Law Enforcement Digest

May 2017

Law enforcement officers: Thank you for your service, protection and sacrifice.

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HONOR ROLL

747 Basic Law Enforcement Academy – January 18, 2017 through May 22, 2017

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Best Academic:	Officer Chase McEvilly, Seattle PD
Best Practical Skills:	Deputy Brent Reid, Snohomish County SO
Patrol Partner:	Officer Derek Thompson, Lacey PD
Tac Officer:	Sabrina Kessler, Redmond PD
	Russ Hicks, WSCJTC

May 2017 LED TABLE OF CONTENTS

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UNITED STATES SUPREME COURT

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CIVIL RIGHTS LAWSUIT: FOURTH AMENDMENT PROVIDES NO BASIS FOR THE NINTH CIRCUIT'S PROVOCATION RULE.

County of Los Angeles v. Mendez, 137 S. Ct. 1359, 198 L.Ed.2d 52 (May 30, 2017).

FACTS (portions excerpted from the opinion):

A confidential informant reported to the Sheriff's Department that Ronnie O'Dell (a potentially dangerous parolee) was at a specific house. O'Dell had a felony arrest warrant, and law enforcement believed he was armed and dangerous. The Sheriff's Department sent several officers to the house. The plan was that some officers would knock on the front door while two Deputies searched the backyard. The Deputies were told that Angel Mendez and his pregnant girlfriend, Jennifer Garcia, lived in the backyard.

The two Deputies searched the backyard with their guns drawn. The backyard had debris and abandoned automobiles. A shack, with a single doorway covered by a blanket, was also in the backyard. The shack had a mounted air conditioner. Clothes and other items were near the shack.

The two Deputies did not know that Mendez and Garcia were sleeping in the shack. The Deputies did not have a search warrant for the property, and did not knock and announce before entering the shack.

When a Deputy entered the shack, Mendez thought it was the homeowner and picked up his BB gun (which resembled a small caliber rifle) so he could stand up. The Deputies saw Mendez holding the gun and pointing it towards one of the Deputies. A Deputy yelled "gun" and the Deputies immediately fired 15 rounds from their firearms. Mendez and Garcia were shot multiple times and suffered severe injuries.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Mendez and Garcia filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the Deputies. The lawsuit asserted three Fourth Amendment claims: (1) warrantless entry; (2) knock and announce; and (3) excessive force. The district court found that the Deputies violated Mendez and Garcia's Fourth Amendment rights by conducting a warrantless entry and failing to knock and announce. In terms of the excessive force claim, the district court found the force was reasonable, but that the Deputies were liable under the Ninth Circuit Court of Appeals' provocation rule. The Deputies appealed to the Ninth Circuit. The Ninth Circuit affirmed the district court's finding that the Deputies were liable under the provocation rule. The Deputies sought review from the United States Supreme Court. The United States Supreme Court disagreed with the Ninth Circuit's provocation rule.

ISSUE: Whether the Fourth Amendment provides a basis for the Ninth Circuit's provocation rule, which imposes liability on an officer who used reasonable force, but recklessly or intentionally provoked the incident leading to the use of force.

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ANALYSIS (portions excerpted from the opinion):

The Fourth Amendment requires officers to use objectively reasonable force. Courts use an objective test to evaluate whether an officer used reasonable force under the facts and circumstances of each particular case. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. When an officer uses reasonable force, taking into account all relevant circumstances, there is no valid excessive force claim.

With this in mind, the Supreme Court found that the Fourth Amendment does not support the Ninth Circuit's provocation rule. The Supreme Court reasoned:

(1) The Ninth Circuit's provocation rule permits an excessive force claim under the Fourth Amendment where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation.

(2) The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.

(3) The framework for analyzing excessive claims is set out in *Graham v. Connor* (i.e., the *Graham* factors: (i) the severity of the crime at issue; (ii) whether the suspect posed an immediate threat to the safety of the officers or others, and (iii) whether the suspect was actively resisting arrest or attempting to evade arrest by flight). If there is no excessive force claim under *Graham*, there is no excessive force claim at all.

However, the Supreme Court also reasoned that plaintiffs can (subject to qualified immunity) generally recover damages that are proximately caused by any Fourth Amendment violation. In this case, the district court and the Ninth Circuit found that officers were liable under Section 1983 for the warrantless entry. The Supreme Court directed the district court to consider whether proximate cause permits Mendez and Garcia to recover damages for their shooting injuries based on the Deputies' warrantless entry.

RESULT: The Supreme Court found that the Deputies did not use excessive force in violation of the Fourth Amendment, but remanded the case back to the district court to determine if the warrantless entry proximately caused Mendez and Garcia's injuries.

