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Legal Sidebar

Torres v. Madrid: Police Use of Force, Fourth Amendment Seizures, and Fleeing Suspects?

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In recent months, many in Congress have shown interest in the laws governing the use of force by law enforcement following incidents such as the death of George Floyd in police custody and the fatal shooting of Breonna Taylor by officers executing a no-knock search warrant. In October, the United States Supreme Court heard oral arguments in *Torres v. Madrid*, an appeal from the Tenth Circuit that asks when police use of force is subject to the Fourth Amendment's prohibition against unreasonable seizures. Specifically, the question presented by *Torres* is whether a suspect has been seized within the meaning of the Fourth Amendment when an officer intentionally uses force to detain that suspect, but is unsuccessful—such as when the suspect temporarily evades capture. The Supreme Court has on several occasions used language that at least indirectly addresses the possibility of seizure by an unsuccessful use of force, but such language at times appears contradictory and courts have disagreed on how to apply it. This Sidebar briefly outlines relevant precedent on seizure by unsuccessful use of force before analyzing the lower court decisions in *Torres*, the theories presented on appeal, and the likely implications of the case.

The Fourth Amendment and Unsuccessful Seizure Precedent

The Fourth Amendment limits the ability of police officers to use force when making arrests. In relevant part, it prohibits "unreasonable searches and seizures." Therefore, the determination of whether the use of force by police is unconstitutional under the Fourth Amendment often turns on whether it is reasonable. But because the Fourth Amendment governs "searches and seizures," police use of force will only be analyzed under that clause if it qualifies as a search or seizure. A seizure generally occurs when "the officer, by means of physical force or show of authority" restrains "the liberty of a citizen" or "the freedom of a person to walk away."

Federal courts disagree, however, on whether seizure occurs when an officer intentionally applies force to a suspect who then flees. Although the Supreme Court has not directly ruled on whether such unsuccessful use of force is a seizure, it has made statements on the issue in other cases involving related topics such as attempted seizure by show of authority and successful seizure by use of force. Those statements arguably conflict and have been applied inconsistently by other courts.

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One precedent at the heart of this judicial disagreement over fleeing suspects is *Brower v. County of Inyo*. In *Brower*, the Supreme Court examined whether a suspect was seized within the meaning of the Fourth Amendment when he fatally collided with a roadblock intended to end his high-speed chase with police. *Brower* therefore involved seizure by use of force that actually stopped the suspect, but the Court's decision included language that could be read to apply beyond those circumstances, saying that generally, seizure requires "an intentional acquisition of physical control" of the suspect. This interpretation of the Fourth Amendment did not contain any language limiting it to the factual circumstances of the case and could be read to suggest that an unsuccessful attempt to detain a suspect through force is *not* a seizure.

The Supreme Court seemed to modify that potential requirement in *California v. Hodari D.*, another Fourth Amendment case involving a fleeing suspect. The Court explained that at common law "the mere grasping or application of physical force with lawful authority" was sufficient to amount to an arrest—the "quintessential" form of seizure—even if unsuccessful in "subduing the arrestee." The *Hodari D.* Court further concluded that seizure can occur in two ways: (1) through physical force, or (2) "where that is absent, *submission* to the assertion [or show] of authority." In other words, *Hodari D.* indicates that obtaining control over the suspect is *not* a requirement of seizure under the Fourth Amendment as *Brower* suggests, *if* physical force has been applied in an attempt to detain the suspect. However, *Hodari D.* did not involve seizure by use of force, but rather seizure by show of authority. The issue in *Hodari D.* was whether cocaine discarded by a suspect during his flight from officers was the product of an unconstitutional seizure and therefore could not be used as evidence against him in his criminal prosecution. The suspect was fleeing from law enforcement officers when he tossed away the cocaine, and he was soon tackled and restrained. Because the suspect discarded the cocaine *before* he was tackled, the drugs could only be the byproduct of a seizure if the suspect had already been seized when he first saw the officers—in other words, seized by virtue of the officers' show of authority. However, the suspect in *Hodari D.* did not submit to any such show of authority and therefore, the Court held that he "was not seized until he was tackled." Thus, despite the Court's broader language above about the possibility of seizure by unsuccessful use of force, *Hodari D.* itself did not arise from such circumstances.

