No. 22-6575

IN THE SUPREME COURT OF THE UNITED STATES

PAUL MICHAEL MALAGERIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court reversibly erred in finding, on the particular facts of this case, that petitioner was not seized within his home during the execution of an administrative arrest warrant.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Malagerio, No. 20-cr-154 (Feb. 22, 2021)

United States Court of Appeals (5th Cir.):

United States v. Malagerio, No. 21-10729 (Sept. 23, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-11)[1] is reported at 49 F.4th 911. The order of the district court (Pet. App. 21-39) is not published in the Federal Supplement but is available at 2021 WL 3030067.

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the pages as if they were consecutively paginated, with the cover page as Pet. App. 1.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2022. A petition for rehearing en banc was denied on October 18, 2022. The petition for a writ of certiorari was filed on January 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of possessing a firearm as a noncitizen illegally in the United States, in violation of 18 U.S.C. 922(g)(5)(A) and 924(a)(2). Judgment 1; see Pet. App. 13. The district court sentenced petitioner to 28 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3; see Pet. App. 14-15. The court of appeals affirmed. Pet. App. 3-11.

1. Petitioner is a citizen of Canada. Pet. App. 4. Petitioner last entered the United States in 2013, and did so without a visa, meaning that he could not legally remain in the United States for more than six months. Ibid.

In 2020, the Department of Homeland Security (DHS) received a tip that petitioner was in the country illegally. Pet. App. 4. After further investigation, the DHS officer in charge of the case found probable cause that petitioner was present unlawfully and

issued an administrative warrant for his arrest. Ibid.; see 8 C.F.R. 287.5(e)(2).

Around 7 a.m. on the day of the planned arrest, a team of DHS agents arrived at the mobile-home community where petitioner resided. Pet. App. 4. Out of concern that petitioner, who worked in the exotic-animals industry, might have firearms or dangerous animals onsite, a team consisting of at least six agents was present. Ibid.; see also id. at 24 (DHS's "investigation indicated that [petitioner] might have had firearms and several exotic animals, including tigers and a mountain lion.").

After the team reached his residence, petitioner "noticed the commotion outside and wanted to go outside to see what was happening," so he "began to get dressed" inside his trailer. Pet. App. 25. An agent knocked on petitioner's door and instructed him to exit with his hands up. Id. at 4. Petitioner responded that he would be out shortly; another minute to 90 seconds passed, after which he opened the door. Ibid. By the time petitioner came to the door, several of the agents had their guns pointed in his direction. Ibid. After exiting his trailer, petitioner "walked multiple steps away from his RV and stood by his pickup truck before being apprehended and handcuffed by officers." Id. at 25; see also id. at 4-5.

Following his arrest, an agent asked petitioner whether he had immigration documents or weapons. Pet. App. 25. Petitioner stated that he had a Canadian passport and three firearms in his trailer. Ibid. The agent then asked for petitioner's consent to search the residence for those items, and petitioner consented. Id. at 26. And based on petitioner's directions about where those items were located, agents recovered the firearms. Id. at 5, 26.

2. A federal grand jury in the Northern District of Texas charged petitioner with possessing a firearm as a noncitizen illegally in the United States, in violation of 18 U.S.C. 922(g)(5)(A) and 924(a)(2). Pet. App. 5. Before trial, petitioner moved to suppress all the evidence that the agents had recovered the morning of his arrest, contending that both the arrest and the search of his trailer violated the Fourth Amendment. Ibid.

At an evidentiary hearing on petitioner's motion, the district court received testimony from four witnesses -- three DHS agents and petitioner -- as well as numerous exhibits, including "body-camera footage of [petitioner]'s arrest." Pet. App. 22 & n.1. At the conclusion of the hearing, the court determined that the DHS agents "had testified consistently with each other and with the documentary evidence and, therefore, found their testimony credible." Id. at 23. And the court found petitioner's own testimony "incredible" because he "was evasive on the witness

stand, was impeached, * * * and refused to answer questions that had an irrefutable answer." Ibid.