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NINTH CIRCUIT COURT OF APPEALS

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CIVIL RIGHTS LAWSUIT: DEPUTY ENTITLED TO QUALIFIED IMMUNITY BECAUSE LAW WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE INCIDENT.
S.B. v. County of San Diego, 864 F.3d 1010 (May 12, 2017).

FACTS (portions excerpted from the opinion):

Two Sheriff's Deputies received a call involving a potentially dangerous person with mental health issues. Dispatch informed the Deputies that family members had reported David Brown as acting aggressively. Brown's family left their house and went to a fire station.

At the fire station, the Deputies learned that Brown was bipolar, schizophrenic, diabetic, and under the influence of Valium and alcohol. The family said that Brown acted "aggressively" all day and "warned that someone was going to get hurt if he did not get alcohol." Brown had access to kitchen knives, but not other weapons.

Three Deputies entered Brown's house. Deputy A had his gun drawn. Deputy B had his Taser at ready. The Deputies heard noises in the kitchen.

Deputy A called out "Sheriff's Department." The kitchen had two entrances. Deputy A and Deputy B entered the kitchen from different entrances. Deputy A told Brown "that he wanted to speak with him."

Deputy A and Deputy B saw that Brown had kitchen knives sticking out of his pockets. Deputy B yelled knife, radioed the same, drew his gun, and holstered his Taser. Brown appeared under the influence. Brown was staggering and stumbling over his words, had difficulty standing up straight, was swaying side to side, and had a glassy eyed stare and could not focus on Deputy A.

Deputy A ordered Brown to raise his hands, and pointed his gun at Brown. Brown did not comply. Deputy A repeated the command, and Brown complied. Brown rambled statements including "Just shoot me" and "I can't bring him back. He's gone."

Deputy A told Brown "If you go for the knife, you will be shot." The Deputies commanded Brown to drop to his knees, and Brown did so.

At this point, the Deputies' had different observations:

> **[Deputy A]:** Deputy B stood to his left, about three to five feet from Brown. Once Brown was on his knees, Deputy B moved towards Brown to handcuff him. Brown looked at Deputy B, lowered his arm and pointed it at Deputy B, and said "Get the fuck away from me." Deputy B stepped back.
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> Brown then looked at Deputy B, reached back with his right hand and produced a knife with a six-to-eight-inch blade. Brown moved as if he were going to get up, and pointed the knife at Deputy B. Deputy A could see Deputy B clearly in his peripheral vision. Believing that Deputy B was in imminent danger, Deputy A shot Brown three or four times, less than one second after Brown grabbed the knife. About five minutes elapsed between when Deputy A first saw the knife in Brown's pocket and the shooting.
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> **Deputy B:** After Brown kneeled, Deputy B holstered his gun and drew his Taser. Brown saw the Taser's red light on his body and said "I've been tased before. Just tase me." Deputy B stepped closer, and Brown began screaming and grabbing his face, and yelled something like "I can't handle it anymore." Brown then reached for the knife in his right back pocket. Deputy A said "Don't do it. Don't do it."
>
> As Brown started to rise with the knife "in one fluid motion," Deputy B heard three to six shots come from Deputy A. Brown's knees were about an inch off the ground when he was shot, with his left hand on the floor and the knife in his right hand. Brown had made eye contact with Deputy B, and was in the process of standing up from his kneeling position. Deputy A shot Brown "almost instantaneously" as Brown grabbed the knife. When Brown's hand touched the knife, the first round came out.

When the shots were fired, Deputy B was switching from his Taser to his gun. Deputy B could not see Deputy A, and believed that the wall prevented Deputy A from seeing him. Brown was closer to Deputy B than Deputy C when the shots were fired.

[Deputy C]: After Brown got down on his knees, Deputy C joined Deputy B so they could handcuff Brown while [Deputy A] kept his gun drawn on Brown. Deputy C told Brown to put his hands on his head, and he did.

When Deputy C and Deputy B took a step closed to Brown, Brown got quiet, unclasped his fingers from his head, and started to slowly bring his hands back down. Deputy C again told Brown to keep his hands on his head, and she pulled Deputy B back to give Brown room. Deputy B was now six to eight feet from Brown.

Brown slowly lowered his hands about halfway, and then extremely quickly grabbed a knife from his right back pocket and held it in front of him. Brown was still on his knees, but started to move as if he were going to stand, and then Deputy C heard three to six shots. She opined that Brown was trying to stab Deputy B, was close enough to do so, and that either she or Deputy B would have been stabbed had Deputy A not fired. She said that Deputy B was three to four feet away from Brown when Deputy A fired (though she did not know if Deputy B moved closed to Brown after she pulled him away). She could not see Moses when he fired the fatal shots.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Brown's family sued the Deputies under 42 U.S.C. § 1983 (Section 1983) for unreasonable force that violated his Fourth Amendment rights. The district court denied the Deputies' motion for summary judgment based on qualified immunity. The district court found three material inconsistencies that required a jury trial: (1) whether Brown was on his knees or attempting to stand when he grabbed the knife and was shot; (2) whether Deputy A could see the other officers clearly when he fired his weapon; and (3) the distance between Brown and Deputy B when Brown grabbed the knife. The district court reasoned the inconsistencies also created a triable dispute over whether Deputy A's conduct violated clearly established law, so qualified immunity was not appropriate. The Deputies appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the trial court.

