No. 09-9100

In The

Supreme Court of the United States

October Term 2010

BEAU RADLEY,

Petitioner,

v.

FAIR COUNTY POLICE DEPARTMENT and ARTHUR GOODE,

Respondents.

On Writ of Certiorari to the

United States Court of Appeals for the Fifteenth Circuit

BRIEF FOR RESPONDENTS

John Ellis
Counsel for Respondents

QUESTIONS PRESENTED

I. Whether the fourth amendment protection against excessive force extends beyond initial seizure.

II. If the Court were to apply a rule of continuing seizure to the fourth amendment protection against excessive force, to what point beyond the initial seizure should that protection extend?

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The opinions of the District and Appeals Courts have not been reported. The opinions appear in the record.

JURISDICTION

The court of appeals entered judgment on March 15, 2010. (R. at 16). Petitioner filed his petition for writ of certiorari on May 15, 2010. *Id*. at 17. This Court granted the petition on October 7, 2010. *Id*. at 18. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2000). A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo*.

STATEMENT OF THE CASE

On September 23, 2008, Officer John Marlin, an employee of the Fair County Police Department, was on patrol in Fair County along Highway X. (R. at 3). Officer Marlin pulled over Beau Radley's vehicle on suspicion that Radley was driving drunk. *Id*. Marlin asked Radley to take a breathalyzer test. *Id*. When Radley refused, Officer Marlin took him into custody and drove him to the Fair Police Station. *Id*.

When they arrived at the station, Officer Marlin escorted Radley into the booking room and transferred custody of Radley to Officer Arthur Goode, another employee of the Fair County Police Department. *Id*. Martin left Radley under the supervision of Officer Goode. *Id*. When Radley and Goode were alone, there was a stern exchange before the initiation of the booking process. *Id*. Officer Goode then removed Radley's handcuffs for the booking process, and when Goode recuffed Radley after booking, he secured the handcuffs tighter than was customary. *Id*. Officer Goode chose to leave the handcuffs tight and paid little attention to Radley's complaints. *Id*.

Upon Officer Marlin's return to the booking room, Radley complained to him that the cuffs were too tight. *Id*. Officer Marlin loosened them and again left Radley in the sole custody

of Officer Goode. *Id*. Leaving Radley's handcuffs on, Officer Goode escorted him out of the booking room and into a holding cell. *Id*. Once in the holding cell, Goode secured Radley on the floor by placing his knee on Radley's back. *Id*. Officer Goode explained that he did not appreciate Radley challenging his authority in front of Marlin, a fellow officer. *Id*. He then suggested that Radley not do so again. *Id*.

Several hours after the exchange, when Officer Goode was off duty, Radley was taken to the Fair County Hospital after he complained to another officer that Goode had injured him. *Id*. The hospital determined that Radley had little more than some minor bruising and a small cut on his lip. *Id*. at 4.

Radley filed a complaint, pursuant to 42 U.S.C. § 1983, against the Fair County Police Department and Officer Goode, alleging that Goode's use of excessive force violated his fourth and fourteenth amendment rights. *Id*. The County filed a motion to dismiss the fourth amendment portion of the complaint on the grounds that it failed to state a claim upon which relief may be granted. In this motion, the County contended that fourth amendment protection from excessive force does not cover arrestees who have already completed the booking process; it argued that even if the Fourth Amendment does cover arrestees beyond the initial seizure, that protection expires once the arrestee leaves the custody of the arresting officer. *Id*. at 5–7. Radley countered that most circuit courts have chosen to adopt a fourth amendment "continuing seizure" doctrine that further protects against excessive force, and that the continuing protection should extend until the arrestee is granted a probable cause hearing or is arraigned and formally charged. *Id*. at 8–9.

The district court granted the County's motion to dismiss. *Id*. at 13. The court conceded that most circuits had adopted a "continuing seizure" doctrine, but it chose to accept the view that the continuing protection only persists while the arrestee remains in the custody of the arresting officer. *Id*. Radley appealed, and the appeals court affirmed the district court's judgment. *Id*. at

14–16. Radley filed a petition for certiorari with the United States Supreme Court. *Id*. at 17. This Court has granted certiorari to determine first, whether fourth amendment protection against excessive force extends beyond the initial seizure; and second, how far beyond the initial seizure that protection should extend if continuing seizure is implemented as a judicial directive. *Id*. at 18.

