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REHEARING ORDER

OPINION OF THE NINTH CIRCUIT (JULY 27, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees/
Cross-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy;
JENNIFER PEDERSON,

Defendants-Appellants/
Cross-Appellees.

Nos. 13-56686, 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW

On Remand from the United States Supreme Court

Before: Ronald M. GOULD and Marsha S. BERZON, Circuit Judges, and George Caram STEEH III,* District Judge.

GOULD, Circuit Judge:

On remand from the United States Supreme Court we are tasked with deciding whether the unlawful entry into a residence by two sheriff's deputies, without a warrant, consent, or exigent circumstances, was the proximate cause of the subsequent shooting and injuries to the plaintiffs. We hold that it was, permitting a federal claim under 42 U.S.C. § 1983. We also hold that the plaintiffs have an independent basis for recovery under California negligence law.

Angel Mendez was shot approximately ten times and suffered severe injuries. He lost much of his leg below the knee, and he faces substantial ongoing medical expenses. Jennifer Lynn Garcia (now Jennifer Mendez) was shot in the upper back and left hand. On the afternoon of the shooting, both were sleeping in their modest home, a small one room structure on the property of Paula Hughes. Two Los Angeles County Sherriff's deputies, Conley and Pederson, unlawfully entered the structure. In doing so, they roused the sleeping Mr. Mendez. In rising from the futon on which he had slept, Mr. Mendez picked up a BB gun that was on the futon to place it on the floor. In the process, the gun was pointed in the general direction of Conley and

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* The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.

Pederson. The deputies, believing that the BB gun threatened them, quickly opened fire.

Before the shooting, deputies of the Los Angeles Sheriff's Department were searching for a parolee-at-large, Ronnie O'Dell. A confidential informant had seen someone resembling O'Dell riding a bicycle in front of Paula Hughes' home. After a briefing during which officers were told that a couple resided in a shack behind Hughes' home, officers were dispatched to the scene and entered Hughes' house. Officers Conley and Pederson, who were among the officers informed about the couple living in the backyard of the Hughes property, were charged with searching the area to the rear of the house. Conley and Pederson, guns drawn and on alert because they believed O'Dell to be armed and dangerous, approached the structure in which the Mendezes resided. There were many apparent signs that the structure was a residence, including: an electrical cord was running to it; an air conditioner was installed; and some storage lockers were nearby. Conley and Pederson nevertheless entered the structure without announcing their presence, and a split second later, misperceiving the threat posed by the BB gun, shot the Mendezes, which caused their grave injuries.

The Mendezes brought claims against the officers under 42 U.S.C. § 1983 for violations of the Fourth Amendment. They argued that the officers unlawfully entered the shack, that the officers' mode of entry was unreasonable because they did not knock and announce their presence, and that the officers used excessive force when they opened fire. The Mendezes also brought claims for negligence under California law.

The district court ruled in favor of the plaintiffs on all three claims under § 1983, granting nominal

damages for the unlawful entry and failure to knock and announce, and roughly four million dollars on the excessive force claim. In addressing the excessive force claim, the district court found that the officers' use of force at the time of the shooting was reasonable, but under our circuit's former provocation doctrine, the officers were still liable for excessive use of force, because the unlawful entry and the failure to knock and announce provoked the circumstances giving rise to the subsequent shooting.

The district court refused to grant recovery under California negligence law, based on its conclusion that Conley and Pederson acted reasonably at the moment of the shooting. The court believed that under then-current California law, the relevant inquiry concerned the moment of the shooting, not the totality of the circumstances surrounding the shooting, including pre-shooting conduct. *Mendez v. County of Los Angeles*, No. CV 11-04771-MWF, 2013 U.S. Dist. LEXIS 115099, at *92-93 (C.D. Cal. Aug. 13, 2013). If one were to consider the totality of the circumstances, the district court determined, Conley and Pederson's conduct was "reckless as a matter of tort law," and so negligent. *Id.* at *97.

In issuing its ruling, the district court was aware of a then-pending California Supreme Court decision, *Hayes v. County of San Diego*, that might bear on this analysis, and stated that if *Hayes* altered the analysis, it would alter its judgment on its own motion. *Hayes* held that "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability." *Hayes v. County of San Diego*, 57 Cal. 4th 622, 639 (2013). The

district court, however, declined to modify its judgment after *Hayes* was decided.

The officers appealed the district court's § 1983 ruling, and the Mendezes cross-appealed its California law ruling. We affirmed in part and reversed in part. On the unlawful entry claim, we held that the officers violated the Fourth Amendment by entering the residence; the officers had no warrant, lacked consent to enter, and the circumstances did not satisfy any of several emergency or exigency exceptions to the Fourth Amendment prohibition on unreasonable searches and seizures. The officers could not benefit from qualified immunity, because at the time of the incident, case law had clearly established that the officers' entry was unlawful. *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1191 (9th Cir. 2016). We also held that the shooting was a foreseeable consequence of the unlawful entry, and that the district court should have awarded full damages on the unlawful entry claim under basic principles of proximate cause.[1] *Id.* at 1195.

On the knock and announce claim, however, we held that though the officers had a constitutional duty to knock and announce before entering, this duty had not been clearly established with regard to the specific facts of this case. As such, the officers were entitled to qualified immunity on this claim, and we vacated the district court's award of nominal damages on it. *Id.* at 1191.

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[1] We held that damages should be awarded jointly against both Pederson—who did not enter the shack—and Conley—who did. A person who is an integral participant in an unlawful search is jointly liable, even if the person does not enter the residence. *Mendez*, 815 F.3d at 1195. This conclusion still holds.

Finally, on the excessive force claim, we upheld the district court's decision based on our circuit's prior provocation rule. We held that the officers' unlawful entry was reckless, at a minimum. *Id.* at 1194. And under the provocation doctrine as established then in our precedent, where an officer intentionally or recklessly provokes a violent confrontation, and that provocation is itself an independent Fourth Amendment violation, the officer was then liable for a defensive use of force. *Id.* at 1193. We did not address the state law negligence claim.

The United States Supreme Court vacated our prior decision and remanded this case to us for further consideration. *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017). The Court disagreed with and reversed two parts of our ruling. First, the Court held that the Ninth Circuit's provocation doctrine was "incompatible with [the Court's] excessive force jurisprudence" because it "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id.* at 1546. However, the Court noted that "plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation." *Id.* at 1548. And the Court noted that the Mendezes could, in principle, still recover for "injuries proximately caused by the warrantless entry." *Id.* at 1548 (emphasis in original). But, in assessing our proximate cause analysis, the Court held that we did not adequately separate the proximate cause analysis for the unlawful entry—on which the officers did not benefit from qualified immunity—from the proximate cause analysis for the failure to knock and announce—on which they did. *Id.* at 1549.

On remand we must address whether the officers' unlawful entry, as distinct from the unlawful mode of entry—that is, the failure to knock and announce—was the proximate cause of the Mendezes injuries. We hold that it was. We also address the still remaining state law negligence claims, and hold that California negligence law provides an independent basis for recovery of all damages awarded by the district court.

I

In our prior ruling we held that the officers engaged in a search by entering the Mendezes' home. *Mendez*, 815 F.3d at 1187. The officers did not have a warrant or consent and did not satisfy any emergency or exigency conditions that could make an entry lawful. *Id.* at 1187-91. The law on all these points was clearly established at the time, so the officers could not obtain qualified immunity for their unlawful search. *Id.* at 1191. There is no reason to revisit those conclusions on remand: We again hold that the officers violated the Fourth Amendment by engaging in an unconstitutional entry into the Mendezes' home.

A § 1983 claim creates a species of tort liability, with damages determined "according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986). Such damages are measured in terms of "compensation for the injury caused to plaintiff by defendant's breach of duty." *Id.* Under this analysis, we must first determine what act or omission constituted the breach of duty, and then ask whether that act or omission was the but-for and proximate cause of the plaintiff's injuries.

The parties dispute which act or omission constituted the breach of duty. The officers argue that the

failure to get a warrant before entering was the omission constituting the breach. Framed in that way, the officers argue, the breach of duty did not cause the Mendezes injuries because, had the officers first gotten a warrant, the same sort of confrontation and shooting still could have occurred.

