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## **U.S. Supreme Court Rejects the Ninth Circuit’s Provocation Doctrine on Officer Shootings**

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### **❖ Introduction**

The U.S. Supreme Court, in [\*County of Los Angeles v. Mendez\*](#), #16-369, 137 S. Ct. 1539, 198 L. Ed. 2d 52, 2017 U.S. Lexis 3396, has unanimously overturned a 9th Circuit federal appeals court decision that imposed liability on an officer’s use of deadly force even though the force was deemed justified at the time, rejecting a “provocation” doctrine that based that liability on a finding of illegal entry under the theory that the improper entry created the conditions that necessitated the use of force. A \$4 million award of damages to the two individual plaintiffs was vacated.

The Ninth Circuit’s provocation rule, which held that an officer’s otherwise reasonable and lawful defensive use of force was unreasonable as a matter of law if the officer intentionally or recklessly provoked a violent response and the provocation was an independent constitutional violation, conflated excessive force claims with other Fourth Amendment claims and improperly permitted excessive force claims that could not succeed on their own terms.

This brief article discusses the facts of the case, the Ninth Circuit’s reasoning for its “provocation doctrine, and the U.S. Supreme Court’s reasons for rejecting that doctrine. At the end of the article, there is a listing of relevant resources and references.

- The essence of that now rejected provocation doctrine was that when 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.”
- A prior article in this publication focused on the Ninth Circuit’s decision. See [\\$4 Million Liability for a Shooting Held Not Excessive Force - The Provocation Doctrine on Officer Shootings in the Ninth Federal Circuit](#), 2016 (5) AELE Mo. L. J. 101. As the Ninth Circuit’s ruling is no longer good precedent, the current article supersedes that prior article.

#### ❖ Facts of the Case

In [Mendez v. County of Los Angeles](#), #13-56686, 815 F.3d 1178 (9th Cir. 2016), two Los Angeles County Sheriff deputies participating in a warrantless raid on a house entered the backyard, where they opened the door to a wooden shack. Once inside, they shot a homeless couple who lived there, one of whom appeared to be pointing a gun at them, inflicting serious injuries.

The deputies were part of a 12-officer team responding to a call from another officer who reported that he had spotted a wanted parolee classified as armed and dangerous entering a grocery store. The team searched the grocery store, but did not find the parolee. One team member received a tip from a confidential informant that a man fitting the parolee’s description was riding a bicycle in front of a residence owned by a woman. The team developed a plan for some of them to proceed to that house, with others proceeding to another house on the same street, since they believed there was a possibility that the parolee had already left the woman’s residence.

The two deputies were assigned to clear the rear of the woman’s property for the safety of themselves and three other officers present, as well as cover the back door for possible containment of the suspect should he be present. They were told that a

man lived in the backyard of the residence with a pregnant woman, but only one of the deputies could recall hearing this announcement.

The officers lacked a search warrant to enter the property. The two deputies entered the backyard through a gate, and opened each of three storage sheds found there, finding nothing. Other officers banged on the front door of the house, and the woman who lived there initially refused them entry because they lacked a warrant. After retrieving a ram to break down the door, the woman opened the door and was handcuffed. No one else was found inside the house.

The deputies in the backyard approached a 7' x 7' x7' wood and plywood shack, which was surrounded by an air conditioning unit, electric cord, water hose, clothes locker, clothes, and other belongings. They did not knock and announce their presence at the shack. One of the deputies later testified that he did not feel threatened at that time.

They approached the shack from the side, and one of them pulled back a blanket utilized as a curtain to insulate the premises. Both deputies then observed the silhouette of an adult man presenting what looked like a rifle pointed at them. One of the deputies yelled "Gun!" Both deputies opened fire, firing a total of fifteen shots.

The man inside the shed was actually only holding a BB gun he had by his bed which he usually used to shoot rats that entered the shed. As the door was opening, he started to move the BB gun so that he could sit up in bed. The trial court found that the BB gun was pointed at the officers, but it recognized that the man may not have intended for it to point in that direction as he was getting up. The man had to have his right leg amputated below the knee as a result of his injuries, and the woman who also lived in the shack was shot in the back.

