Supreme Court's Rejection of Provocation Rule

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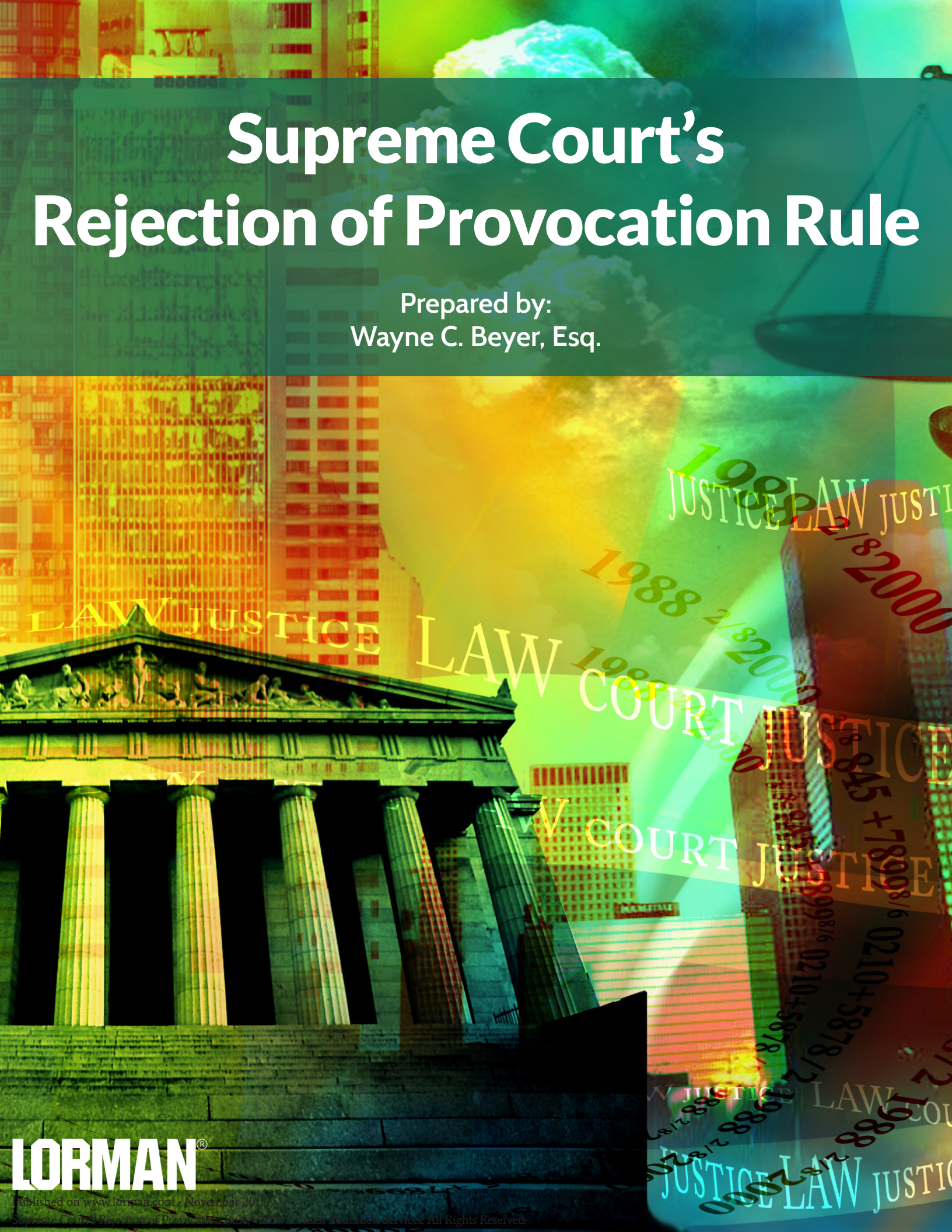

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III. Supreme Court's Rejection of Provocation Rule