By contrast, the plaintiffs argue that the entry into the shed was the act constituting the breach of duty. On this framing of the issue, the officers' breach of duty was the cause in fact of the Mendezes' injuries because, had the officers not entered, the Mendezes would not have been injured. For the reasons explicated below, we hold that on either framing of the issue the officers' unlawful behavior was a proximate cause of the Mendezes' injuries. But, as we explain first, the plaintiffs' framing of this issue is the correct one. The officers' framing of the issue conflates one of several acts that would have discharged their duties under the Fourth Amendment—getting a warrant—with an act performed in violation of that duty—entering the residence. Or, to put it another way, the officers' argument misconstrues the duty not to enter a home without a warrant as a duty simply to get a warrant—overlooking the fact that absent a warrant, consent, or exigent circumstances, there is a duty not to enter.

To see why the plaintiffs' account of the nature of the officers' duty is correct, we need look no further than the text of the Fourth Amendment. The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

By its plain text the Fourth Amendment does two things. First, the Fourth Amendment prohibits unreasonable searches and seizures. *See United States v. Jones*, 565 U.S. 400, 404 (2012) (noting that a physical intrusion into a property is a search under the Fourth Amendment). Second, the Fourth Amendment specifies the conditions under which a warrant can be issued.

The Fourth Amendment protects not only a person's broad interests in privacy, but also, and specifically, a person's interest in being shielded from physical governmental intrusions. *See Jones*, 565 U.S. at 406 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."); *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (noting that in addition to privacy interests, the Fourth Amendment protects citizens interests in being free from physical intrusions).

The Fourth Amendment is often referred to as imposing a "warrant requirement." *See Patel v. City of Los Angeles*, 738 F.3d 1058, 1071 (9th Cir. 2013). This way of stating things is not entirely inaccurate, but it can be misleading. The Fourth Amendment does not require officers to get warrants. Rather, it requires that officers not conduct "unreasonable searches and seizures." The role of the Warrant Clause of the Fourth Amendment is simply to specify one set of conditions under which an entry into a residence can be reasonable—that is, where the officers have a warrant that satisfies the conditions articulated in the Warrant Clause. That is not, however, the only way that an

entry can be reasonable. Officers can also enter with consent, or under certain emergency or exigent circumstances. *See Michigan v. Clifford*, 464 U.S. 287, 293 (1984) ("[A]ny official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances."). An entry into a residence that is not under a warrant, that lacks consent, and that is not justified by exigent circumstances or an emergency is unreasonable. *Id.* Under such circumstances, the Fourth Amendment imposes a duty on officers not to enter. And it is entry itself that constitutes the breach of that duty.

Similarly, an officer who wants to enter a property can do so not only with a warrant but also with consent. But it would be a mistake to conclude that an officer has a freestanding duty to get consent. In normal circumstances, if an officer does not have a warrant or consent or exigent circumstances, the officer must not enter. Consent, much like a warrant, changes an officer's duties. It turns an unlawful act into one that is lawful. But lawful entry remains the key duty. For that reason, Justice Jackson explained in *McDonald v. United States*: "Had the police been admitted as guests of another tenant . . . they would have been legally in the hallways. Like any other stranger they could then spy or eavesdrop on others without being trespassers. . . . [but by unlawfully entering through a window] they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing." 335 U.S. 451, 458 (1948) (Jackson, J., concurring).

That such duties between parties can change based on the surrounding circumstances is a commonplace feature of law. In tort law, for example, an act or omission can be a breach of duty in one context, but not a

breach of duty in another, even if the act or omission itself has the exact same propensity to cause harm. For example, when a person operates a business and invites customers onto the property, the business proprietor owes a duty to those customers to make the premises safe. The business proprietor does not owe a similar duty to a trespasser. *Compare* Restatement (Second) of Torts § 333 (Am. Law Inst. 1981) (trespassers), *with id.* § 343 (invitees). So, if a property owner negligently leaves a hazard on the property, the owner can be liable to the invitee, but not liable to the trespasser. The same act and resulting injury is the basis for liability in one case, but not in the other. The difference is only the presence or absence of a duty owed to another, which makes the act tortious or not. Similarly, a warrant functions to change what duties an officer owes to a civilian. In a case where the officers procure a valid warrant, their defense relates not to causation, but to the fact that because they had a warrant their entry was privileged and so not a breach of any duty owed to the plaintiffs.

In summary, for the purposes of § 1983, a properly issued warrant makes an officer's otherwise unreasonable entry non-tortious—that is, not a trespass. Absent a warrant or consent or exigent circumstances, an officer must not enter; it is the entry that constitutes the breach of duty under the Fourth Amendment. As a result, the relevant counterfactual for the causation analysis is not what would have happened had the officers procured a warrant, but rather, what would have happened had the officers not unlawfully entered the residence.

II

In light of the foregoing analysis, we next determine whether the unlawful entry was the cause in fact and the proximate cause of the Mendezes' injuries. *See White v. Roper*, 901 F.2d 1501, 1505 (9th Cir. 1990). Here, as the district court correctly found, there is no question that the unlawful entry was the cause in fact of the injuries. If the officers had not entered, Mr. and Ms. Mendez would not have been shot while lying in bed. That is the quick end of analysis of cause in fact.

Turning to the more difficult question of proximate cause, we hold that the officer's unlawful entry proximately caused the Mendezes' injuries. The proximate cause question asks whether the unlawful conduct is closely enough tied to the injury that it makes sense to hold the defendant legally responsible for the injury. W. Page Keeton et al., *Prosser and Keeton on Torts* § 42 (5th ed. 1984). Proximate cause is "said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible." *Id.* It is a question of "whether the duty includes protection against such consequences." *Id.* We have held that "the touchstone of proximate cause in a § 1983 action is foreseeability." *Phillips v. Hust*, 477 F.3d 1070, 1077 (9th Cir. 2007), *vacated on other grounds*, 555 U.S. 1150 (2009). The Supreme Court has observed that "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). "A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.*

Whether understood in terms of the scope of the risk or in terms of foreseeability, the findings of the district court make clear that the officers' entry into the structure was here the proximate cause of the Mendezes' injuries. This is not a case where one can say that the injury to the Mendezes was a mere fortuity. The injury followed in a normal course as a result of the unlawful acts of the officers.

First, as a general matter, the risk of injury posed by the entry of an armed stranger into a residence is one of the reasons the Fourth Amendment prohibits entry except under defined specific conditions. There is historical evidence suggesting that the point of the Fourth Amendment's prohibition against trespass into homes was in part to prevent damage done by the trespassers.

For instance, attendees at the Boston Town Meeting of 1772 raised concerns about damage done to chattels after searches. *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 991 (2016). And anti-federalists advocated for constitutional protections against searches because otherwise the government could be free to damage personal property when searching. *Id.* These historical sources suggest that the Fourth Amendment was ratified not just to protect privacy interests, but also out of a concern that governmental trespass to property could lead to subsequent physical harms. In modern times, the same concern was voiced in Justice Jackson's concurrence in *McDonald*. Justice Jackson was concerned that unlawful entries can invite precisely the sort of violence that occurred here, where "an officer seeing a gun being

drawn on him might shoot first." *McDonald*, 335 U.S. at 460-61.

We are not alone in recognizing that an armed officer's high-alert entry can foreseeably lead the officer to use deadly force in response to a misapprehended threat. For instance, in *Attocknie v. Smith*, a police officer unlawfully entered a house and shot the son of a person the officer hoped to apprehend. 798 F.3d 1252, 1255 (10th Cir. 2015). There, like here, the shooting happened only moments after the entry. *Id.* at 1254. The Tenth Circuit held that "a reasonable jury could determine that the unlawful entry was the proximate cause of the fatal shooting of [the victim]." *Id.* at 1258.

Looking to other cases involving unlawful entry—including burglary—can be instructive in assessing the proximate cause question. As evidenced by Justice Jackson's concurrence in *McDonald*, analogizing the acts of officers who unlawfully enter to those of burglars is apt. 335 U.S. at 458. More recently, the Supreme Court has noted that "[b]urglary is dangerous because it can end in confrontation leading to violence." *Sykes v. United States*, 564 U.S. 1, 9 (2011), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). And it has also noted that burglary foreseeably creates the "possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander." *James v. United States*, 550 U.S. 192, 203 (2007), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). Stated another way, unlawful entry invites violence.

Looking to the factual findings of the district court that bear on the proximate cause analysis only reinforces the conclusion that the entry was the

proximate cause of the Mendezes' injuries. Here, the district court found that the officers entered with weapons drawn. *Mendez*, 2013 U.S. Dist. LEXIS 115099, at *11. The officers were aware, or should have been aware that the Mendezes were residing in the building in Hughes' backyard. *Id.* at *34-35. The officers were on alert, believing themselves to be searching for an armed individual. *Id.* at *11. And as the district court correctly observed, in light of the protections afforded by the Second Amendment, which are at their height where defense of one's home is at stake, *see District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008), it can be expected that some individuals will keep firearms in their homes to defend themselves against intruders. *Id.* at *87-88. Under these conditions, armed officers entering a house will necessarily present a substantial risk to anyone in the house they perceive as being armed. It is all the more important that officers in such cases abide by their duties under the Fourth Amendment.

