NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

LOUIS ROBERSON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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(a) <u>The Question Presented for Review Expressed in the Terms and Circumstances of the Case</u>.

Whether an individual can submit to an officer's show of authority – and therefore be seized for purposes of the Fourth Amendment – by temporarily remaining in a parked and running car.

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) <u>Reference to the Official and Unofficial Reports of any Opinions</u>

The order and judgment of the of the United States Court of Appeals for the Tenth Circuit affirming the denial of Mr. Roberson's motion to suppress is published. *United States v. Roberson*, 864 F.3d 1118 (10th Cir. 2017).

(e) <u>Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked</u>.

(i) Date of judgment sought to be reviewed.

The published opinion of the Tenth Circuit of which review is sought was filed July 25, 2017;

(ii) Date of any order respecting rehearing.

Rehearing was denied on October 3, 2017;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Title 28, United States Code, Section 1254(1)

(v) Supreme Court Rule 29.4(b) and (c) do not apply. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) <u>The Constitutional Provisions, Statutes and Rules which the Case Involves</u>.

(1) Constitutional Provisions:

> The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

(g) <u>Concise Statement of the Case</u>.

<u>i.</u> <u>Introduction</u>

This case presents an important question of Fourth Amendment law. Has an individual seated in a running car submitted to an officer's show of authority when the individual does not immediately attempt to flee or drive away?

According to clear precedent from this Court, an individual is seized when he submits to a police officer's assertion of authority. *See, e.g. California v. Hodari D.*, 499 U.S. 621, 625-26 (1991); *Brendlin v. California*, 551 U.S. 249, 254-55 (2007). The question here is whether an individual's decision not to flee or drive away upon a police officer's show of authority is a submission sufficient to render the seizure complete for purposes of Fourth Amendment analysis. This question is particularly important because police encounters, unsupported by reasonable suspicion at their inception, are later justified by an individuals' actions taken *after* the police officer's show of authority and the initial submission to authority.

The facts in this case present the Court with an opportunity to decide the question. Police arrived at a local pool hall without any particularized suspicion of criminal activity. Officers parked in front of Petitioner's car, shined bright debilitating lights into the vehicle, and approached. Upon the officer's show of authority, Petitioner did not flee the vehicle or attempt to drive away. Shortly thereafter, officers observed Petitioner make furtive movements and then ordered the occupants to show their hands. Petitioner placed his hands on the steering wheel and officer opened the vehicle and detected the odor of marijuana. This led to the discovery of a gun under the driver's seat.

The Tenth Circuit analyzed the submission to authority question by examining the view of a reasonable law enforcement officer under the circumstances. *See United States v. Salazar*, 609 F.3d 1059, 1065 (10th Cir. 2010). The Tenth Circuit appears alone in this "reasonable officer" test for submission to authority. Such test also runs contrary to this Court's decisions in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., concurring) and *Florida v. Bostick*, 501 U.S. 429, 435-36 (1991).

ii. Factual Background

On New Years Eve, December 31, 2015, at approximately 10:15 p.m., members of the Oklahoma City Police Gang Enforcement Unit converged in a "wolf-pack" sort of technique on the parking lot of a local pool hall. *Supp. Tr. at 95*. There had been

no call for police, nor any known criminal activity in the parking lot that night. *Supp. Tr. at 26.* Four separate patrol cars with a total of seven gang unit officers simultaneously entered the pool hall parking lot via different entrances. *Supp. Tr. at 24.*

Upon entering the parking lot, two officers stopped their marked police cruiser in front of the first occupied vehicle they encountered. *Supp. Tr. at* 29. Petitioner and his female passenger were sitting in that car. The officers immediately "lit up" Petitioner's vehicle with their police cruiser's "takedown lights." *Supp. Tr. at* 29-30. "Takedown" lights are very bright lights used to illuminate a suspect vehicle or area. The lights are so intensely bright for officer safety reasons. The brightness of the lights allow officers to see what they are approaching but does not allow the person looking into the light to see beyond the light. *Supp. Tr. at 30.*

