THE FOURTH AMENDMENT: ENTRY INTO PRIVATE PREMISES AND EXCESSIVE FORCE

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On September 15, 2017, the Ninth Circuit Court of Appeals decided *Woodward v. City of Tucson et al.*[i], in which the court discussed whether a trespasser has a reasonable expectation of privacy in a home in which he is trespassing and whether the officers were entitled to qualified immunity for excessive force for shooting said trespasser when he charged at them with a hockey stick. The relevant facts of *Woodward,* taken directly from the case, are as follows:

> At 8:58 p.m. on May 21, 2014, the Tucson Police Department ("TPD") received a call from "Zee." Zee reported she was employed by an apartment complex landlord, and former tenants were inside an apartment that was supposed to be empty...
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> Nearly two hours later, at 11:14 p.m., the operator dispatched the call. Officer Meyer responded and arrived at the apartment at 11:22 p.m. In his deposition, Officer Meyer testified that the metal security door was closed when he arrived. He turned the doorknob of the security door and learned that it was unlocked. He thereafter opened the security door, turned the doorknob of the front door and opened it enough to learn that it was also unlocked, and then closed the front door. Officer Meyer left the security door open. He then radioed for backup on the grounds that he had an apartment with an open door. Officer Soeder responded and arrived on the scene at 11:32 p.m. The officers both stated they did not see any sign of forced entry, although Officer Soeder noted that the security door was swung wide open when he arrived.
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> At this point, both officers drew their guns, knocked on the door, and announced that they were police. When no one answered the officers' call, they opened the door and entered the apartment. They did not have a warrant. Upon entering the apartment, neither officer called for radio silence. Radio silence is requested when officers encounter a scene that they believe is likely to create an emergency such that they need the radio channels to be clear in case they need to radio for assistance.
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> Once in the apartment, the officers realized that space in the room was limited because

there were numerous belongings stacked against the wall and taking up approximately half of the room. The officers cleared the front living room and determined that no one else was present. They saw a closed door to what is the apartment's only bedroom and could hear a radio playing inside the enclosed room. The officers approached the closed door and arranged themselves such that Officer Soeder was to the left of the door and Officer Meyer was to the right. Officer Meyer then knocked on the door and announced their presence, at a volume he believed was loud enough to be heard over the radio playing in the room. No one responded. Officer Soeder then opened the door. Because of his position he could not see into the bedroom. Officer Meyer, however, stated that he saw Mr. Duncklee holding "a large stick," with a woman behind him. Officer Meyer stated that Mr. Duncklee was holding the stick in a way that would allow him to strike at Officer Meyer's head. Officer Meyer stated the following in his affidavit:

> As soon as the door swung open enough to see Duncklee, he started charging at me with the stick raised where it could strike at my head, chest or arms. As Duncklee charged he was also yelling something like "aaahh". [sic] From the instant I first saw Duncklee, I perceived that he was a serious and potentially deadly threat to me. He came at me in an aggressive manner with a scream and the stick raised over his shoulder. He was initially about five to six feet from me. Duncklee came through the door frame holding the stick in a swinging position with the end above his shoulder. I immediately started backing up, but knew that I couldn't back up very far because of the small size of the room and the clutter in it. I yelled "Police, stop" at Duncklee, Duncklee kept coming at me. I fired at Duncklee's chest.

Officer Soeder had a different perspective. He stated in his affidavit that when he first opened the door to the closed room,

> I heard a growling noise as if it were an animal. Immediately after that, [Mr. Duncklee] burst through the door into the front room where we were. He was charging at me in a very aggressive manner holding a big, huge stick that appeared to be a hockey stick which he was starting to bring towards my head in a downward motion . . . . Duncklee had the hockey stick up and I remember seeing about 2 feet of the stick raised and coming down to hit my head. I heard a gunshot. There wasn't room to back up because of the clutter and because Duncklee was charging so fast. I tried taking a step or two backwards and hit something behind me which made me start leaning backwards as I shot at Duncklee. I believe that my shot hit Duncklee's head because I was starting to lean backwards at that point from whatever was behind me. Duncklee was only about the distance I could reach if I stretched my arms straight out when I shot him. He was close enough at that point where he could hit me with the hockey stick.
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> Once shot, Mr. Duncklee fell to the floor and did not move. Officer Soeder believed that he had shot Mr. Duncklee in the head and Officer Meyer could see the head wound... [ii]

Duncklee subsequently died from the gunshot. His mother, Woodward, filed suit in federal district court and alleged that the officers violated the Fourth Amendment by entering the residence without a warrant and by using excessive force. The district court denied qualified immunity to the officers on the warrantless entry claim and held that, because the entry into the apartment was a violation, the

subsequent use of force was excessive. Thus, the district court denied immunity for the defendants on both claims. The defendants appealed to the Ninth Circuit Court of Appeals.