Important social interests are served by minimizing interactions between armed police officers on high alert and innocent persons in their homes, precisely because such interactions can foreseeably lead to tragic incidents where innocent people are injured or killed due to a split-second misunderstanding. One way the Constitution serves these interests is by adopting a rule that restricts officer entry into a residence except in certain limited circumstances. And it is obviously foreseeable that fewer tragic incidents like this one would occur under an enforced regime where officers will not enter homes without sufficient justification, as compared to one where officers enter without adequate justification. Especially where officers are

armed and on alert, violent confrontations are foreseeable consequences of unlawful entries.

The officers here suggest that any threat could be diffused by requiring officers to knock and announce, and hence, they argue that only the failure to knock and announce—on which the officers have qualified immunity—and not the entry itself was the proximate cause of the Mendezes' injuries. This argument is fallacious. First, the injuries would have been equally avoided had the officers not entered unlawfully without warrant or consent or exigent circumstances. And had officers knocked and announced, they still could not have lawfully entered absent consent or exigent circumstances or a warrant. The officers' argument ignores the fact that "it is common for injuries to have multiple proximate causes." *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011). Here, both the entry and the failure to knock and announce were proximate causes of the Mendezes' injuries. Officers cannot properly escape liability when they breach two duties, each breach being necessary for the harm to occur, just because one of the duties was subject to qualified immunity. That would lead to the absurd result that an officer who breaches only one duty is liable, but that an officer who breaches multiple duties is not.

Consider a scenario like the one in this case, but where Mr. Mendez is deaf. Suppose that officers do knock and announce, but failing to catch Mr. Mendez's attention, proceed to unlawfully enter. In such a case, where a deaf Mr. Mendez responded the same way as here, unaware that the people entering were law enforcement officers, the officers would still be liable as having violated Mr. Mendez's Fourth Amendment rights in a way that proximately caused his physical

injuries. To shield from liability an officer who additionally breached the knock and announce requirement would be manifestly unjust.

Further, the officers' legal position in the earlier appeal was that they had no duty to knock and announce before entering the inhabited shed, as they had done so at the door of the main house. We rejected that position, but agreed that there was no clearly established law requiring a second knock and announce at the doorway of a second occupied building on the same property. *Mendez*, 815 F.3d at 1192- 93. On the officers' view of the law, they had no knock and announce duty. But they still had a duty not to enter unlawfully, and that breach of duty could have foreseeably led to the injury that occurred. This conclusion should not change because we rejected the officers' legal position on the knock and announce requirement, yet held that they were justified in holding it because the governing law at the time of the incident was not clearly established.

Second, even if an officer knocks and announces his or her presence, or seeks consent to enter, a homeowner may reasonably still wish that the officer not enter, especially in circumstances like this, where the officer has a weapon drawn and is on alert. The reason why is obvious. An innocent homeowner reasonably may believe that allowing an agitated officer to enter the residence will substantially increase the risk that a person, pet, or property inside might be harmed. Police officers rightly remind the public that they are required to make split-second decisions in very difficult situations. *See Tennessee v. Garner*, 471 U.S. 1, 19 (1985). These split-second decisions cannot in every case be made reliably so as to avoid harm to innocents.

But these imperfect life-or-death decisions demonstrate that entry by an officer, on alert, with weapon drawn, can foreseeably result in shooting injuries where the officer mistakes an innocent implement for a weapon. Entry poses a foreseeable and severe risk only partly mitigated by knocking and announcing. Under circumstances like those presented here, the safe course for the public and the one prescribed by the Fourth Amendment, is for officers to remain outside, unless or until they have a warrant or consent or exigent circumstances arise.

III

Even if we were to accept the officers' framing of the issue and treat the failure to get a warrant rather than the entry as the basis of the breach of duty, we would reach the same conclusion regarding proximate cause. To procure a warrant an officer must have probable cause. The probable cause requirement erects a barrier against police intrusions and the associated risk of harm, except where the intrusions are adequately justified. The requirement thus represents the balance we have struck as a society in defining when it is permissible for an officer to impose a risk of harm on innocent members of the public in service of the competing social need to have effective law enforcement. But where probable cause is lacking, imposing that risk cannot be justified.

Here, the officers most likely lacked probable cause to believe that O'Dell was in a shed that was known, or reasonably should have been known, to belong to the Mendezes. As we noted in our prior decision in this case, "O'Dell was supposedly spotted riding a bicycle in front of Hughes' house. Unless he was riding in

circles, he would have passed the house long before the officers arrived. The original group of officers recognized this, as some of them went to another house to look for O'Dell." *Mendez*, 815 F.3d at 1188 n.5. Under the circumstances the officers had no more reason to believe that O'Dell was on Hughes' property than that he was on any other property reachable by bike within the time between the informant's report and the arrival of the police.[2] And although the officers came across a bike parked in front Hughes' home, there was nothing to suggest that the bike was or resembled the bike O'Dell was riding. Seeing a bike after a suspect was seen riding a bike provides no more probable cause than seeing a car after a suspect was seen driving a car. Further attenuating probable cause is that the only reason given for believing O'Dell was in the Mendezes' residence is that he was not in the main house, and the officers thought they heard someone running in that house.

Moreover, even if a magistrate could have properly concluded that there was probable cause that O'Dell could be located in the Mendezes' residence—which we doubt—requiring officers to get a warrant before entry serves important interests. Consider the steps in the process of gaining a warrant. Officers must first gather information that satisfies the conditions set

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[2] Sergeant Minster—who led the operation—stated that the informant said that he had seen someone resembling O'Dell leaving the Hughes residence by bike. There is some reason to believe that this was not O'Dell at all. And even if it was, under those circumstances, it is actually less likely that O'Dell was in Hughes' house than that he was in some other randomly selected house in the area. The officers had no reason to believe that O'Dell would return to a house he had just left.

forth in the Warrant Clause of the Fourth Amendment. That process invites officers to ask whether they have sufficient justification for entering a property. Then the officers must seek out an impartial magistrate who will assess whether the officer's proffered justifications are adequate. Taken together, these two processes play an important protective role. Among other things, they require officers carefully to consider whether they are justified in imposing a known risk on third parties who might be inside the residence. They also force officers to reflect on the circumstances facing them. This slower and more deliberative process helps secure the rights and interests of civilians to be free from unnecessary harms to their property and their person. When a judicial officer is interposed between the police and civilians, "potentially fatal decisions[s] . . . [are] taken away from those on the scene, whose judgment may be clouded by an understandable, but perhaps misguided sense of urgency." *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1368-69 (9th Cir. 1994) (Kozinski, J., concurring); *see also Steagald v. United States*, 451 U.S. 204, 212 (1981). Here, "[b]y failing to take this constitutionally-required step, the officers short-circuited the built-in safeguard of the warrant requirement." *Alexander*, 29 F.3d at 1368-69.

The importance of this slower and more deliberative process is on display here. We concluded previously that there were no exigent circumstances here justifying an immediate entry. *Mendez*, 815 F.3d at 1189-90. It is likely that if the officers had gone through the constitutionally required warrant procedures before entering, they would have remembered that the Mendezes' lived in the building behind the Hughes' house, and taken account of the risks of armed

entry into an inhabited building. In such circumstances a responsible officer would likely have taken additional steps to prevent avoidable injuries to innocent third parties. The process of having to collect information, seek permission for entry from a magistrate, and justify that entry, most clearly serves important social interests where a warrant request is denied because it creates a barrier protecting persons from unnecessary harm at the hands of police. But this process also protects individuals even when the warrant is granted, because it serves an important purpose of encouraging considered reflection before officers take action. Here, the failure to engage in this deliberative process foreseeably led to the Mendezes' injuries.

IV

The officers also argue that their entry was not the proximate cause of the Mendezes' injuries because Mr. Mendez's action of moving the gun so that it was pointed in the direction of the officers was a superseding cause of the injuries. We disagree. To be sure, officers are free from liability if they can show that the behavior of a shooting victim was a superseding cause of the injury. A superseding or intervening cause involves a shifting of responsibility away from a party who would otherwise have been responsible for the harm that occurs. Keeton et al., *supra*, § 44. If a resident sees that an officer has entered and intentionally tries to harm the officer, who in turn draws his weapon and shoots, the resident's intentional action would be a superseding cause of the injury. *See, e.g.*, *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (noting that if a suspect were to shoot at persons known to be officers, the suspect's act would be a superseding cause

absolving the officers of liability for harm caused as a result of an unlawful entry).

