



United States Supreme Court Rejects 9th Circuit Provocation Theory in Deadly Force Confrontation

May 2017

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Article Source: http://www.llrmi.com/articles/legal_update/2017_supreme_court_mendez.shtml

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One of the areas where there has been disagreement among the various United States Court of Appeals is how deadly force will be analyzed, particularly as it relates to what is often referred to as pre-shooting conduct. Some of the Circuits take what this author refers to as a pure moment in time approach, which looks to whether the officer was faced with a threat of serious bodily harm or death at the moment he or she pulled the trigger. In such a case the shooting is reasonable. Other circuits take a wider view of the totality of circumstances which looks at the officer's actions leading up to the deadly encounter and considers whether the officer somehow created the need to use deadly force by pre-shooting conduct. In circuits taking this wider view of the totality of circumstances, an officer who was faced with a threat of serious bodily harm or death and used deadly force, may still be found liable if the officer's improper pre-shooting conduct put the officer in a position where deadly force became necessary. This is sometimes referred to as "officer created jeopardy." The United States Court of Appeals had a distinct analysis in deadly force cases. Under the 9th Circuits approach, an officer's pre-shooting conduct could only be used against the officer if the pre-shooting conduct was unconstitutional. The 9th Circuit, unlike some circuits rejected an analysis that would take conduct, such as improper tactics into account in cases where it was alleged that improper tactics created or provoked the need to use deadly force.¹

¹ *Billington v. Smith*, 292 F.3d 1177 (9th Cir. Idaho June 21, 2002). "Under *Alexander*, the fact that an officer negligently gets himself into a dangerous situation will not make [**36] it unreasonable for him to use force to defend himself. The Fourth Amendment's "reasonableness" standard is not the same as the standard of "reasonable care" under tort law, and negligent acts do not incur constitutional liability. An officer may fail to exercise "reasonable care" as a matter of tort law yet still be a constitutionally "reasonable" officer. Thus, even if an officer negligently *provokes* a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation. But if, as in *Alexander*, an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force."

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The majority opinion in *City and County of San Francisco et al v. Sheehan*² suggests that an officer's liability in a deadly force encounter cannot be based on the broader totality of circumstances approach where the Court held:

Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot “establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.” *Id.*, at 1190. Courts must not judge officers with “the 20/20 vision of hindsight.” *Ibid.* (quoting *Graham*, 490 U. S., at 396).

Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as “a reasonable officer could have believed that his conduct was justified,” a plaintiff cannot “avoi[d] summary judgment by simply producing an expert’s report that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.” *Billington, supra*, at 1189.”

In *Mendez*, the United States Supreme Court considered whether the United States Court of Appeals for the 9th Circuit’s deadly force analysis was consistent with *Graham v. Connor*. As noted under the analysis used by the United States Court of Appeals for the 9th Circuit, a use of deadly force by an officer could be consistent with *Graham* yet still be unreasonable and a constitutional violation if the officer’s acts leading up to the shooting were unconstitutional.

The United States Supreme Court outlined the facts in *Mendez* as follows:

In October 2010, deputies from the Los Angeles County Sheriff’s Department were searching for a parolee-at-large named Ronnie O’Dell. A felony arrest warrant had been issued for O’Dell, who was believed to be armed and dangerous and had previously evaded capture. Deputies Christopher Conley and Jennifer Pederson were assigned to assist the task force searching for O’Dell. The task force received word from a confidential informant that O’Dell had been seen on a bicycle at a home in Lancaster, California, owned by Paula Hughes, and the officers then mapped out a plan for apprehending O’Dell. Some officers would approach the front door of the Hughes residence, while Deputies Conley and Pederson would search the rear of the property and cover the back door of the residence. During this briefing, it was announced that a man named Angel Mendez lived in the backyard of the Hughes home with a pregnant woman named Jennifer Garcia (now Mrs. Jennifer Mendez). *Ibid.* Deputy Pederson heard this announcement, but at trial Deputy Conley testified that he did not remember it.

When the officers reached the Hughes residence around midday, three of them knocked on the front door while Deputies Conley and Pederson went to the back of the property. At the front door, Hughes asked if the officers had a warrant. A sergeant responded that they did not but were searching for O’Dell and had a warrant for his arrest. *Ibid.* One of the officers heard what he thought were sounds of someone running inside the house. As the officers prepared to open the door by force, Hughes opened the door and informed them that O’Dell was not in the house. *Ibid.* She was placed under

² *City and County of San Francisco et al v. Sheehan*, 575 U.S. ____; Slip Op. No.-13-1412 (2015).

arrest, and the house was searched, but O'Dell was not found.

