

U.S. SUPREME COURT REJECTS NINTH CIRCUIT'S "PROVOCATION RULE"

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County of Los Angeles v. Mendez
U. S. Supreme Court, May 30, 2017

The Ninth Circuit's provocation rule makes an officer's otherwise reasonable use of force unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) "the provocation is an independent Fourth Amendment violation." *Billington v. Smith*, 292 F. 3d 1177, 1189 (9TH Cir. 2002). In this case, the U.S. Supreme Court unanimously rejected that rule, holding that it had no basis in the Fourth Amendment.

The Los Angeles County Sheriff's Department received word from a confidential informant that a potentially armed and dangerous parolee-at-large had been seen at a certain residence. While other officers searched the main house, Deputies Conley and Pederson searched the back of the property where, unbeknownst to the deputies, respondents Mendez and Garcia were napping inside a shack where they lived. Without a search warrant and without announcing their presence, the deputies opened the door of the shack. Mendez rose from the bed, holding a BB gun that he used to kill pests. Deputy Conley yelled, "Gun!" and the deputies immediately opened fire, shooting Mendez and Garcia multiple times. Officers did not find the parolee in the shack or elsewhere on the property. Mendez and Garcia sued the deputies and the County under 42 U. S. C. §1983, alleging violations of their Fourth Amendment rights. On the excessive force claim, the district court found that the deputies' use of force was reasonable, but held them liable nonetheless under the provocation rule.

The issue in a Fourth Amendment excessive force case is whether the totality of the circumstances justifies the seizure. If the seizure is reasonable, there is no valid excessive force claim. The Ninth Circuit's provocation rule asked whether some other violation "created a situation that led to the use of force" and whether that other violation was committed recklessly or intentionally. The provocation rule looked to the officers' subjective intent. The U.S. Supreme Court held that if a seizure is reasonable, courts cannot create liability by looking back in time to assess whether a different Fourth Amendment violation might have been tied to the eventual use of force. Doing so is not only an unwarranted expansion of the excessive force analysis, but also improperly ties the reasonableness of the force to a subjective standard rather than an objective one. As the Court stated, "By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms."

The County did not attempt to defend the provocation rule. Instead, it argued that the judgment could be affirmed because the court appropriately considered police conduct prior to the use of force that foreseeably created the need to use it in determining whether the seizure was reasonable under the totality of the circumstances. The Supreme Court declined to address this argument because the lower court decision had not addressed it. "All we hold today," said the Court, "is that once a use of force is deemed reasonable under *Graham [v. Connor]*, 490 U. S. 386 (1989), it may not be found unreasonable by reference to some separate constitutional violation."

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