

No. _____

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

United States Court of Appeals for the Tenth Circuit, No. 16-2216
United States District Court, New Mexico, No. 1:15-CV-1113

KANA FARRELL, ORIANA LEE FARRELL, as an individual and O.B.O. her
minor children: HEZEKIAH FARRELL II, KUSH FARRELL, MAGNIFICENT
FARRELL, and GIBRALTER FARRELL

Plaintiffs-Appellant,

v.

ELIAS MONTOYA

Defendant-Appellee.

*APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT*

APPLICATION TO THE HONORABLE
JUSTICE SONIA SOTOMAYOR
AS CIRCUIT JUSTICE

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Plaintiffs-Appellants, by and through their undersigned counsel, and pursuant to Rule 13(5) of the Rules of this Court, apply for an extension of time of sixty (60) days, to and including July 5, 2018, for the filing of a petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Tenth Circuit, dated December 27, 2017 (attached as Exhibit A, “*Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017), “[Doc. 78]”), on which a timely petition for rehearing and for rehearing *en banc* was denied on February 5, 2018 (attached as Exhibit B, “[Doc. 82]”). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

1. The date within which a petition for writ of certiorari would be due, if not extended, is May 7, 2018 (because the 90-day deadline falls on May 6, 2018, which is a Sunday, and therefore the filing deadline is, May 7, 2018).

2. This case is currently in the following stage of proceedings:

Applicants filed Substantive and Procedural Due Process Claims under the United States Constitution *via* 42 U.S.C. 1983 and various state claims, in New Mexico State Court. Defendants then removed Applicants to federal court, based on the claims under 42 U.S.C. 1983.

3. In the New Mexico District Court (The “District Court”), Defendants moved for summary judgement on the basis of qualified immunity. The District Court found that there was a seizure for purposes of the 4th amendment. [Doc. 29].

The District Court found that there was clearly established law that put Defendant Montoya on notice that his conduct related to shooting at the Applicants could be found to be excessive force by a jury. [Doc. 69]. The District Court did not find the same pertaining to the conduct of Defendants DeTavis and Luna, and granted their motions for summary judgement on the basis of qualified immunity. [Doc. 69].

4. Defendant Montoya applied for an interlocutory appeal to the 10th Circuit Court of Appeals (the 10th Circuit”), which was granted. [Doc. 71], and the matter was then stayed in the New Mexico District Court. [Doc. 73].

5. After briefing completed and an Oral Argument was held, the 10th Circuit found that the Farrells/Applicants, could not show that a seizure occurred at the time of the shooting by Defendant Montoya, pursuant to *United States v. Salazar*, 609 F.3d 1059, 1064 (10th Cir. 2010) (quoting *California v. Hodari D.*, 499 U.S. 621, 625–26, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)) (brackets omitted). *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017); [Doc. 78].

The 10th Circuit went on to hold that the district court should have granted Defendant summary judgment because Officer Montoya’s shots did not halt the Farrells' departure and, because they were fleeing, they were not seized at the time Montoya fired his weapon, even if they had a subjective intent to submit to

authority; and held that the 10th Circuit rule is that "to comply with an order to stop—and thus to become seized—a suspect must do more than halt temporarily; he must submit to police authority, for there is no seizure without actual submission." *Salazar*, 609 F.3d at 1066...". *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017). [Doc. 78]. This part of the 10th Circuit decision appears to be in conflict with the 10th Circuit prior opinions in *United States v. Morgan*, 936 F. 2d 1561 (10th Cir. 1991) and *United States v. Hernandez*, 847 F. 3d 1257 (10th Cir. 2017), where a momentary halt was found to constitute submission to a show of authority, under the *Hodari D* test, and thus a seizure was found. *See also United States v. Huertas*, 864 F.3d 214, 215 (2d Cir. 2017)6, for which petition for writ of *certiorari* to the U.S. Supreme Court has been filed.

Finally, the 10th Circuit found that a seizure is broken as soon as a citizen flees because there is no "ongoing seizure rule". *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017). [Doc. 78]. However, this holding appears to have expanded *Hodari D*'s rule to be that once seizure is found, there is no finding of continued submission, unless identical submission continues, in order to allow Fourth Amendment protections to attach to the officer's conduct, even just three seconds after the last physical touch by one of the seizing officers.