The couple sued the two deputies for violation of their federal civil rights under 42 U.S.C. Sec. 1983, claiming a violation of their Fourth Amendment rights. A bench trial was held, resulting in a finding that the warrantless entry into the shack was a Fourth Amendment search not justified by exigent circumstances or any other exception to the warrant requirement. The trial judge also found a violation of the knock-and-announce rule, and concluded that given the reasonably mistaken fear upon seeing the BB gun, the deputies did not engage in excessive force by shooting the couple.

Despite the fact that the force used was not excessive, the judge ruled that the deputies were liable for the shooting under the provocation doctrine, as first established in [\*Alexander v. City and County of San Francisco\*](#), #92-16751, 29 F.3d 1355 (9th Cir. 1994). The court denied the deputies qualified immunity, holding that each of the conclusions was supported by clearly established law. It awarded nominal damages of \$1 each for the unreasonable warrantless search and the knock-and-announce violation, as well as approximately \$4 million in damages for the shooting. Attorneys' fees were also awarded.

### ❖ Reasoning of the Ninth Circuit

On appeal, a three-judge panel of the Ninth Circuit upheld the \$4 million in damages for the shooting, as well as the \$1 in damages for the unreasonable warrantless search, but held that the deputies were entitled to qualified immunity on the knock-and-announce violation, ordering the \$1 in nominal damages on that claim be vacated.

The shack was clearly in the curtilage of the house and the deputies undertook an unlawful warrantless search under clearly established law by entering the rear of the property through a gate and further opening the door to the shack. No exigent circumstances supported this, as there was no hot pursuit of the sought parolee. Additionally, the deputies had no credible information that the parolee was in the shack. Arguments that there was “consent” for the entry or that the entry was part of a lawful “protective sweep” were also rejected.

The appellate panel found that the law in the Ninth Circuit on the knock-and-announce rule under these circumstances was not clearly established in 2010, the time of the incident, entitling the officers to qualified immunity on that claim. At the same time, the court determined that it would clearly establish the requirement going forward that “officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.”

At the heart of the justification for the \$4 million in damages for the shooting was the provocation doctrine:

"[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."

Because the officers violated the Fourth Amendment by searching the shack without a warrant, which the court reasoned "proximately caused the plaintiffs' injuries," liability was proper, the appeals court ruled.

The deputies argued on appeal that this provocation doctrine did not apply since nothing they did "provoked" a violent response by the plaintiffs. They hinged this on the fact that the man in the shack had no intention to threaten them with his BB gun, so he was not responding to their actions and they did not "provoke" him. Rejecting this argument, the appeals court stated that the prior case law did not establish that liability can only occur if the plaintiff acts violently. Rather, the only requirement was 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."

On the deputies' theory, the court noted, the male plaintiff would be entitled to damages if after the deputies entered he had intentionally pointed a weapon at them while shouting a threat to kill you, but "would be out of luck because he was merely holding a BB gun and didn't intend to threaten the police." Clearly, the court believed that result would make no sense.

The appeals court found that its ruling that the deputies were not entitled to qualified immunity on the unlawful search claim "necessarily indicates that they acted recklessly or intentionally" with respect to the plaintiffs' rights.

The court also noted that since many people in the U.S. own firearms to protect their homes, a "startling entry into a bedroom will result in tragedy." In the immediate case, where the man in the shack was holding a gun when the officers barged into the shack unannounced, the situation which ensued was reasonably foreseeable. "The deputies are therefore liable for the shooting as a foreseeable consequence of their unconstitutional entry even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment.

### ❖ U.S. Supreme Court Decision

The question posed by the case, the U.S. Supreme Court stated, was whether if law enforcement officers make a “seizure” of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, may the officers nevertheless be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force? The Ninth Circuit adopted a “provocation rule” that imposed liability in such situations.

“We hold that the Fourth Amendment provides no basis for such a rule. A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.”

The Court found that the provocation doctrine was incompatible with its prior excessive force rulings, which “sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment,” citing *Graham v. Connor*, #87-6571, 490 U.S. 386 (1989)

The operative question in such cases, according to the Court, is “whether the totality of the circumstances justify[es] a particular sort of search or seizure,” citing *Tennessee v. Garner*, #83-1035, 471 U. S. 1 (1985). When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. Under that objective reasonableness standard, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, based on the information the officer had at the time, rather than “with the 20/20 vision of hindsight.” In summary, the Court asserted, “If there is no excessive force claim under *Graham*, there is no excessive force claim at all. “

The provocation doctrine propounded by the Ninth Circuit, however, instructed courts to look back in time to see if a different Fourth Amendment violation was somehow tied to the eventual use of force, an approach that “mistakenly conflates distinct Fourth Amendment claims.” The proper approach, the Court emphasized, is solely set out in *Graham*. To the extent that a plaintiff has other Fourth Amendment claims, such as unlawful search or unlawful arrest, they should be analyzed separately.

