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LEARNING POINTS



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CAN YOU VIOLATE THE CONSTITUTION BY THE USE OF OBJECTIVELY REASONABLE FORCE?

If You “Provoke The Confrontation” By Means Of An Independent Constitutional Violation, You Can, Says the Ninth Circuit.

By Michael P. Stone, Esq. and Robert Rabe, Esq.

So, they call it the “Provocation Rule”. It’s a Ninth Circuit thing. The Rule says that if you commit a constitutional violation, and in so doing “provoke” a confrontation calling for reasonable self-defense on your part, you can be liable even for your reasonable use of force in the face of threat or aggression. Confused?

Let’s assume you make a warrantless entry into someone’s home in violation of the 4th Amendment. The startled homeowner confronts you with a pistol in his hand. Fearing you are about to be shot, you fire first, wounding the homeowner. Your use of force is deemed to be an objectively reasonable response to the threat you faced in the moment. However, it was your unconstitutional conduct and unannounced entry into the home that *provoked the confrontation*, and thus you could be liable for the shooting and wounding of the resident, even though in the moment, it was a reasonable use of force.

But what about the Supreme Court’s own test, fashioned in *Graham v. Connor* in 1989 that determined how a claim of excessive force against a police officer should be resolved? Indeed, on December 12, 2016, the U.S. Supreme Court granted

certiorari to review application of the Ninth Circuit’s “Provocation Rule” in *County of Los Angeles v. Mendez*, No. 16-369.

In *Mendez*, deputies were searching for an “armed and dangerous” parolee at large, thought to be inside a residence. Deputies deployed around the house, and those at the rear found a shed which needed to be secured. They pulled open the shed door, and confronted a plaintiff holding a BB rifle. Fearing they were about to be shot, the deputies fired and struck two occupants, wounding them severely.

Under the “Provocation Rule”, an officer may be held responsible for an otherwise reasonable use of force where the officer intentionally or recklessly provoked a violent confrontation, and the provocation was itself an independent Fourth Amendment violation. (See *Billington v. Smith*, 292 F.3d 1177, 1189-1190 (9th Cir. 2002).)

Peace officers are familiar with *Graham v. Connor*, 490 U.S. 386 (1989) (“*Graham*”), which provides the framework for reviewing excessive force claims against peace officers. *Graham*’s list of factors for evaluating reasonableness include: (1) the severity

of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resisted arrest or attempted to escape. As stated in *Graham*, a court must judge the reasonableness of a particular use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," keeping in mind that the "most important" factor under *Graham* is whether the suspect posed an "immediate threat to the safety of the officers or others."

The *Mendez* 42 U.S.C. § 1983 case involves an instance where, in applying *Graham*, the officers were found not liable for excessive force, but were found to be liable under the "provocation rule" adopted by the San Francisco-based 9th U.S. Circuit Court of Appeals, for provoking the need to use deadly force. The court concluded that the officers violated the provocation rule since they failed to announce and knock before entering the shed- a Fourth Amendment violation of *Mendez*' rights.

The Ninth Circuit affirmed the district court's judgment based upon the "provocation rule". The court held that "[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."

The Ninth Circuit stated that even without relying upon the "provocation rule", "the deputies are liable for the shooting under basic notions of *proximate cause*," based upon the foreseeability or the scope of the risk created by their conduct. "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."

The court found "the situation in this case, where *Mendez* was holding a gun when the officers barged into the shed unannounced, was reasonably

foreseeable." "Indeed, here an announcement that police were entering the shed would almost certainly have ensured that *Mendez* was not holding his BB gun when the officers opened the door. Had this procedure been followed, the *Mendezes* would not have been shot."

Issues in the Supreme Court

In their petition, Defendants noted the Supreme Court has never approved the "provocation rule", and argued that Courts of Appeals should not be permitted to circumvent *Graham*'s precedent regarding the appropriate manner in which to measure a claim of excessive force. An officer should not be liable for damages stemming from a use of force that was found to be reasonable under the Fourth Amendment.

Defendants pointed out that the "provocation rule" has been rejected by a number of other circuits, resulting in inconsistency in the application of federal law with respect to the imposition of liability against a police officer for violating a plaintiff's constitutional right to be free from excessive force.

Additionally, several circuits have held that under general principles of tort and causation, officers who unlawfully enter a home are not liable for harm caused by a reasonable use of force, which is a superseding cause of the harm.

The questions the Supreme Court has agreed to decide are:

1. Whether the Ninth 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?

2. Whether, in an action brought under 42 U.S.C. § 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?

Comments

The first question addresses the viability of the "provocation rule" which holds that police who are not liable for a use of force not deemed excessive may still be liable because they provoked the victims to respond in a way that made the officers reasonably fear for their safety. Defendants are urging the Supreme Court to follow the holdings of most other circuits which find that force must be measured at the time it is applied, and liability should not be based on pre-seizure conduct.

The majority of circuits hold pre-shooting conduct is not relevant because, under *Graham*, force is measured based upon the circumstances facing the officer at the moment it is applied, and any decision regarding such force must take into consideration the fact that officers must make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. It is a "standard of reasonableness at the moment." (*Lamont v. New Jersey*, 637 F.3d 177, 183 (3rd Cir. 2011).) A court does not consider reasonableness with the clarity of 20/20 hindsight, rather, the court must adopt "the perspective of a reasonable officer on the scene ... in light of the facts and circumstances confronting him." (*Graham*, 490 U.S. at 396.) Determining whether an officer's pre-shooting conduct decisions were reasonable in hindsight, does little to affect the reasonableness of decisions made at the moment the force is applied.

The Defendant officers also suggested to the Supreme Court that the "provocation rule" may even put officers' lives at risk by holding them civilly responsible for a reasonable use of force, because the rule may encourage officers to refrain from self-defense at the threat of violence, or else be subject to liability in a courtroom. Officers cannot be "constitutional scholars ... during the split-second

moment during which the officer must make a decision regarding whether to defend himself or herself from harm."

The second question addresses the Ninth Circuit's holding that the deputies are liable for the shooting under basic notions of "proximate cause," based upon the foreseeability or the scope of the risk created by their conduct. In other words, Mendez holding what appeared to be a rifle and, fearing they would be shot and killed, both Defendants firing their guns is a superseding and intervening event that broke the chain of causation from their Fourth amendment violation for the warrantless entry into the shed.

Qualified immunity can shield government officials from individual civil liability where their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Ninth Circuit's application of the provocation rule to hold an officer liable in an otherwise justified use of force is a matter of concern for all law enforcement. Hopefully the Supreme Court will strike down the "provocation rule", and follow the holdings of other circuits which find that force must be measured at the time it is applied, and liability should not be based on pre-seizure conduct.

Stay safe!

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