On at least two subsequent occasions, the Supreme Court has revisited *Hodari D.* and arguably narrowed its language on seizure by unsuccessful use of force. First, in a footnote in *County of Sacramento v. Lewis*, the Court quoted *Hodari D.* in support of a broad statement that the Fourth Amendment excludes "attempted seizures," which could be interpreted as encompassing instances where an officer applies force to a suspect who escapes. However, the *Lewis* footnote relied on passages from *Hodari D.* that were from the portion of that opinion ruling on a failed seizure by show of authority, rather than use of force. Furthermore, *Lewis* itself did not involve the unsuccessful application of intentional force but rather an *accidental* application of force that *did* stop the suspect. Accordingly, it appears that some courts view *Lewis* as limited to those circumstances. The Supreme Court again revisited *Hodari D.* in *Brendlin v. California*. Although *Brendlin* did not involve either force or a fleeing suspect—the issue was whether a passenger in a vehicle stopped by law enforcement was seized—the case nonetheless included language that could arguably contradict *Hodari D.*'s statement about the application of force. Specifically, the *Brendlin* court noted that seizure may occur by "physical force or show of authority" that "terminates or restrains" the suspect's "freedom of movement." This statement seemingly indicates that both types of seizure require actual acquisition of physical control of the suspect, which could be difficult to reconcile with *Hodari D.*'s language suggesting that seizures by *show of authority* require submission by the suspect, but that seizures by use of *force* may not. Also in possible conflict with *Hodari D.* is the *Brendlin* Court's separate observation that "a fleeing man is not seized until he is physically overpowered."

Federal courts have diverged in their interpretation and application of these Supreme Court precedents. Several federal appellate courts, including the Eighth, Ninth, and Eleventh Circuits, have cited *Hodari D.* as binding authority that a seizure occurs when "physical force is applied, regardless of whether the citizen yields to that force." In contrast, other courts, including the Tenth Circuit and D.C. Court of Appeals, have concluded, in light of *Brower*, that seizure requires physical control of the suspect. For

example, in *Brooks v. Gaenzle*, the Tenth Circuit rejected a Fourth Amendment excessive force claim brought by a suspect who had been shot by police but who "eluded arrest for three days," concluding that he was not seized. In so holding, the court dismissed as dicta the language in *Hodari D.* suggesting that seizure by force need not be successful.

Torres v. Madrid

Torres presents an opportunity for the Court to resolve the judicial disagreement over whether seizure under the Fourth Amendment includes police use of force that fails to bring a suspect under control. The case stems from an early-morning encounter between Roxanne Torres and two New Mexico State Police officers at an Albuquerque apartment complex where the officers were executing an arrest warrant. Torres was sitting behind the wheel of an SUV parked in front of the apartment building where the officers believed that the subject of the warrant resided. The officers approached Torres and demanded that she open the SUV door. Torres instead began to drive away. The officers fired at Torres and struck her twice. Torres fled but was eventually identified and arrested. In her subsequent lawsuit, Torres alleged that by shooting her, the officers used excessive force and violated her right to be free from unreasonable seizure under the Fourth Amendment. The district court disagreed with Torres, ruling that she failed to show that there was a seizure because the officers' use of force "did not stop" her. On appeal, the Tenth Circuit agreed with the district court that there was no seizure because Torres "did not stop" or "submit to the officers' authority," citing the circuit's own precedent in *Brooks*, discussed above.

Before the Supreme Court, Torres argues that the officers seized her when they fired shots with the intent to stop her. Torres contends that seizure incorporated the common-law concept of "arrest" at the founding, and further argues that at common law, arrest could occur by "mere touch with the intent to restrain"—in other words, by intentional application of even minimal force regardless of whether the suspect was detained. According to Torres, *Hodari D.* clarifies that the Fourth Amendment encompasses this common-law conception of arrest, and means that "an intentional application of physical force constitutes a seizure 'even though the subject does not yield.'" At oral arguments, at least three Justices questioned the applicability of *Hodari D.*'s discussion of common law "mere touch" cases to individuals like Torres. For example, Justices Alito and Thomas asked whether "mere touch" cases encompassed not only direct human contact but also "shooting someone" or using an "inanimate object." Although Torres's attorney cited to a 1604 case to support the possibility of seizure through use of an object, she conceded that "there were no shooting cases at the founding," but argued this lack of supporting cases was "because arrests were not effectuated with guns at that point." By contrast, Justice Gorsuch observed that guns were "not unknown" at the founding.

