

No. 16-515

In the Supreme Court of the United States

RICARDO SALAZAR-LIMON,
Petitioner,

v.

CITY OF HOUSTON, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

REPLY BRIEF FOR PETITIONER

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RULES

Fed. R. Civ. P. 56 *passim*

REPLY

As explained in the Petition, facts are not deemed “undisputed” under Rule 56 simply because the party seeking summary judgment said they occurred. Yet Respondents’ Brief in Opposition illustrates this flawed approach—not just with regard to whether Salazar reached for his waistband, but with regard to the entire incident. Salazar is entitled to have a jury decide what the facts really are. Certiorari should be granted.

I. Respondents believe the facts in their favor are “undisputed” because the officer said so.

There are three critical stages of the interaction between Salazar and Officer Thompson: (1) Thompson handcuffing Salazar and saying he was going to jail; (2) Salazar’s reaction to the handcuffing; and (3) Thompson shooting Salazar as he walked away. The final stage involves the “waistband” question. Respondents state that the essential facts of all three stages favor them and are “undisputed,” but the record shows they are mistaken.

Stage 1: The handcuffing and threat of jail.

Respondents begin by stating that they are reciting “undisputed material facts.” Opp. 5. They describe the handcuffing as follows: “Thompson was not placing Salazar under arrest at that time, but was detaining him for a DWI investigation.” *Id.* 6. They suggest this was a “temporary detention.” *Id.* But Salazar testified, in response to questions from Respondents’ lawyer, that Thompson told him he was going to jail and that Thompson would not explain why:

Q. Okay. And what happens?

A. So then I just recall that he says to me, he says that ***he's going to take me to jail.***

Q. Okay.

A. And I — I ask, I say, "***Well, why?***" ***And then he just tells me, "Don't ask."*** He didn't say, like — He didn't say, like, "Calm down" or "Quiet."

And then he takes his hand, and he's going to get his handcuffs; and he grabs my hand, and he wanted to do like this (indicating) to me. So then when he was going to lock the handcuffs on me, I pulled my hand.

Pet. App. 44 (emphasis added).

Respondents' lawyer interjected to confirm that Thompson told Salazar he was going to jail:

Q. Okay. Let's stop there. Let's stop there.

So he tells you that he's going to take you to jail.

A. Uh-huh.

Id. (emphasis added).

Respondents' lawyer then repeated this point two more times, confirming that it was the only thing Thompson said:

Q. Okay. So you said that —

Are you facing him when he tells you he's going to take you to jail?

A. Yes.

Q. Did he tell you to turn around?

A. No.

Q. Okay. Did he say, “Put your hands behind your back”?

A. No.

Q. Okay. ***So the only thing he said to you, before he grabbed his handcuffs, is that he’s going to take you to jail.***

A. Yes.

Id. at 46 (emphasis added).

Thus, Respondents’ claim that it is “undisputed” that “Thompson was not placing Salazar under arrest,” Opp. 6, is not accurate.

This is no minor point. It is the origin of events that led to the shooting. Until this moment, the interaction between Salazar and Officer Thompson was perfectly normal—even Officer Thompson acknowledges that. But if Salazar’s testimony is true—which it is assumed to be at this stage—then this attempted arrest was unlawful, and Salazar was given no reason for it. *See* Pet. 17.

This explains why Salazar pulled his hands away from Thompson’s grasp. And that takes us to the next stage, where Respondents have created a violent picture of “the struggle” that they similarly claim is “undisputed.”

Stage 2: Salazar's reaction to handcuffing.

Respondents describe a violent struggle taking place, and again they say the facts are literally “undisputed” by anything in the record. They state that “Salazar attempted to push Thompson into the lanes of traffic.” Opp. 7. Then they say “[t]he struggle eventually moved away from the lanes of traffic and ended up near the retaining wall where Thompson felt that Salazar was attempting to push him over the wall.” *Id.* Indeed, Respondents continue, “Thompson had to brace himself to keep from toppling over the wall,” and he was even “able to see cars passing on Wesleyan Street below.” *Id.*

Again, the record exposes the truth that these facts are not “undisputed.” Salazar testified that such a violent struggle never occurred at all. Instead, Salazar, frightened about going to jail for apparently no reason, pulled his hands back from Thompson's grasp and walked away:

Q. Okay. So tell me what happens when he goes to handcuff you.

A. So I just pull my hand.

Q. Which hand did he grab first?

A. I believe, the right.

Q. Okay. And you pulled back. What happened next?

A. I pulled back my hand, and I give him my back.

Q. Okay. And what happens next?

A. I became frightened when he said that. I turned around, and I began to walk.

Q. Okay. Showing with lines, indicate where you were walking.

A. (Complying.)

Q. *At any point before you started work—walking, did you and Officer Thompson get involved in a struggle?*

A. *No.*

Q. *So the only movement between the two of you is you pulling away from him, turning around.*

A. *Corre—Correct.*

Q. *And walking away.*

A. *Correct.*

Q. And on your — your map here, it appears that you began walking along the passenger side of your truck.

A. Correct. Because on this side, there were cars coming.

Pet. App. 46–48 (emphasis added).

