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TRAINING BULLETIN



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SUPREME COURT OVERTURNS NINTH CIRCUIT'S “PROVOCATION RULE” INVOLVING POLICE USE OF FORCE

County of Los Angeles v. Mendez, No. 16-369

United States Supreme Court - Decided May 30, 2017

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In *Mendez v. County of Los Angeles*, No. 13-56686, the Ninth Circuit Court of Appeal concluded their “provocation rule” allowed an earlier knock-and-announce Fourth Amendment violation, to transform a reasonable use of force into an unreasonable seizure. The question posed by the Supreme Court was, “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 [earlier] Fourth Amendment violation that contributed to [or provoked] their need to use force?” In an unanimous decision, the Court held that the Fourth Amendment provides no basis for a “provocation rule”. “The basic problem with the provocation rule,” Justice Alito wrote for the Court, is that it “provides a novel and unsupported path to liability in cases in which the use of force was reasonable.”

Deputies were searching for an “armed and dangerous” parolee “at large”, who was believed to be

inside a residence. During the briefing, it was announced that two individuals lived in the backyard of the property. Deputies deployed around the house, and the two at the rear discovered a shack which needed to be secured. They pulled open the door and confronted an individual (Mendez) who was holding a BB rifle. Fearing they were about to be shot, the deputies fired and struck the two occupants of the shack, wounding them severely. Both survived and sued Los Angeles County for their injuries.

A federal district judge decided the two deputies responded reasonably when they observed Mendez with the weapon. The deputies, however, were still liable for the injuries they caused, the judge ruled, because they had “provoked” the incident by going onto private property and barging into the shack without a search warrant, and without announcing their presence prior to doing so. The Court of Appeal affirmed the District Court’s application of the provocation rule.

“Defending Those Who Protect Others”

The Supreme Court concluded the provocation rule is incompatible with established excessive force jurisprudence, which sets forth a settled and exclusive framework, under *Graham v. Connor*, 490 U.S. 386, for analyzing whether the force used in making a seizure complies with the Fourth Amendment. The operative question in such cases is "whether the totality of the circumstances justify[es] a particular sort of search or seizure." When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. The provocation rule, however, instructs 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 framework is set out in *Graham*. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately.

The decision also noted that there is no need to distort the excessive force inquiry in order to hold law enforcement officers liable for the foreseeable consequences of all their constitutional torts, because plaintiffs can (subject to qualified immunity), generally recover damages that are proximately caused by any Fourth Amendment violation. Here, the Court remarked, if the injured couple cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused by the warrantless entry. On remand, the Court of Appeal should revisit the question whether proximate cause permits the injured couple to recover damages based on the deputies' failure to secure a warrant at the outset.

According to some commentators, when the eight justices heard arguments in the case (while Justice Neil Gorsuch's confirmation was pending in the Senate), they sounded evenly split. If so, the Court's opinion may be a compromise of sorts - while rejecting the "provocation rule", the decision still leaves open the possibility that the two individuals shot by the police may recover damages for their injuries based on the

warrantless entry into the shack where they were residing.

In addition to its holding on the "provocation rule", this case is another reminder from the Supreme Court that whenever possible, it is always advisable to obtain a warrant before entering a dwelling of any description.

Stay Safe!

Michael P. Stone is the founding partner of Stone Busailah, LLP. This is his 50th year in police and the law. **Robert Rabe** is the firm's writs and appeals specialist. He practiced as a barrister in London, England prior to joining Stone Busailah, LLP.