Will The Provocation Doctrine Survive?

December 6, 2016 (Fault Lines) — The Supreme Court granted cert in the Ninth Circuit case of Los Angeles v. Mendez, in which a homeless husband and wife won a verdict of $4,000,000 after two County Deputies entered the shack in which they were living in the back of a friend's house and, well, shot 'em.

Angel Mendez and wife Jennifer Mendez were homeless, living in a shack in a friend's backyard. Police, searching for someone else, barged into their windowless shack. No knock. No warrant.

Police allege that Mendez reached for a BB gun, which he owned for shooting rats. The cops opened fire, unleashing 15 shots. Angel was shot multiple times; Jennifer — who was pregnant — was shot in the back.

The deputies appealed, arguing that they were entitled to qualified immunity under a host of theories, even though the district court held their shooting, including the bullets striking the pregnant Jennifer in the back, was a reasonable use of force under Graham v. Connor.

One of the contentions upon which qualified immunity was denied was a Ninth Circuit quirk, the Provocation Doctrine.

Here, the district court held that because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper. We agree.

The deputies argue first that the provocation doctrine is inapplicable because they did not "provoke a violent response by plaintiffs." In other words, they claim that because Mr. Mendez did not intend to threaten the officers with his gun, he was not responding to the deputies' actions and they did not "provoke" him. We reject this argument. Our case law does not indicate that liability may attach only if the plaintiff acts violently; we simply require that the deputies' unconstitutional conduct "created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable."

It's not only a fascinating doctrine, but one that addresses the long-vexing problem: how can a cop benefit from a unlawful situation he created to gain qualified immunity from its consequences.

The problem manifests itself in two ways: On the one hand, the officer engages in unlawful conduct giving rise to a scenario, as here, where someone grabs a gun to defend himself from unknown intruders, only to find afterward that they're police. But had the deputies not entered without a warrant, without knocking and announcing,

Angel Mendez would have had no reason to fear burglars. He only would have had reason to fear the deputies, but that's a different issue.

The second way the problem manifests is where the police engage in deliberate conduct, even though it's unlawful, for the purpose of creating the untenable situation, and with the intention of then exploiting the situation they created.

Quite often, the question arises for those inclined to rational thought how the police can get away with the fact that the product of their actions, which may be the seizure of evidence if not the use of deadly force against a person, can make sense when the officers caused the situation they blame for their subsequent actions. The answer, unfortunately, is that the law doesn't hold that they can't. Except in the Ninth Circuit.

In the application for cert, three questions were posed:

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, if the "provocation" rule is upheld, the qualified immunity analysis must be tailored to require a reviewing court to determine whether every reasonable officer in the position of the defendant would have known his unlawful conduct would provoke a violent confrontation under the specific facts of the case, as this is the conduct for which the Ninth Circuit imposes constitutional liability despite a reasonable use of force under the Fourth Amendment?

3. 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?

The grant of cert expressly limited the Court's inquiry to the first and third questions, and the first, obviously, directly calls into question whether the provocation doctrine should be upheld or overruled. This isn't to say which way the Supremes will go, or whether they will ultimately rule on it at all, but it bodes poorly for the rule given that the Ninth Circuit hasn't fared particularly well in the Supreme Court, and that the doctrine hasn't been adopted by other circuits.

Noting that this doesn't affect the propriety of the conduct, the shooting, which was held reasonable and is not up for review, but rather whether the deputies will enjoy qualified immunity for their constitutional violations, a win for the Mendez's at the Supreme Court would be enormously significant, bringing a huge dose of reason to the latitude given police officers to create, then exploit, unconstitutional conduct. Perhaps the Court will make this the law of the land, but then, smart money is on the death of the provocation doctrine. It just makes too much sense.