SUMMARY OF THE ARGUMENT

I

The fourth amendment protection against excessive force should extend no further than initial seizure. This Court has declined to extend that protection in the past, and there is no reason to do so here. *See Graham v. Connor*, 490 U.S. 386 (1989). Radley's circumstances during the alleged use of excessive force were too far removed from his initial seizure. This Court has also interpreted seizure narrowly and literally. Under those interpretations, seizure is not an ongoing event that occurs throughout the criminal judicial process; it is a single act. *California v. Hodari*, 499 U.S. 621, 225 (1991) (citing *Thompson v. Whitman*, 85 U.S. 457, 470 (1873)). Either physical contact by law enforcement or a voluntary submission to a show of force is required for the act to constitute a seizure. *See Hodari*, 499 U.S. at 624.

Additionally, this Court has refused to extend other fourth amendment protections to arrestees being detained, which is evidence of how fourth amendment protection against excessive force should be applied. *See Bell v. Wolfish*, 441 U.S. 520, 558 (1979). Finally, various circuit courts have followed Supreme Court precedent and likewise refused to extend fourth amendment protection beyond the point of initial seizure. *See, e.g*., *Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir. 1996); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989). Radley's appropriate legal recourse is the Due Process Clause of the Fourteenth Amendment, not the Fourth Amendment.

II

Even if this Court does choose to adopt continuing seizure and extend fourth amendment protection against excessive force beyond the initial seizure, that protection should extend no further than the booking phase, although allowing it to expire before booking is preferable. Even among circuit courts that have adopted continuing seizure, many allow seizure to continue only until the arrestee has left the custody of the arresting officers. *See*, *e.g.*, *Powell v. Gardner*, 891 F.2d 1039, 1044 (2nd Cir. 1989); *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir. 1988). Allowing for joint custody among multiple officers accounts for sudden changes in custody at the scene of the arrest, portrayed by Radley as problematic. If the arresting officer rule proves too unpredictable, this Court should consider adopting a location standard, whereby fourth amendment protection against excessive force expires when the arrestee reaches a certain location.

Even if the foregoing options are not satisfactory, extending continuing seizure to the probable cause hearing, or any step in the criminal judicial process subsequent to booking, would create an ambiguous and impracticable judicial standard. At the absolute furthest, continuing seizure should extend until the arrestee is booked.

ARGUMENT

I. FOURTH AMENDMENT PROTECTION SHOULD BE AFFORDED ONLY UNTIL THE INITIAL SEIZURE IS COMPLETE.

The Fourth Amendment to the United States Constitution guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. Historically, claims of excessive force in the course of an arrest, search, or other act of seizure have been categorized as fourth amendment claims and have been analyzed under a standard of objective reasonableness. *Graham v. Connor*,

490 U.S. 386, 387 (1989). This standard is considerably easier to meet than that of the Due Process Clause contained in the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1. The substantive due process standard has been used to address claims of punishment without due process of law, most commonly brought by pretrial detainees who have already been seized.

A number of circuit courts have broadened the text of the Fourth Amendment and adopted a policy of recognizing "continuing" seizure, allowing the objective reasonableness standard to encompass a greater number of arrestees in a diverse array of post-arrest circumstances. In the past, however, this Court has refused to extend Fourth Amendment protection beyond the initial seizure, and several circuits have followed suit. *See, e.g.*, *Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir. 1996); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989). This Court has also defined seizure narrowly within the everyday understanding of the Fourth Amendment's text. *See, e.g.*, *California v. Hodari*, 499 U.S. 621, 625–26 (1991); *U.S. v. Mendenhall*, 446 U.S. 544, 554–55 (1980). Therefore, this Court should adhere to its own jurisprudence and recognize that seizure is a solitary act limited in scope, and that the higher degree of protection provided by the Fourth Amendment should not extend past the point of initial seizure.

