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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SUMMARY OF ARGUMENT

In the case of *Torres v. Madrid*, Petitioner Roxanne Torres was struck by two bullets by Respondents Janice Madrid and Richard Williamson on July 15th, 2014. Despite being shot, Petitioner Torres continued to elude detention until July 16th, 2014; during the timeframe in between, Petitioner was able to steal another car and drive almost seventy-five miles away. According to well-established standards from *Brower v. County of Inyo*, *Florida v. Bostick,* and *Brendlin v. California,* an effective seizure with intentional application of force must result in the termination of one's freedom of movement and submission to that termination. By effectively fleeing the scene, officers were unable to physically detain Petitioner; without physically disabling Petitioner's freedom of movement, an effective seizure never occurred. Thus, an unsuccessful attempt at detaining a suspect does not constitute a seizure, as per the Fourth Amendment.

ARGUMENT

I. Part I: Describing Common Law

This Court held in *United States v. Watson* that there is an "ancient common law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." *United States v. Watson*, 423 U.S. 411 (1976). These grounds for arrest under common law were repeated by the Court in *Atwater v. Lago*, where it was found that "authorized peace officers" may "make warrantless arrests for all sorts of relatively minor offenses unaccompanied by violence." *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)

The Court continued by affirming the decision of the Supreme Judicial Court of Massachusetts in *Rohan v. Sawin* that "the authority of a constable, to arrest without warrant [...] is most fully established by the elementary books, and adjudicated cases;" that is to say, is supported by common law. *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281 (1850). According to the understanding of this Court, a common law arrest was one in which a law enforcement officer performed the warrantless arrest of an individual due to a misdemeanor or felony committed in their presence;

the reasonable ground standard is thereby applicable, so the question of whether an arrest is legal under common law would depend upon whether an objectively reasonable officer would have taken the same action.

The question of what constitutes an arrest under common law was again answered in *Terry v. Ohio*, where this Court held that an arrest — a seizure, as it were — occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1 (1968).

Therefore, a common law arrest is the use of force or authority to restrain liberty — in this case, by a peace officer — of a person upon reasonable suspicion that such person has committed a felony or misdemeanor.

II. Part II: Seizure under the Fourth Amendment

A. Original Intent

This Court asserted in the case of *California v. Hodari D.* that the word seizure meant a "taking of posession", from original intent to now. *California v. Hodari D.*, 499 U.S. 621 (1991). Even further, the Court states that "for most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in

question, but actually bringing it within physical control." *Id*. Through this standard, an effective seizure must include some level of physical control that deprives a person their freedom of movement.

Other examples of original public meaning of the Fourth Amendment have similar definitions. For example, the American Heritage Dictionary of the English Language finds its definition of seizure from 1588 as, "the act or an instance of taking possession of a person or property by legal right or process." *American Heritage Dictionary of the English Language* (1st ed. 1969). Even more explicitly, Black's Law Dictionary defines the term seizure from 1631 as, "most directly to the act of taking a person into custody or otherwise depriving the person of liberty." *Black's Law Dictionary* (1st ed. 1891).

These dictionary definitions both indicate that a level of control, whether it be "taking possession" from the American Heritage Dictionary or "custody and deprivation of liberty" is necessary to constitute a seizure, as per original intent.

B. Intentional application of force

In the case of *Florida v. Bostick*, this Court held that a person is seized only when officers, "by physical force or a show of authority, terminate or restrain the person's freedom of movement through

means intentionally applied." *Florida v. Bostick*, 501 U.S. 429 (1991). This Court also found in *Brendlin v. California* that "there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Brendlin v. California*, 551 U.S. 249 (2007).

In each of these cases, intentional application of force is demonstrated by officers. In cases of ambiguous intent to restrain or seize an individual, this Court has consistently applied the Mendenhall test. The test holds that a seizure can occur within the meaning of the Fourth Amendment if and only if, "in view of circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave." *United States v. Mendenhall*, 446 U.S. 544 (1980).

Thus, a police officer with intention to limit a person's freedom of movement effects a seizure for purposes of the Fourth Amendment once termination of one's liberty and submission to that termination occurs. A police officer with ambiguous intent to limit a person's freedom of movement effects a seizure for purposes of the Fourth Amendment when "a reasonable person would have believed that he or she was not free to leave." This Court concludes in *Michigan v. Chesternut* that "[W]hat constitutes a

restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Michigan v. Chesternut*, 486 U.S. 567 (1988).