The most important unresolved Fourth Amendment issue is where should Fourth Amendment scrutiny begin when law enforcement officers caused or contributed to cause their use of deadly force? A person is not seized until they are shot or accede to police authority. ***California v. Hodari D.,*** 499 U.S. 621, 626 (1991); ***Brower v. County of Inyo,*** 489 U.S. 593 (1989); ***Terry v. Ohio,*** 392 U.S. 1, 19 n. 16 (1968). They are not seized for Fourth Amendment purposes until they are no longer free to go. ***United States v. Mendenhall,*** 446 U.S. 544, 553 (1980). Many of the cases involve suicidal, mentally disturbed individuals who are not complying with police commands and who have not committed an offense until they raise or point a weapon at an officer. Should the Fourth Amendment review concentrate only on the moment of shooting to the exclusion of events leading up to it? Similarly, where does the reasonableness analysis begin when a search warrant execution goes wrong, or a pursuit that begins with a minor offense ends with a car crash, drawn guns, and an officer standing in the highway to avoid the motorist getting away?

The Circuits have had varying and not altogether reconcilable approaches: from considering only the events "immediately preceding and moment of the shooting" to a broader review of the "totality of the circumstances" to a more complicated causation analysis of whether one Fourth Amendment violation "provoked" another. The First, Third, Seventh (applying qualified immunity), and Eleventh Circuits consider "all the surrounding circumstances" and "actions leading up to" the use of force. The Second, Fourth, Fifth, and Eighth Circuits consider "circumstances immediately prior to and at the moment" the officer made the decision to use deadly force. The Sixth Circuit applies a "segmented" approach, considering each possible violation separately and not as causally related. The Ninth Circuit until the ruling in ***County of Los Angeles v. Mendez***, 137 S.Ct. 1539 (2017), applied a "provocation" theory. Antecedent events could be considered if an earlier, independent Fourth Amendment violation intentionally or recklessly caused a second Fourth Amendment violation, i.e., the self-defense shooting. Similarly, the Tenth Circuit would consider whether the officer's own reckless or deliberate (but not negligent) conduct immediately before the seizure unreasonably created the need to use deadly force.

This section surveys the Circuits' analysis of this significant issue, discusses the Supreme Court's recent rejection of the Ninth Circuit's "provocation" rule, ***County of Los Angeles v. Mendez***, and ends with some recommendations for resolution.

The First Circuit does not limit its inquiry to the moment of the shooting, but considers "all of the surrounding circumstances" and the "actions leading up to" the use of deadly force. ***See, e.g., St. Hilaire v. City of Laconia***, 71 F.3d 20, 26-27 (1st. Cir. 1995) ("We do not read [***California v. Hodari D***., 499 U.S. 621 (1991)] as forbidding courts from examining circumstances leading up to a seizure"; citing two other cases where it "examined each of the actions leading up to a mortal wounding of a woman," (citing ***Hegarty v. Somerset County***, 53 F.3d 1367, 1374-79 (1st Cir. 1995)), and "all of the surrounding circumstances in determining whether the police acted reasonably," (citing ***Roy v. Inhabitants of the City of Lewiston***, 42 F.3d 691, 695 (1st Cir. 1994)), "rather than the moment of the shooting as the defendants had urged."); ***see also Young v. City of Providence***, 404 F.3d 4, 22-23 (1st Cir. 2005) (holding that it was not error for jury to consider "events leading up to the shooting," which included rookie officer leaving cover and exposing himself to armed, off-duty officer).

Under the Second Circuit's cases, the reasonableness of an officer's decision to use force "depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force." ***Cowan ex rel. Estate of Cooper v.***

Breen, 352 F.3d 756, 762 (2d Cir. 2003). ***See, e.g., Terebesi v. Torreso***, 764 F.3d 217, 234 n. 16. (2d Cir. 2014) (adhering to Second Circuit rule that Fourth Amendment reasonableness inquiry "depends only on the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force[,]" line of cases from other Circuits considering pre-seizure conduct were distinguishable); ***see also Nimely v. City of New York***, 414 F.3d 381, 390-91 (2d Cir. 2005) ("In all cases, the reasonableness of the officer's decision to use force in effectuating a seizure 'depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force[,]'" (citing ***Cowan, supra***, 352 F.3d at 762)).