A. *In the past, this Court has expressly declined to extend fourth amendment protection against excessive force beyond the initial seizure.*

This Court held in *Graham v. Connor,* 490 U.S. 386, 387 (1989), that claims of law enforcement officials using excessive force in the course of an investigatory stop, arrest, or other seizure of a citizen are most accurately characterized as claims that invoke the protections of the Fourth Amendment. These claims, the *Graham* Court emphasized, should not be analyzed under the substantive due process test of the Fourteenth Amendment. *Id*. at 388. The *Graham* ruling came in the context of a case in which the plaintiff had been brutalized by officers who pulled him over on suspicion of stealing from a convenience store. *Id*. at 386. The excessive force in

question occurred just outside the plaintiff's car and immediately after he was pulled over for the investigatory stop that constituted the initial seizure; he had not been booked, transported to the station, or even arrested. *Id*. This Court's use of a fourth amendment standard in *Graham* provides some notion of the circumstances to which fourth amendment protection against excessive force should generally be applied: events that are either part of the initial seizure or immediate in time and proximity to it. *See Id*. at 386–88. Operating under *Graham's* implicit definition of the scope of fourth amendment protection, post-booking detainment of Radley in the instant case would not appear to be an investigatory stop, arrest, or other act of seizure.

More significant than the application of a fourth amendment standard to a roadside investigatory stop is this Court's refusal to extend that protection beyond the initial seizure. This Court stated that Its opinions had so far declined to resolve the question whether the Fourth Amendment should provide individuals protection against the intentional use of excessive physical force beyond the point where arrest ends and pretrial confinement begins, and that it was reluctant to answer that question. *See Id*. at 395 n.10. Thus, while it left open the possibility that it might one day understand the Fourth Amendment as continuing past the initial seizure, this Court expressed a lack of desire to address the issue at all. *Id*. The alleged excessive force against Radley occurred so far after his initial seizure that, in keeping with the *Graham* ruling, this Court need not concern itself with extending seizure in the instant case either; the Fourteenth Amendment is a more appropriate avenue for Radley's claim.

B. *This Court has embraced a narrow and literal interpretation of seizure.*

The test established by this Court in *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980), dictates that a free person has been seized under the Fourth Amendment only if a reasonable person in the same circumstances would have believed he or she was not at liberty to leave. Before delving

further into the *Mendenhall* analysis, it is worth pointing out that the text of the *Mendenhall* opinion specifically uses the diction "has been seized" in the past tense when describing the condition of the person who is not free to leave. *Id*. This Court did not instruct that seizure *begins* at that point, but that it has already occurred. *Id*. One must be seized in order to be confined. If a person has already been seized at the point he or she becomes confined, as this Court affirmatively stated in the text of its opinion, that person cannot also still be in the process of *being* seized. The seizure is complete.

However, even disregarding any idiomatic assessment of *Mendenhall*, this Court went on to explain that it constructed the aforementioned definition of seizure for the purpose of applying it to "street encounters" between citizens and law enforcement. *See Id*. This Court plainly did not intend for its definition to encompass post-booking detention in a cell. *See Id*. Furthermore, the *Mendenhall* Court stressed that even these street encounters must be carefully examined on a case-by-case basis to determine which of them actually constitute seizure and warrant fourth amendment protection. *Id*. at 554–55. Therefore, this Court not only defined seizure in *Mendenhall* with street encounters in mind, it also reiterated that fourth amendment protections apply most appropriately to those street encounters, and it further cautioned against broadening the concept of seizure to encompass too vast an array of confrontations between citizens and law enforcement. *See Id*. This Court should follow the precedent established in *Mendenhall* and reaffirm the limits of the Fourth Amendment.

In *California v. Hodari*, 499 U.S. 621, 625 (1991), this Court specified in greater detail what must occur for the encounter to qualify as a seizure. The *Hodari* analysis explained that seizure is defined by some physical application of force, or by a display of authority to which the citizen yields. *Id*. at 625–26. Yielding is by definition a voluntary act. While confinement is indeed a show of authority, there is necessarily no yielding involved because the subject who is

confined has no choice to yield. *See Id*. at 626. Additionally, to clarify the meaning of "physical force," this Court emphasized that merely chasing or cornering the defendant did not constitute seizure. *Id*. at 626–627. The requirement of physical force to produce a seizure was not met until the officers actually tackled the citizen to the ground, indicating that a seizure necessitates application of literal, physical force through bodily contact if the citizen has not yielded to a display of authority. *Id*. at 629.