The district court subsequently denied petitioner's suppression motion in a written order. Pet. App. 21-39. Citing this Court's decision in Brendlin v. California, 551 U.S. 249 (2007), the district court explained that "'a Fourth Amendment seizure occurs in one of two ways: either an officer applies physical force or an officer makes a show of authority to which an individual submits.'" Pet. App. 29-30. The court found that neither type of seizure occurred inside petitioner's residence. Id. at 30.

As an initial matter, the court found that "the officers did not apply physical force until they handcuffed [petitioner] after he exited his RV and walked over to his pickup truck." Pet. App. 30. The court then found that petitioner "did not submit to the authority of officers until he stepped away from his RV and followed commands to hold his hands above his head." Id. at 29. The court thus found that petitioner "was not seized in his home." Ibid.

In support of its finding that petitioner did not submit to any show of authority -- and thus was not seized -- until after leaving his trailer, the district court observed that by petitioner's own admission "when officers arrived, he began

dressing, even before they knocked on his door, because he wanted to see what was happening." Pet. App. 30. The court further observed that petitioner "did not immediately follow the officers' commands" but "instead * * * waited 60-90 seconds after the knock to exit," "did not immediately put his hands up as the officers ordered," and ultimately "submitted to the officers' authority only after he had taken multiple steps away from his RV and finished fixing his shirt," by which point he "was not within his home or its curtilage." Ibid.

The district court alternatively found that, even if petitioner had been seized within his residence, suppression was inappropriate because "the officers acted in objective good-faith reliance on the warrant while arresting" petitioner. Pet. App. 31. The court identified "Supreme Court precedent indicat[ing] that officers may enter an arrestee's home to execute an arrest pursuant to an administrative warrant." Id. at 32 (citing Abel v. United States, 362 U.S. 217 (1960)). The court thus saw no need to directly "address the constitutionality of arresting an individual in his home pursuant to an administrative warrant." Id. at 36 n.11. And the court found that petitioner "gave effective consent" to the search. Id. at 38.

Petitioner proceeded to trial, and the jury found him guilty. Judgment 1; see Pet. App. 5. The district court sentenced

petitioner to 28 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3; see Pet. App. 14-15.

3. The court of appeals affirmed. Pet. App. 3-11.

The court of appeals rejected petitioner's challenge to the lawfulness of his arrest. The court of appeals "focus[ed] on the district court's factual findings," which it determined "[we]re not clearly erroneous and, instead, [we]re supported by the record." Pet. App. 6. Specifically, the court of appeals identified as the critical factual findings the district court's findings (1) "that [petitioner] was not seized until after he had exited his home (the trailer)" and (2) "that he was not located on any curtilage of that home" when the seizure occurred. Id. at 7.

The court of appeals noted petitioner's contention at oral argument "that he was 'seized in [his] doorway.'" Pet. App. 7 (brackets in original). The court explained, however, that under this Court's precedent, "a person standing in the doorway of a house is in a public place, and hence subject to arrest without a warrant permitting entry of the home." Ibid. (quoting Illinois v. McArthur, 531 U.S. 326, 335 (2001)) (internal quotation marks omitted). The court acknowledged that "[i]t is also possible to interpret the record such that [petitioner] was seized before he got to his doorway," but, "view[ing] the record favorably to the government," the court found no clear error in "the district

court[’s] f[i]nd[ing] that [petitioner] was not seized inside his home.” Id. at 8 n.2; see id. at 5.

In light of its determination that petitioner “was not seized until after he had exited his home (the trailer) and * * * was not located on any curtilage of that home” when he was seized, the court of appeals (like the district court) declined to “decide whether an administrative warrant may be used to arrest an alien in his home[,] * * * leav[ing] that important question for another day.” Pet. App. 7. And the court found no reason to disturb the district court’s further finding that the search of petitioner’s residence had been lawful because petitioner consented to the search. See id. at 8-11.