The officers exited their patrol car and walked "resolutely" toward Petitioner's car from the front. Vol. 1 at 54. The patrol car did not block Petitioner's car in, but he would have hit the officers if he tried to drive away. Petitioner did not flee the vehicle or attempt to drive away. "As soon as" the officers got out of their car or "pretty simultaneously," the officers observed Petitioner make stuffing motions underneath the driver's seat. At that point, the officers ordered the occupants to show their hands. Petitioner continued to make stuffing motions. The officers drew their

weapons and commanded Petitioner to show his hands. When the officer reached the driver's window, Petitioner stopped the stuffing motions, rolled down the window, and put his hands on the steering wheel. Officer smelled marijuana and later found a gun under the driver's seat.

iii. Procedural Background

Petitioner was charged with unlawful possession of a firearm in violation of 18 U.S.C. § 922. He moved to suppress the firearm as the fruit of an illegal seizure of his person. He argued that he had been seized when officers parked their patrol car in front of his vehicle, employed "takedown" lights, and approached his car. The government contended the stop began as a voluntary encounter and ripened into a seizure supported by reasonable suspicion upon Petitioner's furtive movements.

The district court denied the motion to suppress. It concluded that "shining the lights on the [Petitioner's] car and walking toward the front of the car via a route that inhibited the defendant's ability to leave [did not] convert[] the attempted voluntary contact into a seizure." *Order on Motion to Suppress at 6*. Alternatively, if the initial approach was considered a show of force sufficient to constitute a seizure, Petitioner's furtive movements occurred essentially simultaneously with the show of force. *Id. at 6-7*.

The court of appeals affirmed in a published, yet fractured opinion. *United States v. Roberson*, 864 F.3d 1118 (10th Cir. 2017). Each member of the three judge panel authored an opinion. Judge Matheson wrote the lead opinion and held that, assuming the initial encounter was a show of authority, Petitioner did not submit until he placed his hands on the steering wheel. In support, the lead opinion applied the Tenth Circuit's "reasonable officer" standard when determining if an individual has submitted to a show of authority. Judge Hartz concurred, but concluded there was no show of force implicating the Fourth Amendment during the officer's initial approach. Judge Moritz dissented and held that officers seized Petitioner within a few moments of entering the pool hall parking lot due to the officer's forceful police presence and Petitioner's submission by remaining seated in his parked car.

The court of appeals denied Petitioner's request for rehearing en banc.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

This case presents an important question of Fourth Amendment jurisprudence. Has an individual seated in a car submitted to an officer's show of authority when he does not initially attempt to flee or drive away. The Tenth Circuit's decision in this case applied a "reasonable officer" standard to determine whether Petitioner submitted. This test is in conflict with other courts of appeals and decisions from this

court. Because this case is an adequate vehicle to resolve this question, further review is in order.

i. Reasonable Officer Standard for Submission

The court of appeals resolution to this case involved application of a "reasonable officer" standard when determining whether Petitioner submitted to the show of authority. This approach is contrary to precedent from this Court and is not followed by any other circuit court.

The test to determine when a seizure occurs utilizes an objective "reasonable person" standard. *Mendenhall*, 446 U.S. at 554. A citizen's submission to a show of police authority may be made clear by affirmative actions or submission to police by means of "passive acquiescence." *Brendlin*, 551 U.S. at 255. *Hodari D.*, 499 U.S. at 628, adopted the *Mendenhall* test for determining when passive submission to a show of authority develops into a seizure. "[A] seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Hodari D.*, 499 U.S. at 627.

Shortly thereafter, the Court added that *Mendenhall*'s 'free to leave' analysis is inapplicable to situations where a person "has no desire to leave" for reasons unrelated to the police presence, holding instead the "appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise

terminate the encounter." *Bostick*, 501 U.S. at 436. These cases culminated in *Brendlin*'s holding that "what may amount to submission depends on what the person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Brendlin*, 551 U.S. at 262.

Yet, the court of appeals applied a different test, originally found in an earlier Tenth Circuit opinion. *See Salazar*, 609 F.3d 1059. Directly contrary to the objective contextual approach to seizure analysis found in Supreme Court precedent, *Salazar* holds that whether a citizen actually submits to a police officer's show of authority is based upon "the view of a reasonable law enforcement officer." *Salazar*, 609 F.3d at 1064-65. Thus, in the Tenth Circuit (and this case), the question of submission depends entirely on the perspective of law enforcement.