However, the hypothetical situation imagined in *Bodine* has no purchase here. The district court found that Mr. Mendez was napping on a futon with a BB gun by his side when the officers entered. *Mendez*, 2013 U.S. Dist. LEXIS 115099 at *13. Moments after the officers entered, Mr. Mendez moved the BB gun. *Id.* at *14. Almost immediately the officers began to fire upon the Mendezes. *Id.* at *15. Mr. Mendez had no idea that the persons entering his home were police officers, making this situation wholly unlike the hypothetical posed in *Bodine*. And Mr. Mendez did not deliberately aim at the intruding officers; he was moving the gun, seemingly so he could rise.

Under basic tort principles, something is a superseding cause only if it is "a later cause of independent origin that was not foreseeable." *Exxon Co. v. Sofec*, 517 U.S. 830, 837 (1996). A victim's behavior is not a superseding cause where the tortfeasor's actions are unlawful precisely because the victim foreseeably and innocently might act that way. *See* Restatement (Second) of Torts § 449 (Am. Law Inst. 1981) (noting that subsequent events that explain why the act was negligent are not superseding causes); *Farr v. N.C. Mach. Co.*, 186 F.3d 1165, 1170 (9th Cir. 1999) (noting that where "the risk that materialized was the one threatened by the [tortious act]," acts of the victim are not superseding causes). So if an officer has a duty not to enter in part because he or she might misperceive a victim's innocent acts as a threat and respond with deadly force, then the victim's innocent acts cannot be a superseding cause.

As explained above, among the reasons why the Fourth Amendment erects a barrier to entry is that an officer might, due to a mistaken assessment of a threat, harm a person inside the residence. Persons residing in a home may innocently hold kitchen knives, cell phones, toy guns, or even real ones that could be mistakenly believed by police to pose a threat. The possibility of misperceiving a threat is among the reasons why entry into a home by armed police officers with weapons drawn is dangerous. In such cases, the innocent acts of a homeowner in moving an ordinary item in an ordinary way cannot properly be viewed as a superseding cause.

Moreover, under basic tort principles, foreseeability is looked at retrospectively when assessing whether an intervening event is a superseding cause. And an event will be a superseding cause only if it is extraordinary in retrospect. *See* Restatement (Second) of Torts § 443 cmts. b, c (Am. Law Inst. 1981) (noting that only an act that is abnormal or extraordinary in retrospect serves as a superseding cause). Here, there is nothing extraordinary about the possibility that officers might mistake an innocent implement for a threat. Nationally prominent events in publicized police shootings show that such a possibility is sadly all too common.

Nothing about Mr. Mendez's innocent actions warrants shifting responsibility for the subsequent shooting injuries away from the officers and to the injured victim. And this is precisely what the district court correctly held. "Mr. Mendez's 'normal efforts' in picking up the BB gun rifle to sit up on the futon do not supersede Deputies Conley and Pederson's responsibility." *Mendez*, 2013 U.S. Dist. LEXIS 115099 at *87.

V

We next turn to the plaintiffs' California negligence claim. We did not address this claim in our prior ruling, nor did the Supreme Court address the California law claim in its decision. We now resolve the Mendezes' cross-appeal and hold that under the California Supreme Court's decision in *Hayes v. County of San Diego*, judgment should be entered in the Mendezes' favor on the California negligence law claim. The district court did not grant relief under California negligence law because the court believed that under then existing California law, negligence is assessed based only on the state of affairs at the moment of the shooting, and not in light of pre-shooting conduct. *Mendez*, 2013 U.S. Dist. LEXIS 115099 at *93. But after the district court entered judgment the California Supreme Court clarified that "law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability." *Hayes*, 57 Cal. 4th at 639.[3]

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[3] The district court had told the parties that it would revisit its judgment in light of *Hayes*, which was pending at the time. The plaintiffs asked the court to do so, but the court refused on procedural grounds because the Mendezes filed a document styled as a "request" rather than styled as a motion. We review a district court's procedural determinations regarding local rules for abuse of discretion. *Kalitta Air L.L.C. v. Cent. Tex. Airborne Sys. Inc.*, 741 F.3d 955, 957 (9th Cir. 2013). Here the district court told the parties that it would revisit its judgment on its own motion if appropriate in light of *Hayes*. In light of this representation to the parties, and the obvious relevance of *Hayes*, the district court should have addressed the issue on its own without prompting by the plaintiffs. To then dismiss the plaintiff's request

Here, the district court's findings compel the conclusion that the officers were negligent under California law. The district court specifically found that the "totality of Deputies Conley and Pederson's conduct was reckless as a matter of tort law," and that "the conduct rose beyond even gross negligence." *Mendez*, 2013 U.S. Dist. LEXIS 115099, at *97, *82; *see also Mendez*, 815 F.3d at 1194 ("the record here bears out Conley and Pederson's recklessness"). It is beyond negligent for officers to enter a dwelling with guns drawn and without announcing their presence, especially when they are on notice that the dwelling is occupied by a third party, unless there are special circumstances that might justify such action. No such special circumstances were present in this case, and it is foreseeable that such reckless behavior can lead to tragic accidents like the one that occurred here.

We note that the officers' failure to knock and announce is an especially dangerous omission. Under California law, the officers here are not entitled to qualified immunity for that lapse. *Venegas v. County of Los Angeles*, 63 Cal. Rptr. 3d 741, 755 (Ct. App. 2007); *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002). Under California law, unlike under 42 U.S.C. § 1983, the failure to knock and announce can be a basis of liability. The officers knew or should have known about the Mendezes' presence. Yet they decided to proceed without taking even simple and available precautions, including announcing their presence,

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on procedural grounds was an abuse of discretion, because the plaintiffs were reasonably relying on the district court's representation.

which could have protected the Mendezes from the severe harm that befell them.

The officers argue that we earlier held that they behaved reasonably in failing to knock and announce. We did not. We held that under federal law applicable to the § 1983 claim, the officers had qualified immunity because it was not clearly established at the time that, under the circumstances, the failure to knock and announce was a federal constitutional violation. *Mendez*, 815 F.3d at 1192. Under the evolving precedent of qualified immunity, officers can receive qualified immunity under 42 U.S.C. § 1983 for acts that are negligent under state common law. *See Robinson*, 278 F.3d at 1016 (holding that qualified immunity applied to claims under § 1983, but not to state law negligence claims). Applying the "clearly established" requirement of the qualified immunity analysis to all state common law negligence claims would effectively eviscerate state common law. *See Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013) ("the doctrine of qualified immunity does not shield defendants from state law claims"). And here it would make meaningless the California Court of Appeals' express holding that there is no qualified immunity for state law negligence claims. *See Venegas*, 63 Cal. Rptr. 3d at 755. We decline to apply a doctrine that has evolved in the narrow and unique context of § 1983 claims in a way that would undermine state law that expressly departs from the federal standard concerning qualified immunity.

Finally, the defendants contend that the negligence claim is barred by two kinds of state law statutory immunity. First, they argue that California Government Code section 821.6 immunizes the officers from liability.

Section 821.6 provides: "A public employee is not liable for an injury caused by his instituting or prosecuting any judicial or administrative proceedings within the scope of his employment, even if he acts maliciously and without probable cause." Cal. Gov't Code § 821.6. And they claim that this immunity has been extended to protect officers engaged in investigations leading up to formal proceedings. We have rejected similar arguments in the past. *Sharp v. County of Orange*, 871 F.3d 901, 920-21 (9th Cir. 2017) ("[t]he 'prosecutorial' immunity under Cal. Gov. Code § 821.6 does not apply because it is limited to malicious-prosecution claims." (citing *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 117 (1974))); *Blankenhorn v. City of Orange*, 485 F.3d 463, 467 (9th Cir. 2007) (holding that section 821.6 immunity applies only to acts done in furtherance of an investigation into a crime).

Second, the officers also claim immunity under California Government Code section 820.2, which provides immunity to public employees from liability for injuries "resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, whether or not such discretion be abused." Cal. Gov't Code § 820.2. However, the California Supreme Court has held that this immunity applies only to policy decisions, not to operational decisions like the decision to enter the Mendez residence here. *See Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995); *see also Sharp*, 871 F.3d at 920. Hence, section 820.2 immunity does not apply.