The first issue on appeal was whether Duncklee had standing to assert a Fourth Amendment claim for warrantless, non-consensual entry into an apartment in which he was a trespasser. The plaintiff alleged that Watts, who was the former tenant of that apartment who had been earlier evicted, had standing to assert the Fourth Amendment, and that Duncklee was an overnight guest of Watts, which would also provide Duncklee a reasonable expectation of privacy in the apartment.

The court first noted that

> **One who has been formally evicted has no reasonable expectation of privacy in his or her previous residence**. *United States v*. *Struckman*, 603 F.3d 731, 747 (9th Cir. 2010) (providing that **a trespasser cannot claim Fourth Amendment protections**);..[iii]

Therefore, since Watts was properly evicted and knew she was evicted, she had no reasonable expectation of privacy that she could grant to Duncklee. The court further noted that Watts did not have a reasonable expectation of privacy at the apartment after eviction even though some of Watts personal property was still in the apartment. The court stated

> **Even though Watts had not removed all of her personal property from the apartment, she had no reasonable expectation of privacy in the apartment** on the night of May 21, 2014.[iv]

Therefore, the court of appeals held that the plaintiff in this case had no standing to assert a Fourth Amendment claim because Duncklee had no reasonable expectation of privacy in the apartment the night he was shot. Further, since he did not have a reasonable expectation of privacy in the apartment, the plaintiff could not assert a claim that argued that the officers violated his rights under the Fourth Amendment by entering the apartment without a warrant.

Therefore, the court of appeals reversed the decision of the district court and held the defendant officers should receive qualified immunity on this issue.

The second issue from the appeal we will discuss is whether the officers were entitled to qualified immunity for excessive force when they shot Duncklee who moved aggressively toward the officers while holding a hockey stick in a manner conducive to striking the officers.

First, the court of appeals noted that the district court denied immunity for the officers on this claim because of the "provocation theory," which basically states that an earlier Fourth Amendment violation renders a subsequent use of force an unreasonable seizure (excessive force) under the Fourth Amendment. Regarding the district court's reasoning, the court of appeals note that a United States Supreme Court case decided in 2017 abolished the "provocation theory." Specifically, the court stated

> [I]n *County of Los Angeles v*. *Mendez*, 137 S. Ct. 1539 (2017), decided after the district court's opinion in this case, the Supreme Court abrogated *Billington* and the provocation theory. **The Supreme Court concluded that the provocation theory was incompatible with established federal excessive force jurisprudence and held that**

> **an earlier "Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.**" *Id*. at 1544. **The Court recognized that the provocation theory conflated distinct Fourth Amendment violations and held that the objective reasonableness of each search or seizure must be analyzed separately**. *Id*. at 1547. In light of *Mendez*, the district court erred in relying on the provocation theory.

Thus, the theory used by the district court to deny qualified immunity had been overruled by the Supreme Court. The court then turned to the two-prong qualified immunity test, in which the court can decide the prongs in any order they wish, to determine whether qualified immunity was appropriate. The test is as follows: First, the court must determine if a constitutional right was violated. Second, the court must determine whether the right was clearly established at the time of the violation.

Here, the court opted to evaluate the second prong first and determine of the law was clearly established at the time of the violation (assuming this was a violation just for the sake of this analysis). The court noted that the relevant facts were, that upon opening the bedroom door, Duncklee immediately moved toward the officers, "yelling and growling," with a two-foot-long piece of a broken hockey stick raised up in a "threatening manner."[v]

The court held that the law was not clearly established that shooting Duncklee in the above facts would amount to a constitutional violation. Further, the court of appeals noted that under existing United States Supreme Court precedent, the use of deadly force in that situation can be reasonable in such a situation. Specifically, the court stated

> **We conclude that reasonable officers in Defendants' positions would not have known that shooting Duncklee violated a clearly established right. Indeed, the case law makes clear that the use of deadly force can be acceptable in such a situation.** *See Tennessee v*. *Garner*, 471 U.S. 1, 11-12 (1985) ("[I]f the suspect threatens the officer with a weapon . . . , deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."); *Blanford v*. *Sacramento Cty*., 406 F.3d 1110, 1111-13, 1117-19 (9th Cir. 2005) (holding that deputies were entitled to qualified immunity for shooting a suspect wandering around a neighborhood with a raised sword, making growling noises, and ignoring commands to drop the weapon).

Therefore, the court reversed the district court and held that the officers were entitled to qualified immunity for the excessive force claim.

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[i] No. 16-15784 (9th Cir. Decided September 15, 2017)
[ii] Id. at 5-10
[iii] Id. at 16
[iv] Id.
[v] Id. at 21