It thus follows from this Court's literal interpretation that a law enforcement officer would be required to continually apply physical, bodily force to the subject throughout the duration of confinement in order to reconcile continuing seizure with the definition set out in *Hodari*. This would be extraordinarily impractical, and because it is also impossible for an arrestee to yield during confinement as previously discussed, post-booking detention in Radley's case cannot meet the criteria for seizure established by this Court.

Finally, in effect rejecting the proposal that seizure is continuous, this Court narrowly interpreted seizure in *Hodari* as being one act in the criminal judicial process, limited in time and space. *See Id*. at 625. According to the *Hodari* opinion, the Fourth Amendment does not purport to invent a concept of "continuing arrest." *Id*. Rather, a seizure is one single act, not a continuous fact. *Hodari*, 495 U.S. at 625 (citing *Thompson v. Whitman*, 85 U.S. 457, 470 (1873)). Once again, the circumstances of Radley's detention after his arrest do not adequately correspond to this Court's established understanding of seizure. Radley had already been seized, and therefore his fourth amendment protection had expired when the alleged excessive force occurred. He should bring his claim under the Fourteenth Amendment.

C. *This Court has refused to extend other fourth amendment protections to arrestees who are being detained.*

Declining to extend fourth amendment protection against excessive force would be in step with this Court's earlier refusal to extend other fourth amendment protections to pretrial detainees. In *Bell v. Wolfish,* 441 U.S. 520, 556–57 (1979), this Court held that requiring pretrial detainees to remain outside while their cells were searched by security personnel did not violate the fourth amendment guarantee against unreasonable search and seizure, because that guarantee does not extend to detainees being held in a detention facility where safety and security are paramount. The *Bell* opinion likewise refused to grant the fourth amendment right to be secure in one's person to pretrial detainees who were subjected to invasive body cavity searches; such privacy rights of detainees were again secondary to the goal of assuring the safety and security of other persons in the facility. *Id*. at 558.

Perhaps most importantly, the *Bell* Court held that any of the above searches could be conducted without probable cause, another protection guaranteed by the Fourth Amendment. *Id*. at 560. Detention facilities, the Court explained, are unique places fraught with serious security threats. *Id.* at 559. The *Bell* Court emphasized that under ordinary circumstances not involving pretrial detainees, any of the above searches would certainly be unreasonable; however, in the setting of a detention facility, the increased risks warrant a finding that increased deprivation of fourth amendment protection is reasonable. *See Id*. at 555–58. If this Court was willing to subject pretrial detainees in *Bell* to blind cell searches and body cavity searches, and if this Court was willing to do away with the fourth amendment requirement of probable cause for those searches, then it should likewise acknowledge that fourth amendment protection against excessive force should not extend to Radley's detention after he was already booked.

It is true that this Court also rejected a substantive due process standard in *Bell*, but it rejected the standard only because the activities in question did not rise to the level of punishment within the Fourteenth Amendment. *See Id*. at 560–61. This Court's explanation of that rejection indicates strongly that substantive due process would have applied if punishment *had* occurred, and that excessive force claims are properly brought under the Due Process Clause at this stage of the criminal judicial process. *See Id*. Accordingly, as a pretrial detainee in a detention facility, Radley's recourse is not the Fourth Amendment; it is the Due Process Clause of the Fourteenth Amendment.

D. *Following Supreme Court precedent, several circuit courts have chosen not to extend fourth amendment protection against excessive force beyond the initial seizure.*

Four federal appeals courts have explicitly rejected the doctrine of continuing seizure. The Seventh Circuit first addressed the issue in *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989). In declining to extend fourth amendment protection against excessive force to an arrestee who was being questioned at a police station, the court noted that the Fourth Amendment's text describes instances in which a person may be deprived of his or her liberty. *See Id*. at 195. The court took the position that the Fourth Amendment should govern the conduct of law enforcement during those instances; it exists for the purpose of restricting the state's ability to go about depriving citizens of their liberty. *See Id*. Consequently, the Fourth Amendment has no application in a context where deprivation of liberty has already occurred, as is the case with Radley during his confinement at the police station. *See Id*. At that point, the right to due process under the Fourteenth Amendment should take over.