However, this expansion of *Hodari D* has been applied in a way that could render the United States Supreme Court decisions in *Michigan v. Chesternut* and

U.S. v. Mendenhall, effectively moot. This is because the 10th Circuit looked to the “submission” factor alone, finding that *any* fleeing, regardless of the surrounding circumstances, in a factual context where seizure had already been effectuated and was clearly occurring just three seconds prior (as discussed below) to the officer’s shooting, constituted a lack of seizure under the Fourth Amendment. [Doc. 79]

However, this appears to be the type of “bright-line test” that the United States Supreme Court in *Chesternut* declined to adopt pertaining to defining what constitutes a seizure, reasoning that such approach would not properly balance the interests of individual rights protection and law enforcement. Instead, the *Chesternut* court reiterated its “clear direction” that in each case the seizure analysis is based on “all of the circumstances surrounding the incident.” *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); see also *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Thus, the 10th Circuit application of the *Hodari D* rule, as a bright-line rule resulted in no protection under the Fourth Amendment for the Farrells. Clearly, these are extraordinarily important issues warranting a carefully prepared Petition.

6. Finally, there is an important issue pertaining to a finding that is not supportable by the record in this case. The 10th Circuit’s finding that “[a]nd in any event, the dash-cam video contradicts the factual basis of the argument; there was

no pause in the minivan's departure. We therefore cannot credit the Farrells' assertion. *See Scott v. Harris*, 550 U.S. 372, 380 (2007)..." is not supportable. [Doc. 78] The dash-cam video, [Doc. 31], shows that Officer Montoya arrived and immediately took out his gun and pointed it at the Farrells. Officer Montoya is in view of the driver's seat directly, and *via* the rear-view and side-view mirrors. Defendant Montoya is shown pointing his gun at the Farrells for five seconds, while Defendant DeTavis is bashing-in the Farrells' vehicle's window. Then, after said five seconds, Farrells start to drive away; and then, exactly three seconds later, when the Farrells are still feet away from the officers, Officer Montoya fires three shots directly at the Farrells' van. [Doc. 79]

Therefore, the 10th Circuit's finding is in conflict with its own rule that the record is to be viewed in the light most favorable to the prevailing party here, the Farrells. *See United States v. Hauk*, 412 F.3d 1179, 1185 (10th Cir.2005). Moreover, the Farrells' argument that they remained halted in response to the show of authority by Officer Montoya when he pointed his gun, and kept it pointing, at the Farrells for at least five seconds before the Farrells began moving forward in their vehicle, is clearly not entirely contradicted by the record, as the video shows. This momentary submission is consistent with *Morgan* and *Hernandez*, *supra*. And it would be an anomaly for the rule to be that five seconds of submission

cannot effectuate a seizure but three seconds of fleeing discontinues the seizure under *Hodari D.*

7. Applicants request an extension of time based on the above, in light of the important issues at hand. And also because the decision whether to file a petition for writ of *certiorari* itself has warranted substantial time, as the Applicants' state claims have been remanded to the New Mexico State Court at this time [Doc. 86], Applicants have had to decide whether or not to continue in federal court, which has taken time due to careful and respectful consideration of the matter in its entirety. Seeking this Court's review in any case is a serious decision. Moreover, this case is uniquely important. Applicants have appropriately required time to consider the important aspects involved in submitting a petition for writ of *certiorari*.

8. Additionally, Applicants' counsel requires the additional requested time to continue to attempt to attain experienced co-counsel to assist in this matter. Applicants, *via* Oriana Lee Farrell, have qualified for indigent status in prior legal proceedings related to the instant matter, and Applicants' financial circumstances have not significantly changed. Applicants' counsel has contacted multiple Supreme Court clinics and attorneys in similar capacities, who have experience with filing petitions for writ of *certiorari* to the United States Supreme Court, which Applicants' counsel does not have, but has not yet been able to retain said

co-counsel. Applicants therefore requests an extension of 60 days to be able to continue to attempt attain co-counsel in light of the Applicants' limited financial circumstances, in order to be able to fully and adequately represent Applicant in this matter.

9. Attorney for Defendant Montoya has been contacted and does not oppose the extension of time applied for herein.

WHEREFORE, Applicant prays, for the foregoing reasons, that an extension of time to and including July 5, 2018, be granted within which petitioner may file a petition for a writ of *certiorari*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on abril 27, 2018, I submitted for e-filing and service the foregoing pleading through the Court's "Odyssey File & Serve" filing system which caused the following counsel of record to be served by electronic means or otherwise stated, as more fully reflected on the Notice of Electronic Filing

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