

Can Reasonable Use of Force Be Unreasonable?

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Can you imagine, after a court found a police officer's use of force reasonable under *Graham*,[1] that the otherwise *reasonable* use of force would be deemed *unreasonable* because of a separate Fourth Amendment violation? In other words, the officer's reasonable use of force would become, as a matter of law, unreasonable if (1) *the officer intentionally or recklessly provokes a violent confrontation*; and (2) *the provocation is an independent Fourth Amendment violation.*[2] This is not from an alternative universe. After a forcible seizure is found reasonable under *Graham*, the so-called "provocation rule" has required the court to ask whether a police officer violated the Fourth Amendment in some other way during the events leading up to the seizure.[3]

Under a recent Supreme Court ruling, the "provocation rule"—a Ninth Circuit construct which had been sharply criticized outside the Circuit–is now abrogated.[4]

In *County of Los Angeles v. Mendez*,[5] the Supreme Court settles this issue and reaffirms that the Fourth Amendment provides no basis for such a "provocation rule." A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.[6] More specifically, once a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation.[7]

The *Mendez* Case.

In *Mendez*, the Los Angeles County Sheriff's Department obtained an arrest warrant for Ronnie O'Dell, an armed and dangerous parolee-at-large. A confidential informant told deputies that O'Dell was at the Hughes residence in Lancaster, California. At a briefing before leaving to arrest O'Dell, deputies learned that a man named Angel Mendez was living in Hughes' backyard with his pregnant girlfriend (now wife), Jennifer Garcia.[8]

During the search for O'Dell, while other deputies searched the Hughes residence, Deputies Conley and Pederson searched the rear of the property where they found three metal storage sheds, a single-door plywood shack, and scattered debris. They checked the sheds and found nothing. Mendez and Garcia were living in the plywood shack, where Mendez kept a BB gun for use in shooting rats. It resembled a small caliber rifle.

The deputies were unaware Mendez and Garcia were sleeping on a futon in the shack.[9] Conley and Pederson approached the shack's door with no search warrant, without knocking and without announcing their presence.

Conley opened the wooden door that was covered with a blanket. Mendez awoke from the futon, and thinking the visitor was Hughes (the homeowner), he picked up the BB gun so he could get out of bed and place the weapon on the ground. Deputy Conley saw Mendez pointing the BB gun in his direction. Conley shouted "gun" and the deputies opened fire. In total, 15 rounds were fired at Mendez and Garcia, both of whom were shot multiple times and suffered serious injuries. Mendez's right leg required amputation as a result.

Deputies never found O'Dell at the Hughes' residence.[10] Asserting three Fourth Amendment claims,[11] Mendez and Garcia filed suit under 42 U.S.C. § 1983 against Los Angeles County and Deputies Conley and Pederson.[12]

The Graham Factors Revisited.

The framework for analyzing excessive force claims has long been laid out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all.[13] Reasonableness has always been the touchstone of any Fourth Amendment analysis.[14] The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with hindsight's 20/20 vision. The Fourth Amendment reasonableness test is not capable of precise definition or mechanical application; however, its proper application requires careful attention to the facts and circumstances of each particular case. The *Graham* factors include (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[15] The Fourth Amendment reasonableness test requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The question of a seizure in regards to reasonableness is whether the totality of the circumstances justifies a particular sort of seizure.[16]

The Provocation Rule was Wrong.

The fundamental problem with the Ninth Circuit's "provocation rule" was that it did not eliminate use of the *Graham* factors; in fact it added an extra step to the analysis. In *Mendez*, the lower court, contrary to Fourth Amendment jurisprudence, had held that although the use of force was determined to be reasonable under *Graham*, the "provocation rule" undid that reasonableness. This provided a novel and unsupported path to liability in cases where the use of force was reasonable.[17] The District Court, without dispute from the Ninth Circuit, had found the use of force by Deputies Conley and Pederson was reasonable under *Graham*; however, according to the lower courts, Mendez and Garcia were still able to recover damages because the deputies committed a separate constitutional violation by entering the shack without a warrant. This conflated analysis led to finding a separate, reasonable use of force now unreasonable, which conflicted with *Graham*.[18]

The "provocation rule" included a vague causal standard. It looked to the *subjective* intent of the officers carrying out the seizure. Officers cannot be asked to go back in time and be judged solely on a purported Fourth Amendment violation that would render unreasonable

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any once reasonable use of force. The "provocation rule" required that split-second decisions of officers be measured against a vexatious rule that created a second guessing, all-or-nothing type standard.

The advice to officers today is to continue conducting police work without fear of being second-guessed by a court for a reasonable use of force. After on *Mendez*, the good news is that the "provocation rule" will no longer expand the scope of the Fourth Amendment against a police officer's sound judgment.



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Notes

1. Graham v. O'Connor, 490 U.S. 386, 109 (1989).
2. Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002).
3. County of Los Angeles v. Mendez, 137 S. Ct. 1546 (2017).
4. *See* Woodward v. Tucson, ~ F.3d ~, 6, (9th Cir. 2017).
5. *Mendez* at 1539.
6. *Id* at 1544.
7. *Id* at 1547.
8. *Id.*
9. *Id.*
10. *Id* at 1544 – 45.
11. Mendez and Garcia claimed a warrantless entry when the deputies searched by entering the shack without a warrant, a knock-and-announce claim when the deputies searched because they failed to announce their presence before entering the shack; and third, an excessive force claim when the Deputies effected seizure by deploying excessive force in opening fire after entering the shack. The Supreme Court did not analyze the other two Fourth Amendment claims.
12. *Id.*
13. *Id* at 1547.
14. Birchfield v. North Dakota, 136 S. Ct. 2160, 2186, (2016).
15. *Graham* at 396 – 97.
16. Tennessee v. Garner, 471 U.S. 1, 8 – 9, (1985).
17. *Mendez* at 1547.
18. *Id.*

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