Wilkins was decided by the Seventh Circuit before this Court's ruling in *Graham v. Connor*, discussed above. However, while revisiting the same issue two years later in *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990), the Seventh Circuit found its prior ruling in *Wilkins* to

be consistent with the *Graham* ruling. It affirmed that in light of *Graham*, where this Court refused to adopt continuing seizure, the Fourth Amendment should govern claims of excessive force during arrests, and due process should govern any similar claims subsequent to arrest. *Id*.

The Fifth and Eleventh Circuits have also rejected the concept of continuing seizure. In *Brothers v. Klevenhagen*, the Fifth Circuit made clear its position that the Fourth Amendment provides no constitutional basis for adjudicating claims of excessive force arising after the incident of arrest is completed, and that the Due Process Clause should apply to pretrial detainees. *Brothers v. Klevenhagen*, 28 F.3d 452, 455–56 (5th Cir. 1994) (citing *Valencia v. Wiggins*, 981 F.2d 1440, 1443–45 (5th Cir. 1993)). In defining the term "pretrial detainee," the court opined that after an individual is arrested, and *certainly* after he or she is transferred to a jail cell, that individual should be considered a pretrial detainee. *Id*. at 457. In *Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir. 1996), the Eleventh Circuit avoided this ambiguity altogether, stating that claims involving the mistreatment of pretrial detainees *or* arrestees are properly made under the Fourteenth Amendment's Due Process Clause. The court in *Cottrell* also reiterated that Fourth Amendment protection against excessive force applies only to the circumstances and events relating to an arrest, and to the force used in making that arrest. *See Id*. at 1492.

The Fourth Circuit most recently rejected continuing seizure, though it had grappled with the issue since the late 1980's. The Fourth Circuit's opinion in *Cooper v. Dyke*, 814 F.2d 941, 949 (4th Cir. 1987), concluded that even if there has been no judicial determination of grounds for detention, including a hearing to assess probable cause or set bail, deprivations of liberty not rising to the level of punishment still violate the Fourteenth Amendment rather than the Fourth Amendment. Three years later, *U.S. v. Cobb*, 905 F.2d 784, 788 (4th Cir. 1990), established that a pre-trial detainee is one lawfully arrested and held prior to any formal adjudication of guilt.

Finally addressing the matter of continuing seizure in *Riley v. Dorton*, the Fourth Circuit decided that a pretrial detainee, who was slapped and threatened more than two hours after his arrest, was not subject to an investigatory stop, arrest, or other act of seizure at the time of the alleged excessive force. *Riley v. Dorton*, 115 F.3d 1159, 1161 (4th Cir. 1997) (citing *Graham v. Connor*, 490 U.S. 386, 387 (1989)). Using the *Graham* precedent in conjunction with its prior rulings in *Cooper* and *Cobb*, the Fourth Circuit held that fourth amendment protection against excessive force does not extend to pretrial detainees or to arrestees, and that the Fourth Amendment does not necessitate or even suggest a doctrine of continuing seizure be constructed by the courts. *See Riley*, 115 F.3d at 1162.

In sum, the precedents of this Court are clear, and multiple circuit courts have followed those precedents in refusing to unnecessarily expand the scope of the Fourth Amendment. This Court should adhere to its own jurisprudence, as well as to the constitutional principles it has disseminated among the lower courts, and again refuse to extend fourth amendment protection against excessive force beyond the initial seizure.

II. EVEN IF THE FOURTH AMENDMENT PROTECTS BEYOND THE INITIAL SEIZURE, IT SHOULD EXTEND, AT A MAXIMUM, ONLY AS FAR AS THE BOOKING PHASE.

Radley contends that this Court should extend fourth amendment protection against excessive force until the probable cause hearing or arraignment, but to do so would be to grossly over-extend the scope of the Fourth Amendment and infringe upon the jurisdiction of the Fourteenth Amendment. While it is true that a majority of circuit courts have extended fourth amendment protection somewhat by adopting continuing seizure, a substantial minority of those circuits have also adopted an arresting officer rule: a doctrine stipulating that the protection ends when the arrestee leaves the custody of the arresting officer. *See*, *e.g.*, *Powell v. Gardner*, 891 F.2d 1039, 1044 (2nd Cir. 1989); *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir. 1988). This

Court should consider adopting either an arresting officer rule or a new rule dictating that fourth amendment protection ends when the arrestee reaches a certain location.