ARGUMENT

Petitioner contends (Pet. 10-39) that he was seized in his home pursuant to an administrative arrest warrant and that such a seizure violates the Fourth Amendment. But petitioner fails to identify any legal error in the lower courts’ fact-bound finding that he was not seized in his home, because he was neither subject to physical force nor submissive to authority until he had left his trailer and its curtilage. The court of appeals’ circumstance-specific decision does not conflict with any decision of this Court or of another court of appeals that has reached a contrary result on analogous facts. Further review is unwarranted.

1. At the core of petitioner's assertions to this Court is the contention that he was seized in his trailer. But he provides no sound reason to overturn the lower courts' fact-specific finding to the contrary. See Pet. App. 6-8; id. at 29-30.

a. The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The "seizure" of a person "can take the form of 'physical force' or a 'show of authority'" by the police "that 'in some way restrains the liberty' of the person." Torres v. Madrid, 141 S. Ct. 989, 995 (2021) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)) (brackets omitted).

More specifically, this Court has made clear that an individual is "seiz[ed]" within the meaning of the Fourth Amendment only if a law enforcement officer applies physical force to restrain the individual -- whether or not the restraint is "ultimately unsuccessful," Torres, 141 S. Ct. at 995 (quoting California v. Hodari D., 499 U.S. 621, 626 (1991)) -- or where an officer invokes his authority to direct the individual's movements and the individual submits to that show of authority, see Hodari D., 499 U.S. at 626-627; Brower v. County of Inyo, 489 U.S. 593, 595-597 (1989). Thus, a seizure may occur "without the use of physical force," but only if there is both "a show of authority" and "actual

submission" to that authority. Brendlin v. California, 551 U.S. 249, 254 (2007).

An "uncomplied-with show of authority" is thus not "a common-law arrest," and in fact "is no seizure" at all. Hodari D., 499 U.S. at 626. When a person has not "passive[ly] acquiesce[d]" to police commands but has instead exercised his agency in a manner inconsistent with "actual submission," "there is no seizure" -- instead, there is "at most an attempted seizure, so far as the Fourth Amendment is concerned." Brendlin, 551 U.S. at 254-255. And "neither usage nor common-law tradition makes an attempted seizure a seizure." Hodari D., 499 U.S. at 626 n.2.

b. The lower courts correctly applied those principles to the specific facts of this case to find that petitioner did not submit to the agents' show of authority -- and thus was not seized for Fourth Amendment purposes -- until he was outside his home. Before that point, he was acting of his own volition rather than complying with the agents' directives.

As the district court explained, petitioner was preparing to exit his trailer before receiving any command to do so from the agents. See Pet. App. 30 (observing that petitioner "testified during the suppression hearing that when officers arrived, he began dressing, even before they knocked on his door, because he wanted to see what was happening."); cf. Brendlin, 551 U.S. at 262 ("[W]hat

may amount to submission depends on what a person was doing before the show of authority."). And the district court found no indication that petitioner accelerated or otherwise modified his plans in response to the agents' directives; to the contrary, "after officers knocked, [petitioner] did not immediately follow the officers' commands and exit," but "instead * * * waited 60-90 seconds after the knock to exit." Pet. App. 30.

Even after he finally emerged, petitioner "did not immediately put his hands up as the officers ordered." Pet. App. 30. Instead, he "turned around and closed the door on his RV," and "submitted to the officers' authority only after he had taken multiple steps away from his RV and finished fixing his shirt." Ibid. The district court thus had ample basis for finding that the agents "did not seize [petitioner] within his home" but instead only after he had voluntarily exited his residence and belatedly complied with their orders. Ibid.