VI

We affirm the district court's holding that officers Conley and Pederson are liable for violations of the

Mendezes' Fourth Amendment rights. On remand, the judgment shall be amended to award all damages arising from the shooting in the Mendezes' favor as proximately caused by the unconstitutional entry, and proximately caused by the failure to get a warrant. Judgment shall also be entered in the Mendezes' favor on the California negligence claim for the same damages arising out of the shooting.[4]

AFFIRMED IN PART, REVERSED IN PART.

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[4] Plaintiffs are also entitled to reasonable attorney fees. 42 U.S.C. § 1988.

BRIEFING ORDER OF THE NINTH CIRCUIT (SEPTEMBER 29, 2017)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellants.

No. 13-56686
D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellees.

No. 13-57072
D.C. No. 2:11-cv-04771-MWF-PJW

Before: GOULD and BERZON, Circuit Judges, and STEEH,* District Judge.

The parties shall file supplemental letter briefs addressing whether the damages in this case were proximately caused by the warrantless entry. In doing so, parties should limit themselves to assessing whether the deputies' failure to secure a warrant at the outset was a proximate cause of the shooting injuries. The parties should specifically address the "foreseeability or the scope of the risk created by the predicate

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* The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.

conduct" as required by *Cty. of Los Angeles. v. Mendez*, 137 S. Ct. 1539, 1548-49 (2017).

Parties shall file simultaneous letter briefs on or before twenty-one (21) days from the filed date of this order. The briefs shall not exceed ten (10) pages (double-spaced) or 2,800 words and may be in the form of letters to the clerk of this court. Parties who are registered for ECF must file the supplemental brief electronically without submission of paper copies. Parties who are not registered ECF filers must file the original supplemental brief plus 15 paper copies.

BRIEFING ORDER OF THE NINTH CIRCUIT (JANUARY 23, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellants.

No. 13-56686
D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellees.

No. 13-57072
D.C. No. 2:11-cv-04771-MWF-PJW

Before: GOULD and BERZON, Circuit Judges, and STEEH,* District Judge.

The parties shall file supplemental letter briefs addressing two issues. (1) The parties should address whether the damages in this case were proximately caused by the unlawful entry itself, i.e. the trespass. In doing so, the parties should not revisit arguments addressing whether the failure to get a warrant was the proximate cause of the Plaintiffs' injuries, as that question was already addressed in prior supplemental

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* The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.

briefing. (2) The parties should address whether the plaintiffs can recover under their California negligence theory. In doing so, the parties should specifically address the implications of the California Supreme Court's decision in *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013).

Parties shall file simultaneous letter briefs on or before twenty-one (21) days from the filed date of this order. The briefs shall not exceed 4,500 words. Parties who are registered for ECF must file the supplemental brief electronically without submission of paper copies. Parties who are not registered ECF filers must file the original supplemental brief plus 15 paper copies.

BRIEFING ORDER OF THE NINTH CIRCUIT (FEBRUARY 15, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellants.

No. 13-56686
D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellees.

No. 13-57072
D.C. No. 2:11-cv-04771-MWF-PJW

Before: GOULD and BERZON, Circuit Judges, and STEEH,* District Judge.

Defendants mistakenly interpreted our prior order for supplemental briefing on "whether the damages in this case were proximately caused by the unlawful entry itself, i.e. the trespass" as pertaining to Plaintiffs' state law cause of action. Defendants, therefore, did not address whether the unlawful entry itself proximately caused the Plaintiffs' injuries for purposes of

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* The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.

the Fourth Amendment. Defendants shall file a supplemental letter brief addressing this issue. In addressing this issue, Defendants should focus on the unlawful entry itself and not revisit the analytically distinct question of whether the failure to get a warrant was the proximate cause of the injuries.

Defendants' supplemental letter brief shall be filed on or before fourteen (14) days of the filed date of this order. The brief shall not exceed 2,500 words. Both parties may file an optional reply brief responding to arguments made in response to our prior briefing order of January 23, 2018, and/or to Defendants' additional supplemental brief filed under this order. Any such optional reply shall be filed on or before twenty-eight (28) days of the filed date of this order. The optional reply brief shall not exceed 2,500 words.

Parties who are registered for ECF must file the supplemental brief and/or the optional reply brief electronically without submission of paper copies. Parties who are not registered ECF filers must file the original brief plus 15 paper copies.

OPINION OF THE SUPREME COURT OF THE UNITED STATES (MARCH 30, 2017)

SUPREME COURT OF THE UNITED STATES

COUNTY OF LOS ANGELES, CALIFORNIA, ET AL.,

Petitioners,

v.

ANGEL MENDEZ, ET AL.,

Respondents.

No. 16-369

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Before: ALITO, J., GORSUCH, J.

JUSTICE ALITO delivered the opinion of the Court.

If law enforcement officers make a "seizure" of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, may the officers nevertheless be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use

force? The Ninth Circuit has adopted a "provocation rule" that imposes liability in such a situation.

We hold that the Fourth Amendment provides no basis for such a rule. A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.

I

A

In October 2010, deputies from the Los Angeles County Sheriff's Department were searching for a parolee-at-large named Ronnie O'Dell. A felony arrest warrant had been issued for O'Dell, who was believed to be armed and dangerous and had previously evaded capture. Findings of Fact and Conclusions of Law, No. 2:11-cv-04771 (CD Cal.), App. to Pet. for Cert. 56a, 64a. Deputies Christopher Conley and Jennifer Pederson were assigned to assist the task force searching for O'Dell. *Id.*, at 57a-58a. The task force received word from a confidential informant that O'Dell had been seen on a bicycle at a home in Lancaster, California, owned by Paula Hughes, and the officers then mapped out a plan for apprehending O'Dell. *Id.*, at 58a. Some officers would approach the front door of the Hughes residence, while Deputies Conley and Pederson would search the rear of the property and cover the back door of the residence. *Id.*, at 59a. During this briefing, it was announced that a man named Angel Mendez lived in the backyard of the Hughes home with a pregnant woman named Jennifer Garcia (now Mrs. Jennifer Mendez). *Ibid.* Deputy Pederson heard this announcement, but at trial Deputy Conley testified that he did not remember it. *Ibid.*

When the officers reached the Hughes residence around midday, three of them knocked on the front

door while Deputies Conley and Pederson went to the back of the property. *Id.*, at 63a. At the front door, Hughes asked if the officers had a warrant. *Ibid.* A sergeant responded that they did not but were searching for O'Dell and had a warrant for his arrest. *Ibid.* One of the officers heard what he thought were sounds of someone running inside the house. *Id.*, at 64a. As the officers prepared to open the door by force, Hughes opened the door and informed them that O'Dell was not in the house. *Ibid.* She was placed under arrest, and the house was searched, but O'Dell was not found. *Ibid.*

Meanwhile, Deputies Conley and Pederson, with guns drawn, searched the rear of the residence, which was cluttered with debris and abandoned automobiles. *Id.*, at 60a, 65a. The property included three metal storage sheds and a one-room shack made of wood and plywood. *Id.*, at 60a. Mendez had built the shack, and he and Garcia had lived inside for about 10 months. *Id.*, at 61a. The shack had a single doorway covered by a blue blanket. *Ibid.* Amid the debris on the ground, an electrical cord ran into the shack, and an air conditioner was mounted on the side. *Id.*, at 62a. A gym storage locker and clothes and other possessions were nearby. *Id.*, at 61a. Mendez kept a BB rifle in the shack for use on rats and other pests. *Id.*, at 62a. The BB gun "closely resembled a small caliber rifle." *Ibid.*

Deputies Conley and Pederson first checked the three metal sheds and found no one inside. *Id.*, at 65a. They then approached the door of the shack. *Id.*, at 66a. Unbeknownst to the officers, Mendez and Garcia were in the shack and were napping on a futon. *Id.*, at 67a. The deputies did not have a search warrant and did not knock and announce their presence. *Id.*, at 66a.