Alternatively, if an arresting officer rule and a location standard prove problematic, fourth amendment protection should *certainly* extend no further than booking. Extending the protection until the probable cause hearing or arraignment, the two steps in the criminal judicial process immediately after booking, would present difficulties for bright line application across all states and would result in a nonsensical scenario in which arrestees free of custody are still classified as being "seized."

A. *Even among circuit courts that have recognized continuing seizure, a common view is that seizure should extend only until the arrestee leaves the custody of the arresting officer.*

Three circuits have expressed views consistent with the arresting officer rule. In *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985), the Ninth Circuit held that a police officer's use of excessive force against two arrestees while en route to the police station constituted a seizure under the Fourth Amendment. The court concluded that once an act of seizure has occurred, the seizure continues as long as the arrestee remains with the arresting officers. *Id*. Important to note here is the plurality of the word "officers." Radley argues that the arresting officer rule subjects the fourth amendment rights of arrestees to arbitrary transfers of custody at the scene of the arrest; he argues that if the officer making the arrest immediately transfers the arrestee to another "backup officer" at the scene, the arrestee's fourth amendment rights have expired based on the whims of the first officer. (R. at 9). This is an inaccurate representation of the rule, as the Ninth Circuit's analysis makes clear. The court's reference to multiple officers unambiguously takes into consideration other officers involved at the scene of the initial seizure. *See Robins*, 773 F.2d at 1010. It accounts for sudden transfers of arrestees between officers at the scene of the arrest by allowing fourth amendment protection to transfer between those officers as well. *See Id*. The

Ninth Circuit therefore recognizes continuing seizure, but it limits the doctrine to the confines of the arresting officer rule. *Id*.

The Second Circuit adopted the arresting officer rule in *Powell v. Gardner*, 891 F.2d 1039, 1044 (2nd Cir. 1989), stating that the fourth amendment standard should be applied to the period prior to the point when the arrestee is arraigned and formally charged, and only while the arrestee remains in the sole or joint custody of the arresting officers. Again, the emphasis on multiple officers and joint custody serves to mitigate potential problems that might result from transfers of custody between officers at the scene. *See Id*. Joining the Second and Ninth Circuits, the Sixth Circuit endorsed the arresting officer rule in *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir. 1988). The court decided that once a person is seized by arrest, the seizure continues during the time that person remains under the supervision of the arresting officers. *McDowell*, 863 F.2d at 1306 (citing *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985)). Yet again, the arresting officer rule adopted by the Sixth Circuit takes into consideration sudden transfers of custody at the scene of the arrest by accounting for multiple officers in its articulation of the rule. *See Id*.

As a consequence, the formulations of the arresting officer rule adopted by the Second, Sixth, and Ninth Circuits abate the concerns raised by Radley with regard to sudden transfers of custody immediately after arrest. This Court should recognize that, under the arresting officer rule, Radley is not subject to a fourth amendment standard. Radley's arresting officer did not transfer him immediately following the arrest. (R. at 3). The officer waited until he and Radley had returned to the station for booking, and when he did transfer custody, it was to another officer completely unrelated to the circumstances of the arrest. *Id*.

Alternatively, however, if this Court decides ambiguity or unpredictability might hinder bright line application of the arresting officer rule, it should consider employing a location standard. *See Arizona v. Roberson*, 486 U.S. 675, 691 (1988) (noting that the Supreme Court has

expressed a preference for bright line rules). This Court could extend fourth amendment protection against excessive force until arrestees reach the police station, or some other physical location that must be reached prior to booking, at which point it would be replaced by the Fourteenth Amendment's substantive due process standard. That is, the Fourth Amendment would cover any use of excessive force at the location of the initial seizure, and any subsequent location to which the arrestee might be taken, until he or she is brought to the police station. Such a standard is desirable because its application would be simple and effective, and it would do away with all potential problems posed by the sudden transfers of custody discussed earlier, particularly issues of equal protection that might result from one arrestee arbitrarily losing his or her fourth amendment rights earlier than another. The location standard would allow the Fourth Amendment to comprehensively cover incidents occurring before the arrestee reaches the location that triggers the Fourteenth Amendment's substantive due process standard, and it would allow the courts to disregard factors that depend on subjectivity and chance, such as transfers of custody, passage of time, and physical proximity to the site of the initial seizure. *See Id*.