Where in this testimony is the shove into traffic that threatened Thompson's life? Where is the reference to wrestling to the other side by the retaining wall where Thompson could actually see the cars below as he desperately braced himself to keep from toppling below? It's only in Thompson's testimony. Salazar's

testimony contradicts it. This is what is known as a factual dispute.

Yet Respondents repeatedly state in their brief that the underlying facts of their portrayal of this violent bout are entirely “undisputed.” This begins in their Question Presented, referring to the “*undisputed facts*” showing a suspect “*trying to push the officer into oncoming traffic and then over the retaining wall of an overpass into traffic below . . .*” Opp. i. This is repeated throughout their brief. *See, e.g., id.* at 11–12 (describing this as part of the “undisputed evidence listed below”); *id.* at 20 (stating it “is also undisputed” that this occurred); *id.* at 25 (“It was undisputed that petitioner” did this).

That misleads this Court about the record.

And there’s more. Respondents also claim that Salazar’s own expert’s view fits their so-called “undisputed” facts as he believed there was a “pushing and pulling match.” Opp. 7. Respondents don’t inform this Court that the expert was not viewing the facts in the light most favorable to Salazar; indeed, the expert stated that these facts included “what I got from *Officer Thompson’s* testimony.” Howse Dep. 97–99 (emphasis added). That’s why such expert testimony has no relevance to the basic question of what facts actually occurred. That’s what juries are for. *See Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (stating jury’s role is “settling disputes as to predicate facts” and excluding expert’s opinion that did not assist in that regard).

Similarly, Salazar's *nolo contendere* plea does not help Respondents on this score. Based on Thompson's version of the events, Salazar was charged with two misdemeanors of driving while intoxicated and resisting arrest. The charging instrument stated Salazar had pushed Thompson "with his hand." Salazar was punished with just a fine. Nothing about this makes it "undisputed" that Salazar shoved Thompson into traffic and nearly threw him over the retaining wall to the street below.

And let's not forget that Thompson admits he had no scratches or bruises on him when he returned to the station after he shot Salazar. Of course, he had to admit that point, because there was a photo taken of him at that time. Here is Thompson's testimony:

Q. I didn't ask you earlier, did you get hurt at all in the altercation with Ricardo?

A. No.

Q. No scrapes, no bruises, nothing like that?

A. No.

Q. I don't see any cuts or any bruises on you in this photo. Correct?

A. Correct.

Thompson Dep. 153, 154.

The fact that Thompson had no scrapes or bruises on him is a good example of an actual "undisputed" fact for purposes of Rule 56.

The broader point, again, is that there are two versions of what occurred. Respondents say there was a violent struggle, and Salazar says the only struggle was pulling his hand from Thompson's grasp. Salazar's version fits better with the undisputed fact of Thompson not having a single scrape on him, but that's for the jury to decide.

Moreover, Salazar's evidence in these stages shows that he was fully compliant when pulled over and exiting his truck, was then threatened with jail and handcuffed for no given reason, pulled his hands away, turned around, and started simply walking away. This presents no danger of imminent harm to any reasonable officer, and is the backdrop for the very next moment when Thompson shoots Salazar in the back.

Stage 3: The shooting.

This brings us to the real question of this case: Is it an "undisputed fact" for purposes of summary judgment that Salazar reached for his waistband just because Thompson said he did, when we know Salazar had no weapon and testified only that he was walking away when shot in the back? *See* Pet. i.

In response, Respondents continue to point to the evidence in *their* favor as the moving party. Indeed, an entire section of their brief is devoted to pointing out that Thompson didn't merely infer that Salazar reached for his waistband but that Thompson stated that he directly observed it. Opp. 17. Salazar agrees that is what Thompson said. But that has nothing to do with the basic Rule 56 analysis, which requires the courts (and Respondents) to address the facts and inferences in the light most favorable to *Salazar*.