ISSUE: Whether the law was clearly established, at the time of this incident, that Deputy A's use of force was unreasonable and violated the Fourth Amendment.

ANALYSIS (portions excerpted from the opinion):

In a Section 1983 lawsuit, an officer is entitled to qualified immunity if: (1) the officer did not violate a constitutional right; or (2) the constitutional right was not clearly established at the time of the incident.

The Fourth Amendment requires officers to use objectively reasonable force. The *Graham v. Connor* (*Graham*) factors evaluate whether the force was objectively reasonable based on: (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.

Courts may consider other factors such as: (1) the availability of less intrusive alternatives to the force used; (2) whether proper warnings were given; and (3) whether it should have been apparent

to the officers that the subject was emotionally disturbed. The most important factor is whether the suspect posed an immediate threat to the safety of the officers or others.

The Ninth Circuit agreed that a reasonable juror could find a Fourth Amendment violation (i.e., Deputy A used unreasonable force) based on:

> (1) the three officers, responding to a call about a mentally ill and intoxicated individual "acting aggressively," entered Brown's house and saw that he had knives in his pockets; (2) after Brown complied with the officer's orders to kneel, Brown grabbed a knife with a six-to-eight-inch blade from his back pocket; (3) Deputy A shot Brown as soon as his hand touched the knife; (4) Brown was on his knees when he was shot; (5) when he grabbed the knife, Brown was approximately six to eight feet away from Deputy B; (6) Deputy A could not see the other officers at the time Brown grabbed the knife; (7) after Brown went for the knife, the officers did not order him to drop the knife or warn that he was about to be shot; and (8) Deputy B had a non-lethal option – a Taser gun.

However, the Ninth Circuit found that the law was not clearly established at the time (i.e., there was no case where an officer acting under similar circumstances was found to have used unreasonable force), and the Deputies were entitled to qualified immunity.

RESULT: The Ninth Circuit reversed the district court's denial of qualified immunity to the Deputies.

CIVIL RIGHTS LAWSUIT: ARIZONA DEPARTMENT OF CORRECTIONS' MAIL POLICY, WHICH REQUIRED A CORRECTIONS OFFICER TO "SCAN" AN INMATE'S OUTGOING LEGAL MAIL, VIOLATED THE SIXTH AMENDMENT AND FIRST AMENDMENT BECAUSE IT REQUIRED A PAGE BY PAGE REVIEW OF OUTGOING LEGAL MAIL AND THERE WAS NO EVIDENCE OF A SUFFICIENT SECURITY THREAT TO JUSTIFY THE POLICY.
Nordstrom v. Ryan, 856 F.3d 1265 (May 18, 2017).

FACTS (portions excerpted from the opinion):

The Arizona Department of Corrections' mail policy required outgoing legal mail inspected for contraband, and scanned to ensure that it is in fact legal mail. The policy did not allow staff to read the mail, and the inmate had to present during the inspection and re-sealing of the mail following inspection. The inspection must be only to the extent necessary to determine if the mail contains contraband, or to verify that its contents qualify as legal mail and do not contain communications about illegal activities. The Arizona Department of Corrections broadly defines contraband to include any non-legal written correspondence or communication discovered as a result of scanning incoming or outgoing legal mail. Based on the testimony of a prison mail supervisor, it appears that the practice of "scanning" involves reading some words in a letter and looking at each page, but not reading the text line-by-line.

PROCEDURAL HISTORY:

An inmate challenged the outgoing legal mail inspection policy as violating his Sixth Amendment right to legal counsel, and First Amendment right to send mail. The Ninth Circuit Court of Appeals agreed.

ISSUE: Whether the Arizona Department of Corrections' outgoing legal mail policy violated the Sixth Amendment and First Amendment because it required staff to scan each page of the correspondence.

ANALYSIS (portions excerpted from the opinion):

The Ninth Circuit reasoned that the outgoing legal mail policy violated the inmate's Sixth Amendment and First Amendment rights because:

(1) There was no evidence that outgoing legal mail to actual attorneys has ever facilitated criminal activity.

(2) Since there is no evidence of abuse of the legal mail system when outgoing mail is addressed to an attorney, there is no reason to conclude that a more limited inspection of outgoing legal mail would have an adverse effect on prison staff, other inmates, or allocation of resources within prisons.