Meanwhile, Deputies Conley and Pederson, with guns drawn, searched the rear of the residence, which was cluttered with debris and abandoned automobiles. The property included three metal storage sheds and a one-room shack made of wood and plywood Mendez had built the shack, and he and Garcia had lived inside for about 10 months. The shack had a single doorway covered by a blue blanket. Amid the debris on the ground, an electrical cord ran into the shack, and an air conditioner was mounted on the side. A gym storage locker and clothes and other possessions were nearby. Mendez kept a BB rifle in the shack for use on rats and other pests. The BB gun "closely resembled a small caliber rifle."

Deputies Conley and Pederson first checked the three metal sheds and found no one inside. They then approached the door of the shack. Unbeknownst to the officers, Mendez and Garcia were in the shack and were napping on a futon. The deputies did not have a search warrant and did not knock and announce their presence. When Deputy Conley opened the wooden door and pulled back the blanket, Mendez thought it was Ms. Hughes and rose from the bed, picking up the BB gun so he could stand up and place it on the floor. As a result, when the deputies entered, he was holding the BB gun, and it was "point[ing] somewhat south towards Deputy Conley." Deputy Conley yelled, "Gun!" and the deputies immediately opened fire, discharging a total of 15 rounds. Mendez and Garcia "were shot multiple times and suffered severe injuries," and Mendez's right leg was later amputated below the knee. O'Dell was not in the shack or anywhere on the property.

The Federal District Court found that the officers' use of deadly force was consistent with *Graham* due to their belief that they were facing a subject holding a rifle and threatening their lives. The trial court then turned to the 9th Circuit's "provocation rule" and found against the officers because the shooting was precipitated by constitutional violations, specifically entering the property without a warrant, and the failure to knock and announce at the shed. The court awarded the plaintiffs approximately 4 million dollars in damages.

The United States Court of Appeals for the 9th Circuit held that the trial court should have given the officers qualified immunity on the knock and announce issue, because the law was not clearly established that officers are required to knock at multiple closed doors on the same property. The 9th Circuit then affirmed the "provocation" rule and upheld the lower court's award due to the officers' improper warrantless entry, a clear violation of the constitution. The 9th Circuit's theory was that the deputies "had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law."

The 9th Circuit also offered an alternative theory of liability holding that "'basic notions of proximate cause' would support liability even without the provocation rule because it was 'reasonably foreseeable' that the officers would meet an armed homeowner when they 'barged into the shack unannounced.'"

The United States Supreme Court took issue with the fact that the 9th Circuit's "provocation rule" allows that a forceful seizure, which has been determined to be reasonable under *Graham* if the officer's conduct leading up to the reasonable seizure amounted to a constitutional violation. The Court noted: "The [provocation] rule's fundamental flaw is that it uses another constitutional violation to manufacture and excessive force claim were one would not otherwise exist." The Court explained:

The basic problem with the provocation rule is that it fails to stop there. Instead, the rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. Specifically, it instructs courts to look back in time to see if there was a *different Fourth Amendment* violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim.

The Court noted that another problem lies in the two-prong test used by the 9th Circuit for the provocation theory. First there must be a separate constitutional violation that creates the situation leading to the force, then the rule requires that the officer committing the violation to have acted recklessly or intentionally. The Court noted that this second prong requires a court to look at the particular officer's subjective intent, which is contrary to the objective reasonableness standard that has always applied to force.

The Court held that the provocation theory is inconsistent with proper use of force analysis under *Graham*.

The Court noted that there is no need to try and tie the prior constitutional violation into an excessive force claim since a plaintiff can recover for injuries "proximately caused" by the warrantless entry.

In dealing with proximate cause, the Court remanded the case back to the lower courts. In doing so, the Court noted that in order for the harm to be proximately caused by the pre-shooting constitutional violation, the court must identify "the foreseeable risks associated with the relevant constitutional violation."

The Court directed the lower court: "On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."

Bottom-Line:

- The 9th Circuit analysis that a constitutional violation that precedes an otherwise valid use of force cannot be used to establish excessive force.
- A plaintiff can sue for the independent pre-shooting constitutional violation.
- A plaintiff who can establish that a constitutional violation that preceded a valid use of force proximately caused their injury because the violation created foreseeable risks that caused the foreseeable harm, can recover for their harm.

Author's note to attorneys: Although this was not the outcome I expected, in my opinion there seems to be a continuous signal from the U.S. Supreme Court limiting the use of force analysis to the "moment in time" discussed in *Graham* thus limiting the relevance of pre-shooting tactical mistakes and, as here even pre-shooting constitutional violations.