The Third Circuit holds the view that pre-seizure conduct should be considered in the reasonableness calculus, but has not decided how much weight should be given to conduct that creates the need to use deadly force in self-defense. ***See, e.g., Abraham v. Raso***, 183 F.3d 279, 291 (3d Cir. 1999) (expressing disagreement with circuit decisions "which which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure[]' . . . because we do not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstance' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished."); ***see also Grazier ex rel. White v. City of Philadelphia***, 328 F.3d 120, 130 (3d Cir. 2003) (dissent) ("if the officer's conduct unreasonably creates the need to use deadly force in self-defense, that conduct may render the eventual use of deadly force by the officer unreasonable in violation of the Fourth Amendment[.]").

The Fourth Circuit reviews the moment of shooting and not events leading up to it. ***See, e.g., Gandy v. Robey***, No. 11-2248 (4th Cir. 4/4/2013) (unpublished) ("In determining whether an officer was justified in using deadly force based on 'probable cause to believe that the suspect pose[d] a threat of serious physical harm,' [***Tennessee v.***] ***Garner***, 471 U.S. [1, (1985)] at 11, we must focus on the moment when such force was employed."); ***see also Waterman v. Batton***, 393 F.3d 471, 477 (4th Cir. 2005) (officers in or near path of accelerating vehicle shot decedent; "the reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment that force is employed.").

The Fifth Circuit confines the excessive force inquiry to the moment of the threat. ***See, e.g., Carter v. Diamond URS Huntsville***, No. Civ. A. H-14-2776 (S.D. Tex. 9/30/2016) (non-deadly force case, but it conveniently summarizes Fifth Circuit's position on Fourth Amendment review: "[T]he Fifth Circuit has narrowed the [reasonableness] test and held that '"[t]he excessive force inquiry is confined to whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting.' Therefore, any of the officers' actions leading up to the shooting are not relevant for purposes of an excessive force inquiry in this Circuit[,]" citing ***Harris v. Serpas***, 745 F.3d 767, 772 (5th Cir. 2014), quoting ***Bazan ex rel. Bazan v. Hidalgo County***, 246 F.3d 481, 493 (5th Cir. 2001)); ***see also Harris v. Serpas***, 745 F.3d 767, 772 (5th Cir. 2014) ("The excessive force inquiry is confined to whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting[.]").

The Sixth Circuit applies a "time-segmented analysis" to excessive force claims. A court should identify the seizure and determine whether the force used during the seizure was reasonable under the totality of the circumstances, rather than whether officers unreasonably created the circumstances leading to the seizure. ***See, e.g., Dickerson v. McClellan***, 101 F.3d 1151, 1161 (6th Cir. 1996) (rejecting plaintiff's theory that unannounced entry created need to use excessive force, Sixth Circuit panel "segmented" entry and shooting, "proceeding to examine whether the force used to effect that seizure

was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances"); ***see also Rucinski v. County of Oakland***, No. 15-1844 (6th Cir. 7/6/2016) (unpublished) ("[The plaintiff] asks us to ignore our 'segmented approach' to analyzing Fourth Amendment excessive force claims, whereby we are required to evaluate the reasonableness of officers' use of force by focusing on the moments immediately preceding that use of force, ***Livermore ex rel. Rohm v. Lubelan***, 476 F.3d 397, 406 (6th Cir. 2007), and not on the adequacy of planning or the length of time spent thinking through the problem at hand. . . . Although this may present a close question and send more excessive force cases to the jury for trial, . . . we may not disregard this Court's long-standing practice of analyzing excessive force claims in segments.").

In the Seventh Circuit, the lack of clarity on the relevance of pre-seizure conduct provides a qualified immunity defense. ***See, e.g., Williams v. Indiana State Police Dept***., 797 F.3d 468, 483 (7th Cir. 2015) ("The sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances." However, with regard to qualified immunity defense, absence of clearly established circuit precedent favors individual defendants. "[O]ur caselaw does not clearly establish that an officer may be liable under the Fourth Amendment solely for his pre-seizure conduct that led to the encounter.").

