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

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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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SUMMARY OF ARGUMENT

This court has established that Fourth Amendment seizures encompass common-law arrest precedent. This precedent states that "To constitute an arrest...—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, *whether or not it succeeded in subduing the arrestee*, was sufficient." *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (emphasis added). *Hodari D.* goes on to require for a common-law arrest—and therefore also a Fourth Amendment seizure—physical force, or, where that is absent, a show of authority. Submission is only required for the latter "show of authority", and not for any application of physical force. *Id.* 626. Cases such as *Terry v. Ohio*, 392 U.S. 1 (1968), *Kyllo v. United States* 533 U.S. 27 (2001), *United States v. Jones* 565 U.S. 400 (2012), and *Carpenter v. United States* 138 S. Ct. 2206 (2018), which offer expanded definitions of the Fourth Amendment, add to rather than contradict this common-law understanding of the Fourth Amendment, as the Fourth Amendment *encompasses* common-law arrest rather than being *solely defined* by it. Therefore, Officer Williamson and Madrid's undeniable act of "physical force"—shooting at Torres multiple times and striking her twice—qualifies as a Fourth Amendment seizure despite its failure to restrain Torres from driving away.

ARGUMENT

I. Fourth Amendment seizures encompass and are inextricably related to common-law arrests.

The Fourth Amendment protects "the right of the people to be secure in the persons, houses, papers, and effects, against unreasonable searches and seizures" U.S. Const. amend. IV. It protects the right of personal security: the fundamental freedom of every citizen to be secure in their person and privacy. This right, which is the core of the Fourth Amendment, is also central to common law. As *Terry v. Ohio*, 392 U.S. 1 (1968) stated:

> "…as this Court has always recognized, 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 251 (1891)." *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

The Fourth Amendment and common law share a central concern with the right of personal security, and therefore are inextricably linked when it comes to analysis of either. The Court has long ruled in accordance with this principle. A prime example is *Hodari D.*, which followed this precedent when it based its definition of Fourth Amendment seizures directly off of common-law arrest, more specifically, Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 206 (1940). *Hodari D.*, 499 U.S. at 626-627.

Hodari D. went on to designate common-law arrests as "the quintessential 'seizure of the person'", a phrase that makes the relationship between seizures and arrests undeniable. *Id.* at 624. Other cases also affirm this: *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), stated that "A full custodial arrest, such as the one to which Ms. Atwater was subjected, is the quintessential seizure", and *Terry v. Ohio* conflated arrests and seizures in the phrase "...distinctions should be made between a 'stop' and an 'arrest' (or a 'seizure' of a person)..." *Atwater v. City of Lago Vista*, 532 U.S. 318, 360 (2001); *Terry*, 392 U.S. at 10.

A. The relationship between common-law arrest and Fourth Amendment seizures dates back to the founding of the United States of America.

The terms "arrest" and "seizure" have been linked since the 18th century. For example, article XIV of the 1780 Massachusetts Declaration of Rights reads as follows:

> "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. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure..." Mass. Decl. of Rights of 1780, art. XIV.

The article's first sentence establishes that it protects against "unreasonable searches, and seizures"; later in the article, the term "arrest" is used multiple times to further describe what the article protects and forbids. This clearly shows that the term "seizure" was originally understood to encompass common-law arrests, and justifies this court's present-day use of common-law arrest precedent to analyze Fourth Amendment seizures (such as in *Hodari D.*).

Furthermore, the Framers of the Constitution in fact created the Fourth Amendment to protect against abuses of common-law trespasses and arrests. Primary sources from the colonial era often discuss writs of assistance or warrants of a similar nature. *See, e.g.* James Otis, Arguments Against Writs of Assistance (1761). These writs of assistance were British general warrants that allowed officials to search areas, including private residences, with only a suspicion that it contained illegal material. Such general warrants were widely criticized as an egregious infringement on privacy and individual rights, and were thus banned in most state constitutions at the founding of the United States of America. *See, e.g.,* Virg. Decl. of Rights of 1776, art. X; Mass. Decl. of Rights of 1780, art. XIV. It was in this context that the Framers drafted the Fourth Amendment, which explicitly guards against these general warrants by establishing that "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.

Therefore, the Fourth Amendment's protection against "unreasonable searches" derives from concerns about common-law trespass, which at the time

manifested in the form of writs of assistance and other general warrants. It then follows that the second part of the Fourth Amendment, its protection against "unreasonable… seizures", is also rooted in the common law and therefore inextricably linked with the definitions and precedents of common-law arrest.

B. Cases which offer expanded definitions of the Fourth Amendment add to rather than contradict this common-law interpretation.

There is, however, much relevant precedent that expands the Fourth Amendment's original, common law-based meaning. The relationship between common-law arrest and Fourth Amendment seizures, however, is not narrow or exclusive, and therefore is not contradicted by this precedent. Rather, the Court's various interpretations of the Fourth Amendment coexist in their intended application to an array of different situations.

A prime example of such a case is *Terry v. Ohio*, the main facts of which involve a police officer stopping and frisking three men with a reasonable suspicion that they were concealing weapons but without true probable cause to search them. This Court ruled that such "stop and frisk" encounters were encompassed and permitted under the Fourth Amendment, despite falling short of "something called a 'technical arrest' or a 'full-blown search'." *Terry*, 392 U.S. at 19. This conclusion was justified with the fact that police-citizen encounters "are incredibly rich in diversity", and restricting the interpretation of the Fourth Amendment to a single, narrow definition prevents it from fully protecting the right of personal security. *Id.* at 13.

