis in light of the facts and circumstances, not in 20/20 hindsight.

A. The four-prong test in *Johnson v. Glick* must be completely considered

The four prongs include: "(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) [w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." Focus turns to the fourth prong, in deciding the intent of the application of force. Both police officers were forced to make a

reasonable, split-second decision in order to protect themselves and others that would possibly be affected by the Petitioner's actions. They saw a clear threat to society as Torres was being "aggressive" and "furtive" in her movements within the car. At this moment they believed that they needed to prevent any further threat to themselves and society by acting based on "circumstances that are tense, uncertain, and rapidly evolving."

B. Excessive force must be proven as "objectively unreasonable" from the officer's perspective

In determining objective reasonableness from the officer's perspective, this Court must look to whether or not it was reasonable considering that "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments." This precedent alone may seem too broad and create a backdoor by allowing police officers to claim all their actions as "reasonable, split second judgements." *Graham v. Connor*. However, precedent set in *Tennessee v. Garner* held that "police may not shoot at a fleeing person unless

the officer reasonably believes that the individual poses a significant physical danger to the officer or others in the community." They were presented with the circumstance that someone under the influence, making aggressive actions, and unresponsive, would be recklessly driving on roads peopled with innocent lives. Without making the decision they did, the officers would have suffered significant damages and injuries, and additionally allow others in the community to be threatened to this danger.

C. Reasonableness inquiry must be analyzed in light of the facts and circumstances, not in 20/20 hindsight

With the analysis of objective reasonableness, this court must consider the circumstances in the position of the officer at the time of the claim, not in 20/20 hindsight. There are a myriad of factors and avenues that the officer must consider, but when making the split-second decision; even though it may seem unnecessary in hindsight, the court must note that the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's

chambers, violates the Fourth Amendment." *Johnson v. Glick.*

CONCLUSION

The Precedents of this Court are very clear. The history and definition of a "seizure" is clear. A seizure only occurs if the Petitioner's liberty is restrained to where a reasonable person would have believed that they were not free to leave. The Court must look at the totality of the circumstances surrounding the Petitioner. The Respondents made it clear that they were law enforcement and, as the Petitioner did not stop and proceeded to leave the site, her liberty was never restrained as she clearly believed that she was free to leave. By applying the rule of seizure set in *United States v. Mendenhall* as well as from precedents from seizure cases, this Court should find that a seizure did not occur in the case of Ms. Torres.

Respectfully submitted,

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