Under either the arresting officer rule, which has been adopted by multiple circuit courts, or a standard that uses a reasonable location (the police station being the most sensible) to determine where fourth amendment protection ends, the proper avenue for Radley's claim is the Fourteenth Amendment.

B. *Extending fourth amendment protection against excessive force until the probable cause hearing, or beyond, would create a standard that is impracticable.*

Even if this Court finds an arresting officer rule or a location standard to be problematic, it should extend fourth amendment protection no further than booking. The step that follows booking in the criminal judicial process is the probable cause hearing. After arrest, many states allow arrestees to be held for up to forty-eight hours before being brought to a magistrate for a

determination of probable cause. *See* FLA. STAT. ANN. § 3.133 (West 2007); TEX. CODE CRIM. PROC. ANN. Art. 14.06 (West 2005). These states also allow extensions of twenty-four hours at a time if the judge can show such extensions are necessary. *See* FLA. STAT. ANN. § 3.133 (West 2007). If this Court introduces a fourth amendment requirement of a continuing seizure doctrine among the states, arrestees would be in the process of being "seized" while they sit in a cell for days on end awaiting a probable cause hearing. The right to due process under the Fourteenth Amendment protects those who have already been seized; by any rational understanding of seizure, an arrestee confined to a cell for several days has already been seized.

Furthermore, if a judge has already issued a warrant for an individual's arrest, that individual is not even *subject* to a post-arrest probable cause hearing in some states, because the judge must have made the required judicial determination of probable cause before issuing the warrant. *See* FLA. STAT. ANN. § 3.133 (West 2007). If this Court were to allow seizure to continue until the formal probable cause hearing, it would create a threshold between fourth and fourteenth amendment protection that would never be reached at all by arrestees for whom a warrant has already been issued. Following this line of reasoning, the fourth amendment protection against excessive force for those arrestees would theoretically never expire. The only potential solution to this problem would be to extend that protection all the way to arraignment for arrestees against whom a warrant has been issued. However, this would allow those arrestees with a warrant to benefit from fourth amendment protection until a later point in the criminal judicial process than arrestees who are arrested without a warrant. The equal protection problems that might result are readily apparent, and they make this alternative unthinkable.

Perhaps most importantly, some states permit law enforcement officers to simply issue citations to arrestees if their offenses are third, second, or first-degree misdemeanors (of which Radley's offense is one in many jurisdictions). TEX. CODE CRIM. PROC. ANN. Art. 14.06 (West

2005). These citations provide a specified time and date when the arrestees must appear before a magistrate for a determination of probable cause. *Id*. Between that hearing and the time they are arrested, the arrestees are more or less free citizens subject only to the future court proceedings. This Court's extension of seizure under the fourth amendment until the probable cause hearing would create a paradoxical scenario in which those arrestees would be walking around essentially free, but would still be classified as in the process of being "seized." Particularly when considering this Court's literal definitions of seizure in *Hodari* and *Mendenhall*, such a scenario surely cannot satisfy any criterion to constitute a seizure within the Fourth Amendment. *See Hodari*, 499 U.S. at 625; *Mendenhall*, 446 U.S. at 553–54.

It would be unconscionable to require that all jurisdictions adopt a continuing seizure doctrine, especially if it extends past booking. Judicial rules are most effective when they are bright line rules that can be implemented without ambiguity or uncertainty. *See Roberson*, 486 U.S. at 691. Even if this Court will not endorse an arresting officer rule, and even if it will not implement a location standard, it should extend continuing seizure no further than booking. Effective application of a continuing seizure doctrine that extends past booking would be impossible. For the reasons described above, the formulation of continuing seizure proposed by Radley would create endless procedural complications and would prove completely ineffectual when put into operation. Allowing the Fourteenth Amendment's substantive due process standard to commence at booking would prevent any of these problems from arising.