The Eighth Circuit applies Fourth Amendment scrutiny to the seizure itself and not to pre-seizure conduct. ***See, e.g., Rollins v. Smith***, No. 03-3222 (8th Cir. 07/22/2004) (unreported) ("In this circuit, preseizure conduct is not relevant in determining whether there was a Fourth Amendment violation."); ***see also Hernandez v. Jarman***, 340 F.3d 617, 621-22 (8th Cir. 2003) ("[W]e consider only whether the seizure itself, not preseizure conduct, was unreasonable.").

The Ninth Circuit employed a "provocation" theory. The Circuit would review antecedent events if an earlier, independent Fourth Amendment violation intentionally or recklessly caused an otherwise reasonable self-defense shooting. The leading case was ***Billington v. Smith,*** 292 F.3d 1177 (9th Cir. 2001) ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force. . . . [T]hat provocation may render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law." (emphasis in original)); ***see also Sheehan v. City and County of San Francisco***, 743 F.3d 1211, 1230 (9th Cir. 2014) (officers' use of deadly force at moment of shooting was reasonable. However, under Ninth Circuit precedent, ***Billington v. Smith***, if officer intentionally provokes violent confrontation, and provocation is independent Fourth Amendment violation, he/she may be held liable for an otherwise lawful use of deadly force in self-defense. "Here, [the plaintiff] has presented a triable issue as to whether the officers committed an independent Fourth Amendment violation by their forcible second entry into her room . . .."), ***cert. dismissed on other grounds***, ***City and County of San Francisco v. Sheehan***, 135 S.Ct. 1765, 1774 (2015).

In ***County of Los Angeles v. Mendez***, No. 16-369 (U.S. 5/30/2017), the Supreme Court rejected the Ninth Circuit's "provocation" rule. County sheriff's deputies had word from a confidential informant that a potentially armed and dangerous parolee was at a residence. While other officers searched the residence, two searched the back of the property. Without a warrant or announcing their presence, they opened the door of a shack. One of the two plaintiffs rose from his bed, holding a BB gun, and the deputies shot both plaintiffs multiple times. As summarized by the Supreme Court, the district court awarded nominal damages on the warrantless entry and failure to knock-and-announce claims. It then applied the Ninth Circuit's "provocation" rule under which an otherwise reasonable use of deadly force became unreasonable where "an officer intentionally or recklessly provokes a violent confrontation if

the provocation is an independent Fourth Amendment violation." ***Mendez*** (citing ***Billington v. Smith***, 292 F.3d 1177, 1189 (9th Cir. 2001)). On appeal, the Ninth Circuit: gave the officers qualified immunity on the knock-and-announce claim; ruled that the warrantless entry violated clearly established law; and affirmed the district court's application of the provocation rule, or alternatively that basic principles of proximate cause would support liability. ***Mendez v. County of Los Angeles***, 815 F.3d 1178, 1191, 1193, 1195 (9th Cir. 2016).

The Supreme Court rejected the provocation rule under which an otherwise justified shooting could be rendered unreasonable based on an antecedent Fourth Amendment violation, here as argued by the plaintiffs the failure to knock-and-announce the deputies' presence. Instead, the objective reasonableness rule in ***Graham v. Connor***, 490 U. S. 386 (1989), is dispositive. "When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim." The Ninth Circuit's approach "mistakenly conflates distinct Fourth Amendment claims." Rather, "the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Moreover, the Ninth Circuit limited causation to intentional or reckless unconstitutional conduct, rather than applying traditional proximate cause. But in "taking into account all relevant circumstances," the court, on remand, could consider whether the warrantless entry (as opposed to the knock-and-announce violation) proximately caused an unreasonable shooting.

The Tenth Circuit will consider whether an officer reasonably believed he/she was in danger at the time deadly force was used, and whether the officer's own reckless or deliberate conduct immediately before the seizure unreasonably created the need to use that force. The Supreme Court's ***Mendez*** decision casts doubt on the Tenth Circuit's approach. ***See, e.g., Pauly v. White***, 814 F.3d 1060, 1071 (10th Cir. 2016) ("[W]e have held that '[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force[,]'" citing ***Jiron v. City of Lakewood***, 392 F.3d 410, 415 (10th Cir. 2007) (quoting ***Sevier v. City of Lawrence, Kan***., 60 F.3d 695, 699 (10th Cir. 1995))); reversing grant of qualified immunity and remanding, ***White v. Pauly***, 137 S.Ct. 548, 552 (2017) (Because "[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed[,]" third trooper did not violate clearly established law by failing to give warning.); ***see also Fogarty v. Gallegos***, 523 F.3d 1147, 1159-60 (10th Cir. 2008) ("We also consider whether an officer's own 'reckless or deliberate conduct' in connection with the arrest contributed to the need to use the force employed.").