The court of appeals, for its part, then permissibly affirmed the relevant factual findings under the undisputed clear-error standard of review. Pet. App. 6-8. Petitioner's assertions that the court's "finding varies from the District Court's decision" (Pet. 9), or "used different reasoning" (Pet. 18), lack merit. The court of appeals acknowledged a plausible interpretation of the facts under which petitioner was seized inside his trailer, see

Pet. App. 8 n.2, but applied the clear-error standard in deferring to the district court's finding "that [petitioner] was not seized until after he had exited his home," id. at 7.

In any event, the lower courts' granular determinations as to the precise moment when petitioner was seized in this particular encounter are highly factbound and do not warrant further review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts."); see also Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

2. Petitioner provides no sound reason for this Court to grant certiorari in this this case.

a. Petitioner asserts (Pet. 10) a circuit conflict about "whether law enforcement constructively enters a home when, relying on armed commands rather than a judicial warrant or exigent circumstances, officers coerce a person to exit the security of their home." But that assertion rests on two mistaken premises.

First, as discussed above, the district court found that petitioner was not "coerced * * * to exit his home." Pet. 10; see Pet. App. 30. And the court of appeals did not disturb that finding. As a result, neither court reached the question whether coercion by law enforcement would constitute "constructive entry." Pet. i.

Second, in asserting a circuit conflict, petitioner conflates two separate requirements for establishing a Fourth Amendment seizure: (1) the show of authority necessary to attempt a seizure, and (2) the distinct -- and, in this case, dispositive -- submission to authority that completes the seizure. In particular, petitioner relies (Pet. 11) on this Court's decision in United States v. Mendenhall, 446 U.S. 544 (1980), as establishing an "objective seizure test" to determine when a person has been seized. But this Court has explained that the "so-called Mendenhall test" -- which provides that a seizure occurs "'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave'" -- is only a test to determine the "existence of a 'show of authority'" -- not the separate existence of a submission to authority. Hodari D., 499 U.S. at 627-628 (citation omitted).

And it is the submission-to-authority condition that the lower courts found missing here. See Pet. App. 29 ("Because

[petitioner] did not submit to the authority of officers until he stepped away from his RV and followed commands to hold his hands above his head, the Court finds that he was not seized in his home."). The other circuit decisions that petitioner cites (Pet. 12-13, 20-23), in contrast, all involved not only a showing of authority under the Mendenhall factors (the portions that petitioner cites), but also facts (often undisputed) showing submission to it.[2] Those decisions accordingly had no reason to address the permissibility of a seizure in circumstances where a

[2] See United States v. Reeves, 524 F.3d 1161, 1164, 1169 (10th Cir. 2008) (observing that suspect "answered his door * * * in response to a show of authority," "complied" with orders to show his hands, and "was taken into custody"); United States v. Saari, 272 F.3d 804, 807 (6th Cir. 2001) (observing that suspect "testified that he stepped outside because he was ordered to do so and he was afraid of being shot. He stepped out with his hands above his head."); Sharrar v. Felsing, 128 F.3d 810, 819 (3d Cir. 1997) (observing that suspects were "telephoned * * * at home" by the police, who "asked them to come out," and that they "consented to do so and were arrested outside"); United States v. Maez, 872 F.2d 1444, 1447 (10th Cir. 1989) (observing that suspect was told by his wife "what was happening" (i.e., the show of authority), "looked outside," and "said, 'we have to go outside'") (citation omitted); United States v. Edmondson, 791 F.2d 1512, 1515 (11th Cir. 1986) (observing that suspect adopted a "submissive arrest posture" that "indicate[d] an acquiescence to a show of official authority"); United States v. Al-Azzawy, 784 F.2d 890, 891 (9th Cir. 1985) (observing that suspect "was ordered to get on his knees and place his hands on or above his head, which he did"), cert. denied, 476 U.S. 1144 (1986); United States v. Morgan, 743 F.2d 1158, 1161 (6th Cir. 1984) (observing that suspect "appeared at the front door holding a pistol in his hand" but, in accord with an officer's order, "put the gun down inside the door and went outside"), cert. denied, 471 U.S. 1061 (1985).