When Deputy Conley opened the wooden door and pulled back the blanket, Mendez thought it was Ms. Hughes and rose from the bed, picking up the BB gun so he could stand up and place it on the floor. *Id.*, at 68a. As a result, when the deputies entered, he was holding the BB gun, and it was "point[ing] somewhat south towards Deputy Conley." *Id.*, at 69a. Deputy Conley yelled, "Gun!" and the deputies immediately opened fire, discharging a total of 15 rounds. *Id.*, at 69a-70a. Mendez and Garcia "were shot multiple times and suffered severe injuries," and Mendez's right leg was later amputated below the knee. *Id.*, at 70a. O'Dell was not in the shack or anywhere on the property. *Ibid.*

B

Mendez and his wife (respondents here) filed suit under Rev. Stat. § 1976, 42 U.S.C. § 1983, against petitioners, the County of Los Angeles and Deputies Conley and Pederson. As relevant here, they pressed three Fourth Amendment claims. First, they claimed that the deputies executed an unreasonable search by entering the shack without a warrant (the "warrantless entry claim"); second, they asserted that the deputies performed an unreasonable search because they failed to announce their presence before entering the shack (the "knock-and-announce claim"); and third, they claimed that the deputies effected an unreasonable seizure by deploying excessive force in opening fire after entering the shack (the "excessive force claim").

After a bench trial, the District Court ruled largely in favor of respondents. App. to Pet. for Cert. 135a-136a. The court found Deputy Conley liable on the warrantless entry claim, and the court also found both

deputies liable on the knock-and-announce claim. But the court awarded nominal damages for these violations because "the act of pointing the BB gun" was a superseding cause "as far as damage [from the shooting was] concerned." App. 238.

The District Court then addressed respondents' excessive force claim. App. to Pet. for Cert. 105a-127a. The court began by evaluating whether the deputies used excessive force under *Graham v. Connor*, 490 U.S. 386 (1989). The court held that, under *Graham*, the deputies' use of force was reasonable "given their belief that a man was holding a firearm rifle threatening their lives." App. to Pet. for Cert. 108a. But the court did not end its excessive force analysis at this point. Instead, the court turned to the Ninth Circuit's provocation rule, which holds that "an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation." *Id.*, at 111a. Based on this rule, the District Court held the deputies liable for excessive force and awarded respondents around $4 million in damages. *Id.*, at 135a-136a.

The Court of Appeals affirmed in part and reversed in part. 815 F.3d 1178 (CA9 2016). Contrary to the District Court, the Court of Appeals held that the officers were entitled to qualified immunity on the knock-and-announce claim. *Id.*, at 1191-1193. But the court concluded that the warrantless entry of the shack violated clearly established law and was attributable to both deputies. *Id.*, at 1191, 1195. Finally, and most important for present purposes, the court affirmed the application of the provocation rule. The

Court of Appeals did not disagree with the conclusion that the shooting was reasonable under *Graham*; instead, like the District Court, the Court of Appeals applied the provocation rule and held the deputies liable for the use of force on the theory that they had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law. 815 F.3d, at 1193.

The Court of Appeals also adopted an alternative rationale for its judgment. It held that "basic notions of proximate cause" would support liability even without the provocation rule because it was "reasonably foreseeable" that the officers would meet an armed homeowner when they "barged into the shack unannounced." *Id.*, at 1194-1195.

We granted certiorari. 580 U.S. ___ (2016).

II

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." *Billington v. Smith*, 292 F.3d 1177, 1189 (CA9 2002). The rule comes into play after a forceful seizure has been judged to be reasonable under *Graham.* Once a court has made that determination, the rule instructs the court to ask whether the law enforcement officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure.

If so, that separate Fourth Amendment violation may "render the officer's otherwise reasonable defensive

use of force unreasonable as a matter of law." *Id.*, at 1190-1191.

The provocation rule, which has been "sharply questioned" outside the Ninth Circuit, *City and County of San Francisco v. Sheehan*, 575 U.S. ___, ___, n.4 (2015) (slip op., at 14, n. 4), is incompatible with our excessive force jurisprudence. The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.

The Fourth Amendment prohibits "unreasonable searches and seizures." "[R]easonableness is always the touchstone of Fourth Amendment analysis," *Birchfield v. North Dakota*, 579 U.S. ___, ___ (2016) (slip op., at 37), and reasonableness is generally assessed by carefully weighing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted).

Our case law sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment. *See Graham*, 490 U.S., at 395. As in other areas of our Fourth Amendment jurisprudence, "[d]etermining whether the force used to effect a particular seizure is 'reasonable'" requires balancing of the individual's Fourth Amendment interests against the relevant government interests. *Id.*, at 396. The operative question in excessive force cases is "whether the totality of the circumstances justifie[s] a particular sort of search or seizure." *Garner*, *supra*, at 8-9.

The reasonableness of the use of force is evaluated under an "objective" inquiry that pays "careful attention to the facts and circumstances of each particular case." *Graham*, *supra*, at 396. And "[t]he '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." *Ibid.* "Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001). That inquiry 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 basic problem with the provocation rule is that it fails to stop there. Instead, the rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. Specifically, it instructs courts to look back in time to see if there was a <u>different</u> Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim. *Billington*, *supra*, at 1190 ("The basis of liability for the subsequent use of force is the initial constitutional violation . . .").

This approach mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a

claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry.

By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms. That is precisely how the rule operated in this case. The District Court found (and the Ninth Circuit did not dispute) that the use of force by the deputies was reasonable under *Graham.* However, respondents were still able to recover damages because the deputies committed a separate constitutional violation (the warrantless entry into the shack) that in some sense set the table for the use of force. That is wrong. The framework for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately.*

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* Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." 490 U.S., at 396 (internal quotation marks omitted). On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. Brief for Respondents 42-43. We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. See, *e.g.*, *McLane Co. v. EEOC, ante*, at 11 ("[W]e are a court of review, not of first view" (internal quotation marks omitted)). All we hold today is that once a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitu-

The Ninth Circuit's efforts to cabin the provocation rule only undermine it further. The Ninth Circuit appears to recognize that it would be going entirely too far to suggest that any Fourth Amendment violation that is connected to a reasonable use of force should create a valid excessive force claim. *See, e.g.*, *Beier v. Lewiston*, 354 F.3d 1058, 1064 (CA9 2004) ("Because the excessive force and false arrest factual inquiries are distinct, establishing a lack of probable cause to make an arrest does not establish an excessive force claim, and vice-versa"). Instead, that court has endeavored to limit the rule to only those distinct Fourth Amendment violations that in some sense "provoked" the need to use force. The concept of provocation, in turn, has been defined using a two-prong test. First, the separate constitutional violation must "creat[e] a situation which led to" the use of force; second, the separate constitutional violation must be committed recklessly or intentionally. 815 F.3d, at 1193 (internal quotation marks omitted).

Neither of these limitations solves the fundamental problem of the provocation rule: namely, that it is an unwarranted and illogical expansion of *Graham*. But in addition, each of the limitations creates problems of its own. First, the rule includes a vague causal standard. It applies when a prior constitutional violation "created a situation which led to" the use of force. The rule does not incorporate the familiar proximate cause standard. Indeed, it is not clear what causal standard is being applied. Second, while the reasonableness of

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tional violation. Any argument regarding the District Court's application of *Graham* in this case should be addressed to the Ninth Circuit on remand.

a search or seizure is almost always based on objective factors, *see Whren v. United States*, 517 U.S. 806, 814 (1996), the provocation rule looks to the subjective intent of the officers who carried out the seizure. As noted, under the Ninth Circuit's rule, a prior Fourth Amendment violation may be held to have provoked a later, reasonable use of force only if the prior violation was intentional or reckless.

The provocation rule may be motivated by the notion that it is important to hold law enforcement officers liable for the foreseeable consequences of all of their constitutional torts. *See Billington*, 292 F.3d, at 1190 ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, . . . liability is established, and the question becomes . . . what harms the constitutional violation proximately caused"). However, there is no need to distort the excessive force inquiry in order to accomplish this objective. To the contrary, both parties accept the principle that plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation. *See, e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (§ 1983 "creates a species of tort liability" informed by tort principles regarding "damages and the prerequisites for their recovery" (internal quotation marks omitted)); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986) ("[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts"). Thus, there is no need to dress up every Fourth Amendment claim as an excessive force claim. For example, if the plaintiffs in this case cannot recover on their excessive force claim,

that will not foreclose recovery for injuries proximately caused by the warrantless entry. The harm proximately caused by these two torts may overlap, but the two claims should not be confused.

III

The Court of Appeals also held that "even without relying on [the] provocation theory, the deputies are liable for the shooting under basic notions of proximate cause." 815 F.3d, at 1194. In other words, the court apparently concluded that the shooting was proximately caused by the deputies' warrantless entry of the shack. Proper analysis of this proximate cause question required consideration of the "foreseeability or the scope of the risk created by the predicate conduct," and required the court to conclude that there was "some direct relation between the injury asserted and the injurious conduct alleged." *Paroline v. United States*, 572 U.S. ___, ___ (2014) (slip op., at 7) (internal quotation marks omitted).