CONCLUSION

The text of the Fourth Amendment, the opinions of the circuit courts, and the decisions of this Court dictate that seizure should be defined as a single act, and no doctrine should exist that allows it to continue throughout the criminal judicial process. This Court has previously refused

to extend other fourth amendment protections past the initial seizure, and it should likewise refuse to extend the protection against excessive force. However, if this Court chooses to recognize a continuing seizure doctrine, the doctrine should be subject to the limitations of an arresting officer rule or a location standard. Even if both of these limitations prove problematic, the booking phase is the furthest point to which continuing seizure should extend. Allowing it to continue past booking would create an ambiguous standard resulting in severe procedural uncertainties among the states.

While a majority of circuit courts that have addressed this issue have recognized a continuing seizure doctrine, this Court should view the split among the circuits in a different light. The proper line to be drawn between minority and majority is not a line between those circuits that recognize continuing seizure and those that do not. Rather, the critical divide is between the circuits that have extended continuing seizure beyond booking and those that have not. Regardless of how many actually recognize the doctrine, a majority of circuits have *not* extended continuing seizure past booking.

Therefore, the most prudent course of action would be for this Court to reject any continuation of fourth amendment protection beyond the initial seizure, thereby avoiding an unnecessary expansion of the Constitution. If, however, this Court does choose to implement a rule allowing fourth amendment protection to extend past the initial seizure, that extension should terminate once the arrestee is booked. In either case, the appropriate avenue for Radley's claim is the Fourteenth Amendment. As this Court aptly stated in *California v. Hodari*, 499 U.S. 621, 627 (1991), it is not desirable, even as a matter of policy, to expand the Fourth Amendment beyond its text and beyond the traditional meaning of arrest. The same holds true in the present case.

PRAYER

For these reasons, Respondents pray this Court affirm the decision of the court below.

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John Ellis
Counsel for Respondents

CERTIFICATE OF SERVICE

Counsel for Respondents certifies that this brief has been prepared and served on all opposing counsel in compliance with the Rules of the Freshman Moot Court Competition.

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John Ellis
Counsel for Respondents

APPENDIX

U.S. CONST. amend. IV

The right of the people to be secure 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.

U.S. CONST. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLA. STAT. ANN. § 3.133(a)(1) (West 2007)

Rule 13.133. Pretrial Probable Cause Determinations and Adversary Preliminary Hearings

(a) Nonadversary Probable Cause Determination

(1) *Defendant in Custody*. In all cases in which the defendant is in custody, a nonadversary probable cause determination shall be held before a judge within 48 hours from the time of the defendant's arrest; provided, however, that this proceeding shall not be required when a probable cause determination has been previously made by a judge and an arrest warrant issued for the specific offense for which the defendant is charged. The judge after a showing of extraordinary circumstance may continue the proceeding for not more than 24 hours beyond the 48-hour period. The judge, after a showing that an extraordinary circumstance still exists, may continue the proceeding for not more than 24 additional hours following the expiration of the initial 24-hour continuance. This determination shall be made if the necessary proof is available at the time of the first appearance as required under rule 3.130, but the holding of this determination at that time shall not affect the fact that it is a nonadversary proceeding.

TEX. CODE CRIM. PROC. ANN. Art. 14.06(a)(b)(c) (West 2005)

Art. 14.06. Must take offender before magistrate

(a) Except as otherwise provided by this article, in each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall take the person arrested or have him taken without unnecessary delay, but not later than 48 hours after the person is arrested, before the magistrate who may have ordered the arrest, before some magistrate of the county where the arrest was made without an order, or, to provide more expeditiously to the person arrested the warnings described by Article 15.17 of this Code, before a magistrate in any other county of this state. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

(b) A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate, the name and address of the person charged, the offense charged, and the following admonishment, in boldfaced or underlined type or in capital letters: "If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U.S.C. Section 922(g)(9) or Section 46.04(b), Texas Penal Code. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney."

(c) If the person resides in the county where the offense occurred, a peace officer who is charging a person with committing an offense that is a Class A or B misdemeanor may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate of this state as described by Subsection (a), the name and address of the person charged, and the offense charged.