Kyllo v. United States 533 U.S. 27 (2001), *United States v. Jones* 565 U.S. 400 (2012), and *Carpenter v. United States* 138 S. Ct. 2206 (2018) are further examples of the Court expanding the traditional definition of the Fourth Amendment. All three cases dealt with modern, technological activities that did not exist at the founding and thus could have not have been deemed searches using a narrow, traditional interpretation of the Fourth Amendment. *Kyllo* ruled on the use of Thermovision imaging on a private residence, *Jones* ruled on the use of a GPS tracking device on a car, and *Carpenter* ruled on governmental acquisition of cell phone records. *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *United States v. Jones*, 565 U.S. 400, 3 (2012); *Carpenter v. United States,* 138 S. Ct. 2206, 1 (2018). All three ruled that these activities were indeed Fourth Amendment searches, thus expanding its definition past its original meaning.

In his dissenting opinion in *Hodari D.,* Justice Stevens contended that "The Court today takes a narrow view of 'seizure,' which is at odds with the broader view adopted by this Court almost 25 years ago." *Hodari D.*, 499 U.S. at 632. He went on to argue that the Court's assertion that Fourth Amendment seizures are defined by common-law arrest precedent is at odds with cases that offer a wider interpretation of the amendment as described above (mainly referencing *Terry* in his argument). However, Justice Stevens misinterpreted the language of *Hodari D.* in that it does not specify that common-law arrest should be the *only* defining precedent in Fourth Amendment interpretation. It may be easy to draw this conclusion, especially from the line, "We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges." *Id.*

at 627 (emphasis added). When taken out of context, this seems to indicate a narrow reading of the Fourth Amendment that does indeed contradict earlier precedent, as Justice Stevens contends.

However, placed in context, it is clear that this line is specific to this case and not an overarching statement on *all* Fourth Amendment cases and situations. This is indicated by the phrase "as respondent urges", which directly addresses the respondent's specific argument to classify a show of authority without submission as a Fourth Amendment seizure. The facts of *Hodari D.* are related to and best analyzed under the common-law arrest interpretation of the Fourth Amendment; the Court rejected respondent's argument because it contradicts this common-law arrest precedent (which asserts that a show of authority requires submission). It did not reject the fact that, in certain situations, Fourth Amendment seizures can fall into categories that require additional analysis beyond common-law arrest, such as the "stop and frisk" situation that *Terry* centers on. In short, *Hodari D.* simply confirms that the Fourth Amendment *encompasses* common-law arrest, rather than being *solely defined* by it.

The seizure in question of Ms. Torres by Officers Madrid and Williamson can be adequately analyzed with common-law arrest precedent, and does not require the kind of expansion that *Terry* and other cases provide. Still, it is important to clarify how such cases fit into the Court's larger understanding of the Fourth Amendment in order to completely discern its meaning and proper analysis.

II. Common-law arrests, and therefore Fourth Amendment seizures, occur where there is application of physical force, regardless of whether it is successful in restraining the subject.

Now that it is established that Fourth Amendment seizures encompass common-law arrest precedent, the question is whether this precedent requires physical force to be successful in detaining a suspect to constitute a "seizure". The answer, as clearly affirmed in *Hodari D.,* is no. *Hodari D.* established that Fourth Amendment seizures require "*either* physical force… *or,* where that is absent *submission* to the assertion of authority." *Hodari D.*, 499 U.S. at 626. This physical force does not have to be successful to constitute a seizure: "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.* (emphasis added).

This assertion is rooted directly in common-law arrest. *Hodari D.* cites *Whitehead v. Keyes*, 85 Mass. 495, 501 (1862) to prove this, which states that "[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him." *Id.* 624-25. Another relevant passage used in *Hodari D.* reads as follows:

> "'Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest

> without either touching or submission.' Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 206 (1940) (footnotes omitted)." *Id.* 626-27.

The distinction between "touching" and "submission" clearly indicates that physical force is exempt from the requirement of submission that show of authority seizures have. Any physical contact or "touch", automatically defines an arrest and therefore a Fourth Amendment seizure regardless of the subject's actions afterwards, which only become relevant if no such contact is made. This is undeniably clear in both *Hodari D.* and the sources it cites.

CONCLUSION

In conclusion, an unsuccessful attempt to detain a suspect by use of physical force constitutes a "seizure" within the meaning of the Fourth Amendment. This is because of the inextricable link between the Fourth Amendment seizures and common-law arrest, which although not exclusive or without exception, is certainly encompassing, and applies to this case. Common-law arrest precedent clearly establishes that physical force does not need to be successful in an arrest, summarized in Hodari D. as follows: "To constitute an arrest...—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, *whether or not it succeeded in subduing the arrestee,* was sufficient." Hodari D., 499 U.S. at 624 (emphasis added).

The two bullets that struck Ms. Torres back undeniably qualify as "physical force", and thus Ms. Torres ensuing flight does not negate the initial physical force seizure affected by the officers. Officer Madrid and Williamson's shooting of Ms. Torres in this case constitutes a Fourth Amendment seizure and should be analyzed as such.

Respectfully submitted,

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