Unfortunately, the Court of Appeals' proximate cause analysis appears to have been tainted by the same errors that cause us to reject the provocation rule. The court reasoned that when officers make a "startling entry" by "barg[ing] into" a home "unannounced," it is reasonably foreseeable that violence may result. 815 F.3d, at 1194-1195 (internal quotation marks omitted). But this appears to focus solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of Appeals concluded that the officers had qualified immunity on that claim. By contrast, the Court of Appeals did not identify the

foreseeable risks associated with the relevant constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry. In other words, the Court of Appeals' proximate cause analysis, like the provocation rule, conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it. On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset. *See Bank of America Corp. v. Miami, ante*, at 12 (declining to "draw the precise boundaries of proximate cause" in the first instance). The arguments made on this point by the parties and by the United States as *amicus* provide a useful starting point for this inquiry. *See* Brief for Petitioners 42-56; Brief for Respondents 20-31, 51-59; Reply Brief 17-24; Brief for United States as *Amicus Curiae* 26-32.

* * *

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING CERTIORARI (DECEMBER 2, 2016)

SUPREME COURT OF THE UNITED STATES

16-369 Los Angeles County, CA v. Mendez

Decision Below: 815 F.3d 1178

Lower Court Case Number: 13-56686, 13-57072

Question Presented:

In a 42 U.S.C. § 1983 action, the district court concluded Los Angeles County Sheriff's Department ("LASD") deputies did not use excessive force in shooting the plaintiffs in violation of their Fourth Amendment rights, based upon the factors set forth by this Court in *Graham v. Connor*, 490 U.S. 386 (1989), as the deputies reasonably feared for their safety at the time of the shooting. However, the deputies were nevertheless found liable under the "provocation" rule created by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). This Court has not yet agreed or disagreed with the Ninth Circuit's "provocation" rule, but has noted the doctrine has been "sharply questioned" by other Courts of Appeals. *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1777 n.4 (2015). The questions presented are:

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?

GRANTED Limited to Questions 1 and 3 presented by the Petition.

CERT. GRANTED 12/2/2016

OPINION OF THE NINTH CIRCUIT (MARCH 2, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees/
Cross-Appellants,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy;
JENNIFER PEDERSON,

Defendants-Appellants/
Cross-Appellees.

Nos. 13-56686, 13-57072

D.C. No. 2:11-cv-04771 MWF-PJW

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Before: Ronald M. GOULD and Marsha S. BERZON, Circuit Judges, and George Caram STEEH III,* Senior District Judge.

GOULD, Circuit Judge:

While participating in a warrantless raid of a house, Los Angeles County Sheriff's Department deputies Christopher Conley and Jennifer Pederson entered the backyard, opened the door to a wooden shack, and shot Angel and Jennifer Mendez, a homeless couple who resided in the shack. After a bench trial, the district court held that the deputies violated the Fourth Amendment knock-and-announce requirement and prohibition on warrantless searches, finding that no exigent circumstances applied. The district court denied the deputies' bid for qualified immunity and awarded the Mendezes damages.

The deputies argue on appeal that the district court erred by denying their qualified immunity defense. The Mendezes cross-appeal the district court's conclusion that the deputies had probable cause to believe that a wanted parolee was hiding in the shack when the deputies searched it. We affirm the district court's conclusion that the deputies were not entitled to qualified immunity for their warrantless entry, and we hold that the district court properly awarded damages for the shooting that followed. Given this disposition, the cross-appeal is dismissed as moot. We reverse, however, the district court's determination that the deputies

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

were not entitled to qualified immunity on the knock-and-announce claim, and we remand for the district court to vacate the nominal damages for that claim.

I

Because this case involves the deputies' renewed assertion of qualified immunity after judgment, we recite the following facts in the light most favorable to the nonmoving parties and the factfinder's verdict. *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 452-53 (9th Cir. 2013).

In October 2010, Deputies Christopher Conley and Jennifer Pederson were part of a team of twelve police officers that responded to a call from a fellow officer who believed he had spotted a wanted parolee named Ronnie O'Dell entering a grocery store. O'Dell had been classified as armed and dangerous by a local police team, although that classification was "standard" for all parolees-at-large without regard to individual circumstances. Before that day, "Conley and Pederson did not have any information regarding Mr. O'Dell." Conley testified that at the time of the search he knew nothing about O'Dell's "criminal past" and that he didn't recall being given information that O'Dell was armed and dangerous, and Pederson testified that the only information she was given about O'Dell was that he was a parolee-at-large.[1] The officers searched the grocery store for O'Dell but did

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[1] Pederson also stated, in response to a leading question, that she was shown a "flyer of sorts" containing a picture of O'Dell and information about O'Dell's criminal history, but she did not testify what the flyer described.

not find him. The officers then met behind the store to debrief.

During this debriefing, another deputy, Claudia Rissling, received a tip from a confidential informant that a man fitting O'Dell's description was riding a bicycle in front of a residence owned by a woman named Paula Hughes. The officers "developed a plan" in which some officers would proceed to the Hughes house, but because "the officers believed that there was a possibility that Mr. O'Dell already had left the Hughes residence," others would proceed to a different house on the same street. Conley and Pederson were "assigned to clear the rear of the Hughes property for the officers' safety . . . and cover the back door of the Hughes residence for containment." The officers were told that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)."[2] Pederson heard that announcement, but Conley testified that he did not recall it.[3]

Conley and Pederson arrived at the Hughes residence along with three other officers. The officers did not have a search warrant to enter Hughes's property. Conley and Pederson were directed "to proceed to the back of the Hughes residence through the south gate." Once in the backyard, the deputies encountered

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[2] Mr. Mendez was a high school friend of Hughes, and Hughes allowed him to construct and live in a shack in her backyard. The Mendezes had been living there for about ten months.

[3] The district court found that "[e]ither he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made."

three storage sheds and opened each of them, finding nothing.

During this time, other officers (led by Sergeant Gregory Minster) banged on the security screen outside Hughes's front door and asked Hughes to open the door. Speaking through the door, Hughes asked the officers whether they had a warrant, and she refused to open the door after being told they did not. Minster then heard someone running inside the residence, who he assumed was O'Dell. The officers retrieved a pick and ram to bust open Hughes's door, at which point Hughes opened the front door. Hughes was pushed to the ground, handcuffed, and placed in the backseat of a patrol car. The officers did not find anyone in the house.

Pederson then met up with Minster and told him, "I'm going [to] go ahead and clear the backyard," and Minster approved. Conley and Pederson then proceeded through the backyard toward a 7′ x 7′ x 7′ shack made of wood and plywood. The shack was surrounded by an air conditioning unit, electric cord, water hose, clothes locker (which may have been open), clothes, and other belongings. The deputies did not knock and announce their presence at the shack, and Conley "did not feel threatened." Approaching the shack from the side, Conley opened the wooden door and pulled back a blue blanket used as a curtain to insulate the shack. The deputies then saw the silhouette of an adult male holding what appeared to be a rifle pointed at them. Conley yelled "Gun!" and both deputies fired fifteen shots in total. Other nearby officers ran back toward the shots, and one officer shot and killed a dog.

The tragedy is that in fact, Mendez was holding only a BB gun that he kept by his bed to shoot rats

that entered the shack; as the door was opening, he was in the process of moving the BB gun so he could sit up in bed. The district court found that the BB gun was pointed at the deputies, although the witnesses' testimony on that point was conflicting and the court recognized that Mendez may not have intended the gun to point that direction while he was getting up. Both Mendezes were injured by the shooting. Mr. Mendez required amputation of his right leg below the knee, and Ms. Mendez was shot in the back.

The Mendezes sued Conley and Pederson under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. After a bench trial, the district court held that the deputies' warrantless entry into the shack was a Fourth Amendment search and was not justified by exigent circumstances or another exception to the warrant requirement. The district court also held that the deputies violated the Fourth Amendment knock-and-announce rule. The court concluded that given Conley's reasonably mistaken fear upon seeing Mendez's BB gun, the deputies did not use excessive force when shooting the Mendezes, *see Graham v. Connor*, 490 U.S. 386 (1989), but the deputies were liable for the shooting under our circuit's provocation rule articulated in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). The court also held that its conclusions in each respect were supported by clearly established law and that the officers were not entitled to qualified immunity. The Mendezes were awarded roughly $4 million in damages for the shooting, nominal damages of $1 each for the unreasonable search and the knock-and-announce violation, and attorneys' fees. The deputies filed a notice of appeal, as well as a motion to amend the

judgment arguing that the district court erred in denying qualified immunity. The district court denied the motion, and the deputies filed a second notice of appeal as to that decision. The Mendezes filed a cross-appeal challenging aspects of the district court's factfinding in case we were inclined to grant qualified immunity on the facts as found by the district court.[4]

II

We review de novo the district court's post-trial denial of qualified immunity, construing the facts in the light most favorable to the factfinder's verdict and the nonmoving parties. *Cal. Highway Patrol*, 712 F.3d at 452-53. The court's factual findings are reviewed for clear error. *Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1088 (9th Cir. 2015).