The Ninth Circuit in the provocation doctrine proposed a two-prong test: First, the separate constitutional violation must “creat[e] a situation which led to” the use of force; and second, the separate constitutional violation must be committed recklessly or intentionally. Neither limitation, however, “solves the fundamental problem: namely, that the provocation rule is an unwarranted and illogical expansion of *Graham*.”

Further, the Court noted, “each limitation creates problems of its own.” First, the rule relies on a vague standard of causation. Secondly, while the reasonableness of a search or seizure is almost always based on objective factors, the provocation rule instead “looks to the subjective intent of the officers who carried out the seizure.”

There is “no need to distort the excessive force inquiry in this way” in order to hold law enforcement officers liable for the foreseeable consequences of all their constitutional torts, the Court reasoned. Plaintiffs can, subject to qualified immunity, generally recover damages that are proximately caused by any Fourth Amendment violation, including unlawful search. In this case, if the plaintiffs could not recover on their excessive force claim, that would not necessarily foreclose them from recovering “for injuries proximately caused by the warrantless entry.”

The Court further pointed out that the Ninth Circuit’s proximate-cause holding in this case was “similarly tainted. Its analysis appears to focus solely on the risks foreseeably associated with the failure to knock and announce—the claim on which the court concluded that the deputies had qualified immunity—rather than the warrantless entry.” On remand, the Court directed, the appeals court should revisit the issue of whether proximate cause permitted the plaintiffs to “recover damages for their injuries based on the deputies’ failure to secure a warrant at the outset.”

Following the Court’s decision, the “provocation” rule is completely dead, and the *Graham* objective reasonableness standard remains the sole criteria for determining whether there is liability for the excessive use of force under the Fourth Amendment.

“The rule’s fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.”

## ❖ Resources

The following are some useful resources related to the subject of this article.

- [Firearms Related: Intentional Use](#). AELE Case Summaries.
- [Provoking A Confrontation and the Fourth Amendment](#). Section 1983 Blog.

## ❖ Relevant Monthly Law Journal Articles

- [Federal Civil Rights Liability for Accidental Shootings by Officers](#), 2016 (4) AELE Mo. L. J. 101.
- [Civil Liability for Use of Deadly Force-- Part One--General Principles and Objective Reasonableness](#), 2007 (11) AELE Mo. L.J. 101.
- [Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training](#), 2007 (12) AELE Mo. L.J. 101.
- [Liability for Use of Deadly Force-- Part Three. Supervisory Liability and Negligent/Accidental Acts](#), 2008 (1) AELE Mo. L.J. 101.
- [Long v. Honolulu Police Sharpshooter Decision](#), 2008 (5) AELE Mo. L.J. 501.
- [Anatomy of a Fatal Police Shooting -- Allegations and Holdings](#), 2009 (2) AELE Mo. L. J. 101.
- [Shooting at Moving Vehicles](#), 2010 (9) AELE Mo. L. J. 101
- [Excessive Force Claims Concerning Pointing Firearms--Part 1](#), 2010 (10) AELE Mo. L. J. 101
- [Excessive Force Claims Concerning Pointing Firearms--Part 2](#), 2010 (11) AELE Mo. L. J. 101

❖ **References:** (*Chronological*)

1. [Discipline for Officer-Provoked Force Incidents after County of Los Angeles v. Mendez](#), by Paul D. Knothe, California Public Agency Labor and Employment Blog (June 27, 2017).
2. [As a Matter of Law and Policy, the Ninth Circuit’s “Provocation Rule” Must Stand](#), by James Byrd, Harvard Civil Rights Civil Liberties Law Review (Feb. 9, 2017).
3. Notes: [Armed Standoffs and the Warrant Requirement](#), 59 Hastings L.J. 1517 (2008). (Available for purchase).
4. [Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer’s Pre-Seizure Conduct in an Excessive Force Claim](#), 13 Wm & Mary Bill of Rights J. 651 (2004).



## **AELE Monthly Law Journal**

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