

No. 21-6599

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 04 2021

OFFICE OF THE CLERK

Jeffrey Clinton Michalik — PETITIONER
(Your Name)

vs.
United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals Fifth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeffrey Clinton Michalik
(Your Name)

F.C.I. Bastrop, P.O. Box 730

(Address)

Bastrop, Texas 78602

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1.- Does the holding in *Torres v. Madrid*, 141 S. Ct. 989 (2021) that the touching of an individual by law enforcement to guide or restrain movement is a seizure equivalent to a common law arrest for Fourth Amendment analysis, now require *MIRANDA* warnings before the ensuing custodial interrogation under the five factor Fifth Amendment analysis in *United States v. Wright*, 777 F. 3d. 769, (5th Cir.2015)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

District court Judge
Hon. David A. Ezra, Senior Judge

District court counsel
Tracy Thompson, Assistant United States Attorney for
the Western District Texas

Asset Forfeiture counsel
Antonio Franco Jr., Assistant United States Attorney

Appellate Counsels
Joseph Gay and
Neeraj Gupta Assistant United States Attorneys for the
Western District Texas

RELATED CASES

N/A

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**: N/A

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 15, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 7, 2021, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**: N/A

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.
2

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.
2

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and 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.

United States Constitution, Amendment V:

No person shall held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put twice in Jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

At 6:30 a.m. October 22, 2015 eight armed government agents executed a search warrant for Michalik's residence timed to intercept him as he was leaving for work. The search warrant had no provision for detention of anyone.

Michalik was immediately "seized" and impermissibly directed by armed agents to go back to the house to assist them in executing the warrant; was not told he was free to leave; that he doesn't have to talk with them; that remaining during the execution of a warrant is voluntary; or that he is free to leave after he gave them his keys. They had his keys so he could not leave for work if he had chosen to.

Further, the two agents admitted they: immediately isolated him; closely escorted and guided Michalik everywhere; never let him out of their sight, and where always physically positioned to control his movements, unnecessary if he was really free to leave.

But the agents also touched Michalik in the house before, and during their close, continuous escort in guiding him from his house out to the agents' vehicle before the custodial interrogation.

Agent DePaola eventually admitted she did not tell the occupants that they were free to leave, but actually told them they had to inform the agents of their desire to leave, i.e., requesting permission to leave.

The unrebutted testimony of the other occupants confirms that they had to obtain permission to move or do anything within house or to leave for school; are escorted everywhere with an armed guard; and are manifestly not free to leave.

His family still held hostage, Michalik agreed to take the agents to his work to get the newly discovered laptop where Agent DePaola, after much dissembling, finally stridently admitted that there, Michalik asked the agents if they needed a warrant for the laptop, not necessary if Michalik was consenting, thereby corroborating Michalik's other testimony.

Without the custodial **purported** statements, the Government would never have known the laptop at his workplace existed. And without the laptop, all concede the Government has no case to present.

REASONS FOR GRANTING THE PETITION

The Panel's decision filed July 15, 2021 now conflicts with the March 25, 2021 Supreme Court decision in *Torres v. Madrid* 141 S. Ct. 989 (2021) 1; and requires resolution of the very important and likely recurring issue of whether the *Torres* holding that the touching of an individual by law enforcement to guide or restrain movement is a seizure equivalent to a common law arrest for Fourth Amendment analysis, now requires *Miranda* warnings before the ensuing custodial interrogation under Fifth Amendment analysis. Consideration en banc is necessary to secure and maintain conformity and uniformity of the Circuit's decisions with *Torres*, and the five factor Fifth Amendment custodial Interrogation analysis under *United States v. Wright*, 777 F. 3d. 769, (5th Cir. 2015); and to reconcile imbedded "touching" with arrest by acquiescence to a show of authority, which so often coincidentally occurs in the interrogations during the execution of the search warrants.

Mr. Michalik was denied suppression of his Purported Statements both as the product of an illegal and continuing custodial seizure, involving preinterrogation touching under the Fourth Amendment; and where interrogated without *Miranda* warnings while remaining continuously restrained in his movements to a degree associated with formal arrest for Fifth Amendment purposes. *United States v. Cavazos*, 668 F. 3d 190, 193 (5th Cir. 2012).

Michalik was denied suppression of the laptop at work, which was not subject to the Government's search warrant for his house both for the aforementioned continuing Fourth and Fifth Amendment violations; and because his subsequent written consent for the laptop at his work was obtained by misrepresentations and threats even after asking the agents if they needed a warrant for the work laptop.

On March 25, 2021 the Supreme Court issued its decision in *Torres v. Madrid*, 141 S. Ct. 989 (2021); 209 L. Ed. 2d 190 Holding in a bright line ruling that the "mere touching" of a Defendant with the intention of restraining them, even if unsuccessful constitutes a Fouth Amendment seizure, defined as an arrest under common law. See also *California v. Hodari D*, 499 U.S. 621, at 624; 111 S. Ct. 1547 (1991) holding alternatively that an arrest and seizure can also be obtained by the Defendant's acquiescence to the show of the agent's authority, not seriously disputed here where the District Court and the Panel cite his "cooperation". Op. 7 Both occurred here.

REASONS FOR GRANTING THE PETITION

In addition to Michalik's immediate and continuous seizure from the moment of his illegal detention in his driveway while leaving for work, the agents also touched the Appellant in the house before, and during their close, continuous escort and guiding of him from his house out to the agents' vehicle before the custodial interrogation.

Neither the district court, nor the Panel considered or addressed Michalik's Fourth Amendment challenge, or the continuing taint throughout the interdiction as to whether, under Fifth Amendment analysis Miranda warnings were required.

Because Torres now makes clear the by the Mere Touching of Michalik during the interdiction, this was a seizure equivalent to a common law arrest for Fourth Amendment purposes, this needs to be reconciled with and rationalized within the five factor Fifth Amendment custodial analysis, necessitating suppression of his statements, and the work laptop.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey Michalik

Jeffrey Michalik

Date: November 30, 2021