So how is that done here, where Salazar testified to the entire incident but was never asked whether he reached for his waistband and therefore never sounded out the words “I did not reach for my waistband”? Does that mean any statement Thompson later made about the incident at his deposition that was not specifically negated (such as reaching for the waistband) is automatically an “undisputed” fact, even when Thompson’s story changed? Respondents say yes: “Thompson’s testimony on that remains an undisputed fact.” Opp. 19. The courts below did as well. In other words, the courts concluded that Salazar’s testimony about walking away and being shot in the back was legally equivalent to him stating, “I reached for my waistband and then was shot.” That approach is mistaken and resolves inferences against Salazar.

The correct approach in this scenario is to undertake the same analysis that occurs in every case at the summary-judgment stage: “The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant’s] favor.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Through this familiar lens, we simply consider Thompson’s and Salazar’s testimony as it exists on the record—like any other case.

This standard Rule 56 approach makes it evident that there is a factual dispute here—a jury could readily conclude Salazar did not reach for his waistband.

Consider the facts and inferences in favor of Salazar as they would be presented to a jury at trial. He is pulled over for speeding. He has no criminal history.

The officer runs checks on him and the truck and everything comes up clean. Salazar is polite and fully complies with the officer's request for him to step out of the car. The officer then tells him he is going to jail, will not say why, and starts handcuffing him. Salazar pulls his hands from Thompson's grasp, turns around, and starts walking away. Salazar testifies to these acts in detail under questioning from Respondents' lawyer, indicating no other movements or actions other than simply walking away. As he walks away, he hears the officer say "Stop" and is "able to take one more step or two" before being shot in the back, leaving him paralyzed from the waist down. Pet. 6–7.

Then consider an actual undisputed fact the jury will know: There was nothing in Salazar's waistband. As Judge Kozinski would say, it "makes no sense whatsoever" for Salazar to reach for an empty waistband—especially in the absence of any violent struggle. *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014).

Thompson also has a clear motive to claim that Salazar reached for his waistband even if it never happened. He shot an unarmed man in the back while the man was walking away. And Thompson has credibility issues. He had no scratches or bruises after claiming to be in a violent struggle, and only months after filing his initial report did he first claim that Salazar "turned" toward him. Pet. 18–19.

Simply put, in light of Salazar's evidence, it is a "justifiable inference" that Salazar did not reach for his waistband. *See Tolan*, 134 S. Ct. at 1863. The courts below were mistaken to deem it an "undisputed fact"

that he did reach for his waistband just because Thompson said so.

Respondents note that this case is different from *Cruz* because Salazar survived his shooting. They note Salazar testified about the interaction and could have explicitly contradicted Thompson's claim regarding the waistband. Opp. 16. In this way, they suggest that Cruz's family is entitled to a jury trial because he died, but Salazar is not because he survived. No doubt, Salazar could have explicitly stated "I did not reach for my waistband," but the Rule 56 inquiry remains the same in the absence of such a specific statement: The Court looks at the record as it exists and considers the evidence and all inferences in the light most favorable to the non-moving party. Indeed, in many ways Salazar's case is stronger than Cruz's for the very reason that Salazar *did* testify, explaining exactly what occurred during the entire interaction with Thompson, including that he was merely walking away when he was shot in the back.

In sum, it is not "undisputed" that Salazar reached for his waistband just because Thompson said he did. There are only two people in the world who know what happened on the side of the highway that night, and those two people need to take the stand and tell their versions of the facts to the jury. The Seventh Amendment requires it.

II. Respondents claim their "undisputed" facts make the cases with disputed facts distinguishable.

Respondents provide a lengthy discussion of why they say this case is distinguishable from those cases

where there was a factual dispute about the imminent harm to an officer. No case-by-case reply is necessary here, because Respondents' sole basis for distinguishing those cases is to adopt Thompson's facts in his favor and then say those facts are "undisputed" here. Opp. 21–28. As shown above, that is not how the summary-judgment analysis works.

III. Certiorari is warranted.

Respondents' brief confirms that certiorari is warranted. It illustrates a willingness to deem facts "undisputed" so long as those facts are in Respondents' favor, even when belied by the record and even in the volatile context of a police shooting. And just as in *Tolan*, the Fifth Circuit's analysis here is contrary to the decisions of this Court and every other circuit. *Tolan*, 134 S. Ct. at 1868 (The "opinion below reflects a clear misapprehension of our summary judgment standards in light of our precedents.").

When an unarmed man with no criminal history is shot in the back and paralyzed from the waist down, the public understands that a jury is to decide what actually happened and whether that shooting was justified. At least then there will be the perception that the judicial system allowed the truth to be determined as the Seventh Amendment requires. Only this Court can ensure that occurs.

CONCLUSION

The petition for a writ of certiorari should be granted.

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