(3) There are readily available, less restrictive alternatives that are unlikely to have an adverse effect on prisons. These less restrictive alternatives include prison staff checking whether the outgoing mail is addressed to a licensed attorney.

The Ninth Circuit noted:

> We reiterate our holding that prison officials may *inspect*, but may not *read*, an inmate's outgoing legal mail in his presence. At most, a proper inspection entails looking at a letter to confirm that it does not include suspicious features such as maps, and making sure that illegal goods or items that pose a security threat are not hidden in the envelope. The Arizona Department of Corrections' legal mail police does not meet this standard because it requires that prison officials "verify that the letter's contents qualify as legal mail."

RESULT: The Ninth Circuit remanded the case to the district court to enter an injunction so that the outgoing legal mail policy complies with constitutional standards and is based on evidence of actual risks.

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WASHINGTON STATE COURT OF APPEALS

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IMPLIED CONSENT WARNINGS: AT THE TIME OF THE DRIVER'S ARREST, THE IMPLIED CONSENT STATUTE NO LONGER REQUIRED IMPLIED CONSENT WARNINGS BEFORE ASKING AN ARRESTED DRIVER TO CONSENT TO A BLOOD TEST.
Kandler v. City of Kent, 199 Wn. App. 22, 397 P.3d 921 (May 15, 2017).

FACTS (portions excerpted from the opinion):

Joanne Kandler was arrested for driving under the influence of marijuana. At the time, the Implied Consent Warning statute, RCW 46.20.308, did not require an officer to read implied consent warnings before an asking an arrested driver to consent to a blood draw. The arresting officer asked Kandler whether she would consent to a blood draw. The officer informed Kandler that she had the right to refuse; evidence from the blood test could be used against her in legal proceedings; she had a right to consult with an attorney before giving consent; and consent was to be given knowingly, freely, and voluntarily. Kandler consented to a blood draw.

PROCEDURAL HISTORY:

The prosecution charged Kandler with Driving Under the Influence. Before trial, the defense moved to suppress the result from the blood draw, and argued the officer should have read implied consent warnings before asking Kandler to consent to a blood draw. The trial court granted the motion to suppress. The superior court reversed the trial court and reasoned that the Implied Consent statute did not apply to blood tests. Kandler appealed to the Washington State Court of Appeals. The Court of Appeals agreed with the superior court.

ISSUE: Whether RCW 46.20.308, the Implied Consent statute, required the officer to read the arrested driver implied consent warnings before asking her to consent to a blood draw when (at the time of the arrest) the statute's language no longer applied to blood draws.

ANALYSIS (portions excerpted from the opinion):

The Implied Consent statute, RCW 46.20.308, requires officers to read implied consent warnings before asking an arrested driver to consent to a breath test. In the past, the Implied Consent statute also required officers to read implied consent warnings before asking an arrested driver to consent to a blood test. At the time of Kandler's arrest, however, the Implied Consent statute did not have references to blood test, but the statute still required officers to warn arrested drivers (before asking the driver to consent to a breath test) that "if the test indicates a concentration of THC in the driver's blood above the legal limit, driving privileges will be revoked."

Even though the Implied Consent statute had references to consequences if the concentration of THC in the driver's blood was above the legal limit, the Court of Appeals found the Implied Consent Statute did not apply to blood draws. The Court of Appeals reasoned:

(1) By including warnings concerning the consequences of driving with a blood THC concentration above the statutory limit, the statute implied, incorrectly, that a breath test could measure the concentration of THC in a person's blood. But this faulty understanding of what a breath test could measure is not relevant here, where the officers did not seek to administer a breath test.

(2) The statute in effect at the time of Kandler's arrest expressly applied to breath tests.

(3) Because the implied consent statute did not apply to Kandler's blood test, evidence from the test was admissible if the State showed that the test was within the consent exception to the warrant requirement. Consent to a search is valid if it is voluntarily given. Kandler does not dispute that she consented to the test and makes no argument that her consent was not voluntary.

RESULT: The Court of Appeals reversed the trial court's suppression order, and the test results from the voluntary blood test are admissible evidence.

LED EDITORIAL NOTE: In 2015, the Legislature amended RCW 46.20.308 to remove references to THC in a driver's blood. While the Implied Consent statute does not apply to blood draws, it applies to breath tests. An officer must read implied consent warnings to an arrested driver before asking the driver to submit to a breath test.

If an officer asks an arrested driver to consent to a blood draw, the driver must voluntarily consent to the draw. Courts will look at the totality of the circumstances to determine if a

driver voluntarily consented to the blood draw. As always, officers are encouraged to discuss these issues with their agencies' legal advisors and local prosecuting attorneys.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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