The Eleventh Circuit has not staked out where Fourth Amendment scrutiny should begin but applies a "totality of the circumstances" approach. Even so, it clearly gives weight to the immediate decision to shoot over events leading up to the seizure. ***See, e.g., Carr v. Tantangelo***, 338 F.3d 1259 1269 (11th Cir. 2003) ("In determining whether the officers in this case are entitled to qualified immunity, we analyze the precise circumstances immediately preceding [the subject's] being shot and not the earlier surveillance decisions or the events following the shooting."); ***see also Harrigan v. Metro Dade Police Department***, Docket No. 1:12-cv-22993-JEM (11th Cir. 12/23/2015) (unpublished) (stating that reasonableness analysis "depends on all the circumstances relevant to an officer's decision to use force[.]").

The District of Columbia Circuit does not have a decision specifically addressing where Fourth Amendment scrutiny should begin in a law enforcement self-defense shooting, although there are numerous reported fatal shooting cases. ***See, e.g., Flythe v. District of Columbia***, 791 F.3d 13, 22 (D.C. Cir. 2015) (subject attempted to stab one officer and then, as he fled, failed to respond to commands from second officer; finding genuine issue of disputed fact regarding whether subject remained danger to second officer, D.C. Circuit panel reversed summary judgment for second officer); ***see also Buruca v. District of Columbia***, 902 F. Supp.2d 75, 87 (D.D.C. 2012) (after individual approached cars and pointed gun at drivers, officer ordered individual to drop weapon, but instead subject raised his pistol and pointed it at officer, who fired his weapon; plaintiff who only sued District, on summary judgment submitted no lay testimony, expert testimony, affidavits, declarations, or physical evidence to refute District's account).

Practice Tip: The ***Mendez*** decision is important because it rejected the causation models of the Ninth and impliedly the Tenth Circuits, where the Ninth said an otherwise reasonable shooting could be rendered unreasonable by a prior Fourth Amendment violation, and the Tenth Circuit said, like the Ninth, that intentional or reckless conduct before a shooting could turn a self-defense shooting into an unreasonable seizure. Instead, like the Sixth Circuit, the Supreme Court would deal with each alleged Fourth Amendment violation separately, and not as causally related. In calling for consideration of "all relevant circumstances" under its landmark ***Graham v. Connor*** decision, the Court seems in favor of the approach of the First, Third, Seventh, and Eleventh Circuits, which scrutinize "all the surrounding circumstances" and "actions leading up to" the use of deadly force, over the methodology of the Second, Fourth, Fifth, and Eighth Circuits, which look to the "circumstances immediately prior to and at the moment" the officer made the decision to use deadly force.

And ***Mendez*** did not rule out the possibility that unreasonable conduct can be the proximate cause of an unreasonable shooting. In fact, it remanded on that issue. The broad "totality of the circumstances" and the narrower "moment of the shooting and events immediately before it" only provide useful guidance (and can be reconciled with each other) if they are seen as invoking a legal cause review. The practitioner should be mindful of the distinction between cause-in-fact and legal cause. As to the individual officers, their presence at the scene is merely a cause-in-fact: a 911 call for service; an observed offense; or a warrant execution. The Fourth Amendment's protection against "unreasonable" seizures does not provide a remedy until the subject is no longer free to go, ***see United States v. Mendenhall,*** whether the subject is to be arrested or taken into custody for psychological or medical treatment. At the point where officers start taking action, their conduct is subject to review on a legal or proximate cause analysis. They can be held accountable for an unreasonable seizure, for causing or contributing to cause the circumstances that required them to use deadly force. Even so, to the extent that existing law in this area is not clearly established, they may be entitled to qualified immunity.