Totality Of Circumstances Under *Graham*: How Far Back Do You Go?

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Graham v. Connor, 490 U.S. 386 (1989)

- Use of force inquiry: “The question is whether the officers' actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.”
- Incorporates “totality of circumstances” standard from *Tennessee v. Garner*, 471 U.S. 1 (1985).

Open Issue: Is There A Temporal Limit On What Circumstances Are Considered?

- Do you only look at the specific facts at the time the officer uses force?
- Do you consider facts leading up to the use of force, i.e. tactical decisions that put the officer in a position that prompted the use of force?

Supreme Court Recognizes Open Issue

- *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) –parties briefed issue, but not included in questions presented for cert.

Circuit Split

- Evaluate only facts confronting officer at the moment force is used. *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007)
- Evaluate all facts leading up to use of force. *Jiron v. City of Lakewood*, 392 F. 3d 410 (10th Cir. 2004); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4 (1st Cir. 2005).

Typical Situations

- Use of cover –officers “unnecessarily” putting themselves at risk, prompting use of defensive force.
- Tactical decisions – confronting suspect rather than waiting for back up, or in some cases, await mental health professionals to deal with suspect.

Impact Of State Law

- Some states recognize that pre-shooting conduct may be evaluated in context of a negligence claim – *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013); *Mendez v. County of Los Angeles*, 897 F.3d 1067 (9th Cir. 2018).