defendant is confronted with a sufficient show of authority but nevertheless declines to submit to that authority -- which is what the lower courts found here -- let alone reached an outcome in conflict with the decision below.

b. Petitioner also errs in contending that certiorari is necessary to resolve a purported circuit conflict over whether United States v. Santana, 427 U.S. 38 (1976), "applies when officers use force or deception to entice a person to open their door." Pet. 27. To begin with, the court of appeals did not hold that Santana permits officers to use force or deception to effectuate the seizure of a person. Instead, the court of appeals referenced Santana (via a case that quotes it, Illinois v. McArthur, 531 U.S. 326 (2001)) in responding to petitioner's contention, raised at oral argument, "that he was 'seized in [his] doorway,'" as opposed to a public place. Pet. App. 7 (citation omitted; brackets in original). The court simply cited this Court's precedents for the unremarkable proposition that "a person standing in the doorway of a house is in a public place, and hence subject to arrest without a warrant permitting entry of the home." Ibid. (internal quotation marks and citations omitted).

Furthermore, the court of appeals cited Santana only after affirming the district court's factual findings, under which petitioner acted under his own volition "until after he had exited

his home" and "any curtilage of that home." Pet. App. 7. It accordingly did not consider a circumstance where a suspect's actions were the product of coercion, force, and/or deception. The court of appeals' decision accordingly does not conflict with the decisions petitioner cites (Pet. 28-31) involving such circumstances.[3] While petitioner claims that his actions were not "truly * * * voluntary," Pet. 30, that is not a proposition supported by the decisions below.

c. Contrary to petitioner's contentions (Pet. 14-19, 23-27), the question whether the Fourth Amendment permits law enforcement to enter a person's residence for the purpose of executing an administrative arrest warrant is not presented here. As discussed above, supra pp. 10-12, the DHS agents did not physically enter petitioner's trailer while effectuating his arrest, and the lower courts correctly determined that the agents did not seize petitioner from within his residence. Thus, because no residential seizure occurred here (and because petitioner "waived" and/or "conceded" any challenge to the scope or validity

[3] See Maez, 872 F.2d at 1451 ("defendant c[ame] out of [his] home under coercion"); Al-Azzawy, 784 F.2d at 893 (defendant "did not voluntarily expose himself to [officers'] view or control outside his trailer"); United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980), aff'd, 457 U.S. 537 (1982) (defendant's "initial exposure to the view and the physical control of the agents was not consensual on his part").

of the warrant, Pet. App. 7, 29), this Court should not address that issue in the first instance. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

d. Finally, petitioner's claim (Pet. 35-36) that the court of appeals "ignored crucial evidence in this case" -- specifically, "a bodycam video" -- lacks merit. The court acknowledged the existence of the body-camera footage, Pet. App. 4, and observed that the district court "review[ed] * * * the video" when reaching its factual findings, id. at 5. For its part, the district court repeatedly cited the body-camera footage in its recitation of the events leading to petitioner's arrest. See id. at 25, 30 (citing Gov't Ex. 14). And petitioner's characterization of that footage does not call into question any of the district court's findings. Compare Pet. 36 ("The officers refused to leave when [petitioner] did not immediately answer the door. The knock and talk ended and the officers remained -- ordering [petitioner] to 'come out.'"), with Pet. App. 25 ("Rowden went to [petitioner]'s RV, knocked, announced that immigration and customs police were present, and ordered [petitioner] to exit the RV. * * * Between 60 and 90 seconds after Rowden knocked on his door, [petitioner] opened his door and exited his RV."). In any event, even if petitioner could identify some arguable inconsistency between the

district court's factual findings and the body-camera footage, that claim would at most reflect a case-specific error that does not warrant this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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