The United States Solicitor General's office—which filed a brief and participated in oral arguments as a friend of the court in support of Torres—argues that the Fourth Amendment includes "seizure by intentionally applying restraining force to a subject." Although escape by the subject of that force "will render the seizure fleeting," according to the Solicitor General's office, it does not "negate the seizure entirely."

In contrast, citing to precedents including *Brower* and *Brendlin*, the officers assert that a Fourth Amendment seizure requires obtaining control of the suspect. The officers argue that such holdings comport with the historical understanding of seizure, which "from the time of the founding" has required "taking possession" of the suspect. Thus, the officers conclude that since Torres did not submit when shot, she was not seized within the meaning of the Fourth Amendment. In reaching their position, the officers dismiss as dicta the language in *Hodari D.* cited by Torres because "it was unnecessary to the result" of that case. For example, in response to questioning by Justice Thomas at oral arguments, the officers' attorney argued that the relevant language was extraneous because *Hodari D*. did "not involve . . . use of force." Justice Sotomayor, however, described the *Hodari D.* language on seizure by unsuccessful use of force as key to the "entire analytical approach" of that opinion, and Justice Kagan questioned how the

relevant language in *Hodari D.* could be mere dicta given that it appeared "six times" in "a seven-page opinion."

Implications for Congress

Oral arguments in *Torres* brought up some issues that have been of interest to many in Congress in recent months, such as the legal limitations on the use of force by police officers, and the recourse available when officers exceed those limits. For example, Justices Breyer and Sotomayor asked what legal recourse would be available if the Fourth Amendment does not encompass the unsuccessful use of force by police to restrain a suspect—a concern reflected in a number of amicus briefs filed in *Torres*. Justice Breyer remarked that if the Fourth Amendment includes only successful searches and seizures, it would leave "no protection at all" for "a whole area" of the "right of the people to be secure . . . from unreasonable searches and seizures." In contrast, Justices Alito and Gorsuch asked about the availability of other legal remedies for individuals like Torres—raising whether ruling for the officers would abolish all avenues to challenge the unsuccessful use of force. They questioned whether Torres could seek relief through tort battery claims in state courts or under the Fourteenth Amendment—which prohibits deprivation of "life, liberty, or property, without due process of law" and includes a "substantive component" barring "certain arbitrary government actions." The officers' attorney responded that both were possibilities. Torres's attorney countered that because due process violations occur only where the conduct at issue "shocks the conscience," "all sorts of abuses by the government . . . would fall short" of that standard, which generally poses a "high threshold" for plaintiffs to meet. As for state tort claims, Torres argued in briefing that they are not "adequate substitute[s] for a Fourth Amendment remedy." In some states, tort claims against officers are unavailable absent constitutional violations, and officers may also be protected against tort claims by defenses unique to that context.

The Court's resolution of *Torres* could have significant implications. If the Court concludes that unsuccessful use of force can qualify as a seizure under the Fourth Amendment—as Torres argues—Congress could not change the scope of this constitutional right through legislation even if it disagrees with the outcome. If the Court instead rules that Torres cannot establish a Fourth Amendment violation, then as discussed above, individuals like Torres may have other avenues available for legal recourse, including state tort remedies and Fourteenth Amendment Due Process claims. Although Congress could not alter the scope of state law claims or Fourteenth Amendment rights, Congress might be able to otherwise enact legislation addressing unsuccessful police use of force. For example, Congress could likely create a statutory remedy for the subjects of force by *federal* law enforcement. It has less flexibility to create such a route for those subject to force applied by state or local law enforcement, however.

Also of possible interest to Congress given the recent confirmation hearings of Justice Barrett, the Supreme Court vacancy created by the death of Justice Ginsburg had yet to be filled when oral arguments were held in *Torres* last month. Therefore, eight Justices heard oral arguments in the case—the general implications of which are discussed in other CRS products. Although Justice Barrett has since been confirmed by the Senate, it is standard Supreme Court practice that new Justices do not participate in decisions in cases argued before they were seated—although in some instances the Court may order reargument to allow for such participation.

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