Even the analytical underpinnings of *Salazar* are of questionable validity. In support of adopting the reasonable officer test, *Salazar* cited *United States v. Cardoza*, 129 F.3d 6, 14 n.4 (1st Cir. 1997). *Cardoza*'s footnote, in turn, stated, "[G]iven the generally objective standards employed in Fourth Amendment seizure analysis, we would see little reason to inquire into the subjective intent of the detainee in making the determination whether or not he or she has 'submitted to' a show of authority." *Cardoza*'s proposition that an individual's subjective intent is irrelevant to the

submission analysis does not necessarily require inquiring into the objective view of a reasonable officer. *See also Roberson*, 864 F.3d at 1140 (Moritz, J., dissenting) (same).

The dissenting court of appeals' opinion in this case acknowledged the application of a "reasonable officer" standard in *Salazar* and agreed it is binding on the panel. Yet it further criticized *Salazar* in stating that the appropriate *Mendenhall/Bostick* test which is set out in *Brendlin* says nothing about analyzing submission from a reasonable officer's view. *Roberson*, 864 F.3d at 1140.

This test has been described as "troubling" by at least one other circuit appellate judge. *United States v. Stover*, 808 F.3d 991 (4th Cir. 2015) (Gregory, J., dissenting) ("The Tenth Circuit has offered no analytical basis for its 'reasonable officer' rule (aside from an assertion that objective rules are preferred for Fourth Amendment questions, Salazar, 609 F.3d at 1064), and I can find no other circuit that has adopted the test explicitly."). Even the majority opinion in *Stover*, which has cited to *Salazar*, cautioned that it did "not necessarily adopt the lower standards of submission recognized in some of these cases." *Id*. at 1000.

In an unpublished opinion, the Sixth Circuit cites to *Salazar* for the proposition that a submission analysis is "an objective inquiry that takes into account all the facts and circumstances of the stop." *United States v. Johnson*, 631 Fed.Appx. 299 (6th

Cir. 2015) (unpublished). Yet *Johnson* did not review the question from the perspective of a "reasonable officer." It weighed the totality of the circumstances. *Id*. at 303-04. No other court of appeals decision appears to discuss *Salazar* or the reasonable officer test.

In short, the court of appeals' opinion in this case applies an outlier test not followed by any other circuit and contrary to this court's precedent.

ii. The issue is important

When an individual has submitted in the Fourth Amendment context controls the analysis of the seizure. It determines whether an officer has reasonable suspicion to effectuate a seizure even if that reasonable suspicion develops after the initial contact but before submission. Additional clarity on this issue will provide meaningful guidance to both defendants and law enforcement, who deal with this issue on an hourly basis.

In many Fourth Amendment cases, "the primary dispute concerns the submission-to-authority requirement." *United States v. Mosely*, 743 F.3d 1317 (10th Cir. 2014) (quoting *Salazar*, 609 F.3d at 1064). The question frequently boils down to "where to draw the line between submission and non-submission in the face of an individual's equivocal reaction to police acts initiating a show of authority." *Stover*, 808 F.3d at 999. The answer to this question controls the timing of a seizure. Often,

a police officer's show of authority begins without the necessary reasonable suspicion required of a seizure. However, a suspect's actions after the initial show of authority, but before submission to that authority can be considered when determining whether reasonable suspicion exists. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); *United States v. Smith*, 633 F.3d 889, 893-894 (9th Cir. 2011). Thus, the timing of a submission is of paramount importance to the seizure analysis.

Indeed, "lower courts will frequently be confronted with difficult questions concerning precisely when the requisite physical seizure or submission to authority (typically deemed to require something more than 'slowed movement' or a 'momentary pause') occurs." 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(d) (5th ed. 2017). Clarity on this issue is essential.

iii. Conclusion

The petition should be granted.

(i) Appendix.

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Roberson, 864 F.3d 1118 (10th Cir. 2017).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

Order Denying Rehearing, *United States v. Roberson*, No. 16-6136 (10th Cir. Oct. 3, 2017);

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

Order on Motion to Suppress, dated December 15, 2015, United States District Court for the Western District of Oklahoma, CR-15-160-F (Docket Number 32);

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

None.

Respectfully submitted,

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