



## U.S. SUPREME COURT TO EXAMINE PROVOCATION THEORY IN LAW ENFORCEMENT SHOOTINGS

January 2017

For duplication & redistribution of this article, please contact Law Enforcement Risk Management Group by phone at 317-386-8325.  
Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

---

Article Source: [http://www.llrmi.com/articles/legal\\_update/2017\\_mendez\\_v\\_los\\_angeles\\_county.shtml](http://www.llrmi.com/articles/legal_update/2017_mendez_v_los_angeles_county.shtml)

©2017 [Jack Ryan](#), Attorney, Legal & Liability Risk Management Institute

### **Does the fact that the officer's pre-shooting conduct, even if unconstitutional, created the need for deadly force, is the shooting unreasonable?**

The short version of the *Mendez v. Los Angeles County* is that officers went to a home to search for a wanted subject (parolee) who was listed as "armed and dangerous," though all parole violators were listed that way. Upon arrival the officers forced their way into the home without a warrant, exigency, or consent. The officers did not find anything. Officers then went to a shed in the backyard, which was later determined to be part of the home's curtilage and forced their way in. One of the homeless occupants, Mr. Mendez was moving his BB gun that he used to shoot rats when the officers entered and the officers perceiving a threat opened fire shooting Mr. and Mrs. Mendez.

Following a bench trial, the judge found that the shooting was reasonable however the entry into the shed violated the 4<sup>th</sup> Amendment, and the officers violated the knock and announce rule. Because these violations provoked the need for deadly force, the judge awarded the Mendez's 4 million dollars in damages plus attorney's fees. As part of the ruling the award included a nominal award of 1 dollar for the 4<sup>th</sup> Amendment violation of entering the shed without warrant, exigency, or consent and a nominal award of 1 dollar for violating the knock and announce rule.

The United States Court of Appeals for the 9<sup>th</sup> Circuit reviewed the trial judge's findings.<sup>1</sup> First, the 9<sup>th</sup> Circuit remanded the denial of qualified immunity to the officers on the failure to knock and announce at the shed. The 9<sup>th</sup> Circuit indicated that previous decisions held that officers need not knock and announce at every entry point within the same property. Since the officers had knocked at the front door of the home upon initial arrival, they may not need to knock again at the shed within the curtilage of the home. The court found that the officers here had violated the knock and announce rule, but reversed the 1 dollar nominal damages awarded on the violation of the knock and announce rule and remanded the knock and announce issue to the trial court on the qualified immunity issue.

---

<sup>1</sup> Mendez v. Cnty. of L.A., 815 F.3d 1178 \* (9th Cir. Cal. 2016)

---

©2017 Article published in the free LLRMI E-Newsletter

Link to article online: [http://www.llrmi.com/articles/legal\\_update/2017\\_mendez\\_v\\_los\\_angeles\\_county.shtml](http://www.llrmi.com/articles/legal_update/2017_mendez_v_los_angeles_county.shtml)  
<http://www.llrmi.com> | <http://www.patctech.com>

The 9<sup>th</sup> Circuit then upheld the trial judge's findings on the "provocation theory."

The court defined the provocation theory:

**"[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." . Here, the district court held that because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper. We agree... we simply require that the deputies' unconstitutional conduct "created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable.**

The court then went on to assert that even if the 9<sup>th</sup> Circuit's provocation theory on shooting were not applied the officers would still be liable because their conduct of improperly entering the shack was the Proximate Cause of the injuries suffered by Mr. and Mrs. Mendez.

The court noted:

**"Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," and the analysis is designed to "preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.**

In other words, where the officers' improper conduct creates a foreseeable risk or a risk which is within the scope of risk one would expect to result from the improper conduct, the officer may be held liable even if the shooting was justified at the moment the officer pulled the trigger.

### **NOW COMES THE APPEAL TO THE UNITED STATES SUPREME COURT:**

In training, as well as in our book, *Law and Best Practices of a Successful Law Enforcement Operation*, we survey a Circuit by Circuit review in order to show that an officer's pre-shooting conduct may be viewed differently, depending on the Circuit where the shooting occurs.

This case may clear up an area of deadly force law that even some of the more notable force experts and instructors clearly do not understand.

The United States Supreme Court has identified two questions to be presented in this case:

1. Whether the U.S. Court of Appeals for the 9th Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other courts of appeals; and

---

©2017 Article published in the free LLRMI E-Newsletter

Link to article online: [http://www.llrmi.com/articles/legal\\_update/2017\\_mendez\\_v\\_los\\_angeles\\_county.shtml](http://www.llrmi.com/articles/legal_update/2017_mendez_v_los_angeles_county.shtml)  
<http://www.llrmi.com> | <http://www.patctech.com>

2. Whether, in an action brought under Section 1983, an incident giving rise to a reasonable use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment.

As noted, this case has the potential to set one clear rule with respect to deadly force analysis and how pre-shooting conduct will be viewed in these cases. Additionally, it is not just firearms cases that may be impacted but rather any case where it is alleged that the officer's pre-force conduct i.e. bad tactics, constitutional violation, or even reckless acts were the cause of the ultimate force that occurred.

Some time between now and June we should have an answer to these questions though a date has not yet been set for argument. As always, we will keep you posted after the oral argument, and once the case is decided.

---

©2017 Article published in the free LLRMI E-Newsletter

Link to article online: [http://www.llrmi.com/articles/legal\\_update/2017\\_mendez\\_v\\_los\\_angeles\\_county.shtml](http://www.llrmi.com/articles/legal_update/2017_mendez_v_los_angeles_county.shtml)  
<http://www.llrmi.com> | <http://www.patctech.com>