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Supreme Court Update

Professor Jennifer E. Laurin

Author Contact Information:
Jennifer E. Laurin

University of Texas School of Law

jlaurin@law.utexas.edu
(512) 232-3627

I. Scope of This Outline

This outline contains the five criminal law and procedure cases heard by the Supreme Court in its 2020 Term that do not pertain solely to federal practice. In each section, cases already decided are discussed first, followed by a description of the issues presented in those still awaiting decision at the time of writing. The final section briefly describes cases slated to be heard in the October 2021 Term.

A terrific resource for all of these cases, and to track the Court's jurisprudence in general, is SCOTUSblog.com, which, for each case on which certiorari is granted, compiles the decision below, the briefs, the transcript of oral argument, and the Court's opinion, as well as expert commentary.[1]

I. Fourth Amendment

Torres v. Madrid, 141 S. Ct. 989 (2021): Fourth Amendment seizure

Background and issue: The case – a Section 1983 lawsuit – arises out of a 2014 encounter between New Mexico State Police officers and Albuquerque resident Roxanne Torres. The officers arrived at an apartment complex in the pre-dawn hours of the morning to arrest a woman who they believed to be involved in a drug ring. Torres, who in fact had no relationship to the woman, was in a car in the complex parking lot, with the engine running, when the officers arrived. The officers exited their vehicle and approached Torres, shouting commands and displaying their guns. Torres alleges in her complaint that she did not realize the officers were police and believed she was being carjacked; she also was, in her words, "tripping out" on methamphetamine. Torres began to drive away from the officers, who responded by firing a total of thirteen bullets at Torres's moving car, striking her twice. Torres managed to keep driving but eventually lost control of her car. She availed herself of another car whose engine was running and made her way to a hospital outside Albuquerque, but her injuries required that she be airlifted back to the city. She was eventually arrested for, charged with, and pleaded no contest to fleeing from an officer, assault on an officer, and vehicle theft. She then sued the officers involved in the incident, alleging that their shooting amounted to excessive force in violation of the Fourth Amendment.

Of course, the Fourth Amendment applies only to "searches and seizures," and so *if* the officers never "seized" Torres, no claim lies. That is the conclusion that the lower courts in this case reached, aligning on one side of a circuit split over whether police use of force that makes contact with but does not in fact restrain the target of the force amounts to a seizure. The Court granted cert to resolve that circuit split. The question before it was whether application of lethal force to restrain someone constitutes a "seizure" within the meaning of the Fourth Amendment, even if the force does not immediately stop the person?

[1] *See*, SCOTUSblog, http://www.scotusblog.com (last visited May 7, 2021).

Held: Yes, reversed, 5-3, Roberts, C.J. for the Court. Chief Justice Roberts, writing for the majority, begins by noting that the Court "largely covered this ground" in its decision in *California v. Hodari D.*, 499 U. S. 621 (1991) – though, for reasons discussed below, the Court stops short of suggesting that the decision is binding precedent in the instant case. *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021). In *Hodari D.*, in an opinion by Justice Scalia that centered the common law of arrest as the touchstone of the Fourth Amendment's original, and contemporary, meaning, the Court asserted that the common law treated "the mere grasping or application of physical force with lawful authority" as an arrest, "whether or not it succeeded in subduing the arrestee." *Id.* at 624. At common law, use of force to accomplish arrest was treated as a distinctive case than other, non-forcible shows of authority, and only the latter category, according to *Hodari D.*, required accomplishment of termination of movement to qualify as arrest. Critically, to the dissent at least, the premise that unsuccessful grasping amounted to arrest was not necessary to the outcome in *Hodari D.*, which turned instead on the conclusion that an unsuccessful show of non-forcible authority was *insufficient* to accomplish arrest. Nevertheless, the Chief Justice writes in *Torres*, *Hodari D.* establishes two propositions: What counted as an arrest at common law counts as a Fourth Amendment seizure today, and an arrest could be accomplished at common law by application of force that does not terminate movement. But in an odd acknowledgement that it might be relying on what amounts to dicta, the Court then asserts that, regardless of whether *Hodari D.* binds as a matter of stare decisis here, the majority "independently reach the same conclusions." *Torres*, 141 S. Ct. at 996.

And so the opinion goes on to canvas the early American common law and reach the same conclusions that it says were established three decades earlier. Along the way the majority homes in on a facet of that history that the dissent seizes upon, so to speak: The absence of any cases indicating that touching by a fired bullet amounts to arrest, and the near-exclusive fact pattern of the requisite show of force being the grabbing of the seized person. No matter, says the majority: Police were by and large not armed until well into the nineteenth century, and in at least one case – *Countess of Rutland's Case*, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605) – a seizure was found to be accomplished by physical touching by mace – a "touching with an object" analogous to "touching by bullet." *Torres*, 141 S. Ct. at 997. Applying to Torres's case the proposition that "application of physical force . . . whether or not it succeeded in subduing the arrestee" is a common law arrest and therefore a seizure, the majority concludes that the police did indeed "seize" Torres within the meaning of the Fourth Amendment, by applying physical force to her body with intent to prevent her from driving away. Finally, the majority emphasizes a caveat: A seizure requires the use of force with intent to restrain; accidental use of force does not qualify. But such "intent to restrain" must be assessed not subjectively by reference to the seizing officer's thoughts and motivations, but rather by asking "whether the challenged conduct *objectively manifests an intent to restrain*," *Id.* at 998 – whatever that means.

Justice Gorsuch authors a hopping mad dissent, joined by Justices Thomas and Alito. *Id.* at 1003 (Gorsuch, *J.*, dissenting). He begins by characterizing *Hodari D.*'s statements concerning the significance of a "touch" in establishing a seizure as dicta, and then takes the majority to task for a conception of "seizure" that defies a common sense

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