C. No Seizure According To This Court's Fourth Amendment Precedent

Petitioner Torres was seized in neither of the standards listed above, including intentional application and ambiguous application of force. Under the standards set by Florida v. Bostick and Brendlin v. California, Petitioner Torres would have been seized if her freedom of movement was terminated and she submitted to that termination of movement. There is no indication that Petitioner Torres did either. Although Petitioner was struck by two bullets from Respondents, the usage of deadly force failed to terminate Petitioner's freedom of movement. In fact, Petitioner was able to flee the scene, steal yet another car, and drive over seventy-five miles to a hospital in Grants, New Mexico. By continuing to drive and *move* after being shot, Petitioner's freedom of movement was never obstructed; a seizure under the Fourth Amendment, as per the standards set by Florida v. Bostick and Brendlin v. California with the intentional application of force, could not have occurred.

Assuming, *arguendo*, that the Mendenhall test were to be applied instead of the standards set by Florida v. Bostick and Brendlin v. California, Petitioner would still not have been effectively seized. The Mendenhall test states that a seizure can occur if and only if, ""in view of circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave". By continuing to drive almost seventy-five miles after being struck during the exchange with Respondents, Petitioner demonstrated that she was, in fact, free to leave and escape the scene.

D. No Seizure Through Application of Original Intent

Furthermore, when considering the original intent established under California v. Hodari D. and reaffirmed by the literature of the time (see *American Heritage Dictionary of the English Language* and *Black Law's Dictionary*), one finds that a level of control that deprives one of their liberty of movement is necessary to constitute a seizure. Throughout the exchange with Respondents, Petitioner was never physically contained; despite rounds being fired, Petitioner's liberty of movement was never deprived.

E. No Violation Without Seizure

As per the rules in *United States v. Mendenhall*, *Florida v. Bostick*, and *Brendlin v. California*, without an effective seizure under either

the standards of intentional and ambiguous application of force or the original intent as per historical dictionaries, there can be no violation of the Fourth Amendment.

III. Part III: Analysis under Hodari D.

California v. Hodari D. held that an arrest under common law does not always implicate the Fourth Amendment right to be free of unreasonable searches and seizures. The facts of this case differ enough from *Hodari D.* that the same standard is not applicable.

In *Hodari D.*, the question was whether the pursuit of *Hodari D.* by the police officer constituted a seizure under the Fourth Amendment; this Court ruled that it did not. In this case, the action in question that purportedly implicated a Fourth Amendment right was not a show of authority as it was in *Hodari D.* Instead, the question is whether the unsuccessful application of physical force to restrain Torres constituted a seizure. As the ruling in *Hodari D.* was not dependent upon the definition of a common law arrest, this standard is strictly dicta.

While an unsuccessful show of authority that a reasonable person would perceive to be restraining their liberties would qualify as a seizure under *Hodari D.*'s standard, the common law definition that

a seizure requires bringing a person under physical control precludes the usage of force by a police officer from falling under the same standard; instead, the standard in *Tennessee v. Garner* that deadly force requires probable cause of danger is more readily applicable.

If any attempted arrest such as that in this case were to be approached with the standard that the unsuccessful use of force would constitute a seizure under the Fourth Amendment, any suspect who successfully fled a police officer using physical force would have a cause of action.

CONCLUSION

Petitioner Torres was not seized on July 15th, 2014, despite being struck by two bullets from Respondents. This Court should rule under the framework of intentional application of force, set forth by *Florida v. Bostick* and *Brendlin v. California*. The usage of force in this case by Respondents was perfectly reasonable given the threat of death or serious physical injury from the car that Petitioner was driving. This Court reaffirmed the Respondents' usage of deadly force in the case of *Tennessee v. Gardner*, where it was determined that a peace officer may only use deadly force to prevent escape if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others". As Respondents perceived that Petitioner was driving towards them, they had probably cause to believe Petitioner posed a significant threat themselves.

The standard set by *Florida v. Bostick* and *Brendlin v. California* maintains that an effective seizure under the Fourth Amendment occurs when termination of one's liberty and submission to that termination occurs. Similar cases, including *Brower v. County of Inyo* held that a Fourth Amendment seizure does not occur "whenever there is a governetally desired termination of an individual's freedom of movement"; seizure only occurs when

there is a "governmental termination of freedom of movement." *Brower v. County of Inyo*, 489 U.S. 593 (1989). Given that Petitioner freely drove past the officers, stole another car, and drove almost seventy-five miles, no such termination of liberty or submission to termination occurred.

Without an effective seizure according to common standards, there can be no violation of the Fourth Amendment.

This Court should affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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