Law enforcement officers are entitled to qualified immunity from damages unless they violate a constitutional right that "was clearly established at the time of the alleged misconduct." *Ford v. City of Yakima*, 706 F.3d 1188, 1192 (9th Cir. 2013) (citations omitted). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). But "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "[T]he salient question . . . is whether the state of the law" at the time of the events (here, October 2010) gave the

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[4] The Mendezes state that they waive their cross-appeal if we affirm the district court's award of monetary damages for the shooting.

deputies "fair warning" that their conduct was unconstitutional. *Id.* In other words, an officer is entitled to qualified immunity unless existing case law "*squarely governs* the case here." *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

III

A

We start by analyzing the legality of the deputies' entry into the wooden shack. The deputies first argue that they did not "search" the shack within the meaning of the Fourth Amendment when Conley opened the door.

In 2010, the law was clearly established that a "search" under the Fourth Amendment occurs when the government invades an area in which a person has a "reasonable expectation of privacy." *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2005) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). This includes the "area immediately adjacent to a home," known as the "curtilage." *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (citation omitted). Four factors used to determine whether an area lies within the curtilage are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987)).

The deputies contend that not every reasonable officer would have assumed that this "dilapidated" shack was a dwelling. This assertion is irrelevant, as it erroneously assumes that the Fourth Amendment applies only to residences. *See Dunn*, 480 U.S. at 307-08 ("[T]he general rule is that the curtilage includes all outbuildings used in connection with a residence, such as garages, sheds, and barns connected with and in close vicinity of the residence.") (citation and internal alterations omitted); *United States v. Johnson*, 256 F.3d 895, 898 (9th Cir. 2001) (en banc) (holding that a shed may be protected under the Fourth Amendment and remanding for district court to answer the question in first instance). In *Struckman*, we held that a "backyard—a small, enclosed yard adjacent to a home in a residential neighborhood—is unquestionably such a 'clearly marked' area 'to which the activity of home life extends.'" 603 F.3d at 739 (citation omitted).

In this case, the trial court found that the shack was thirty feet from the house; it "was not within the fence that enclosed the grassy backyard area" but "was located in the dirt-surface area that was part of the rear of the Hughes property" and could not be observed, let alone entered, "without passing through the south gate and entering the rear of the Hughes property." These facts support a finding that the shack was in the curtilage. Therefore, it was clearly established under *Struckman* and *Dunn* that the deputies undertook a search within the meaning of the Fourth Amendment by entering the rear of Hughes's property through a gate and by further opening the door to the shack in the curtilage behind the house. The deputies' citations to cases involving "abandoned property" are inapposite because even if the shack was "dilapidated," the officers

knew that Hughes lived in the house, and the shack was very clearly in the curtilage of the house.

The district court correctly determined that the deputies conducted a search within the meaning of the Fourth Amendment under clearly established law.

B

The deputies next argue that they are entitled to qualified immunity because a reasonable officer could have thought that exigent circumstances justified the search.

A warrantless search "is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (citing *Kentucky v. King*, 563 U.S. 452, 459-62 (2011)). The exigent circumstances exception encompasses situations in which police enter without a warrant "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," while "in hot pursuit of a fleeing suspect," or "to prevent the imminent destruction of evidence." *King*, 563 U.S. at 460 (citations omitted) (collecting cases).

The deputies primarily argue that "[a]n officer may enter a third party's home to effectuate an arrest warrant if he has probable cause or a reason to believe the suspect is within, and exigent circumstances support entry without a search warrant." Although the question is quite debatable, we will assume without deciding that the officers were not "plainly incompetent" in concluding they had probable cause to believe that O'Dell was in the shack behind Hughes's house.

Stanton v. Sims, 134 S. Ct. 3, 5 (2013).[5] Even with probable cause, clearly established law indicates the unlawfulness of the deputies' entry into the shack in this case.

As the Supreme Court held in *Steagald v. United States*, 451 U.S. 204 (1981), exigent circumstances to enter a home do not exist merely because the police know the location of a fugitive, even if they possess an arrest warrant for that person. *Id.* at 211-12. In *Steagald*, the police received a tip from a confidential informant regarding the location of "a federal fugitive wanted on drug charges." *Id.* at 206. The officers executed an arrest warrant at that location two days later, but the Court held that the search-warrantless entry could not be justified absent exigent circumstances. *Id.* at 211-12. The Court rejected the view that "a search warrant is not required in such situations if the police have an arrest warrant and reason to believe that the person to be arrested is within the home to be searched." *Id.* at 207 n.3. *Steagald* establishes that in this case, the fact that the deputies suspected O'Dell to be in the shack was not, by itself, sufficient to justify the warrantless search.

Although the deputies do not use the phrase "hot pursuit," their exigency argument seems to be premised

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[5] To mention just one consideration, O'Dell was supposedly spotted riding a bicycle in front of Hughes' house. Unless he was riding in circles, he would have passed the house before the officers arrived. The original group of officers recognized this, as some of them went to another house to look for O'Dell. But we have no reason to further address the probable cause question, as we may affirm while assuming the district court's probable cause predicate.

on that doctrine.[6] The hot pursuit exception typically encompasses situations in which police officers begin an arrest in a public place but the suspect then escapes to a private place. *United States v. Santana*, 427 U.S. 38, 42-43 (1976). In *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court upheld a warrantless entry into a home when "police were informed that an armed robbery had taken place, and that the suspect had entered [the home] less than five minutes before they reached it." *Id.* at 298. By contrast, the Court concluded in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), that the state's hot pursuit argument was "unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime." *Id.* at 753.

As a preliminary matter, a police officer spotting O'Dell, a wanted parole-violator, outside of a grocery store does not appear to qualify as pursuit from "the scene of a crime" as in *Warden* or *Welsh*. But even assuming the hot pursuit doctrine applies, *Welsh* explains why the deputies here are not entitled to qualified immunity. In *Welsh*, a witness "observed a car being driven erratically" and called the police, but the driver abandoned his car and "walked away from the scene." 466 U.S. at 742. Police arrived "[a] few minutes later" and, after determining that the owner of the car was Welsh, the police walked to Welsh's residence "a short distance from the scene." *Id.* at 742-43. Without securing a warrant or consent, the police

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[6] Indeed, the other three possibilities listed in *King*—that officers entered to render emergency assistance to an injured occupant, to protect an occupant from imminent injury, or to prevent the imminent destruction of evidence, *King*, 563 U.S. at 460—do not fit the circumstances presented here.

entered and arrested Welsh. *Id.* at 743. The Court held that the entry was not valid under the hot pursuit doctrine because "there was no immediate or continuous pursuit of the petitioner from the scene of a crime." *Id.* at 753.

Our court, sitting en banc, applied *Welsh* to a situation in which police officers broke into a fenced yard in search of a man who escaped while police were arresting him on an outstanding warrant. *Johnson*, 256 F.3d at 898-900, 907-08. We concluded that the search in that case was not "continuous" because the officers had seen the suspect run into the woods but lost sight of him for "over a half hour" before they entered the property at issue. *Id.* at 907–08. "[A]ny other outcome," we cautioned, "renders the concept of 'hot pursuit' meaningless and allows the police to conduct warrantless searches while investigating a suspect's whereabouts." *Id.* at 908.

Welsh and *Johnson* squarely govern this case and clearly establish that the hot pursuit doctrine does not justify the deputies' search of the shack. Officer Zeko spotted a person he thought was O'Dell outside the grocery store, but that was the last time any policeman saw him before the search took place, which the record suggests was about one hour later. While the deputies received additional information about O'Dell's possible location from the confidential informant, the location identified was outside Hughes' home, not in the house or the shack behind it. And the officers still did not enter the shack until at least fifteen minutes after learning that O'Dell was outside Hughes' home. Moreover, the officers were far from sure that O'Dell was still (or had ever been) inside Hughes's house—let alone in the shack—as evidenced by the fact that they

simultaneously searched a house down the street. As in *Welsh*, "there was no immediate or continuous pursuit of the [suspect] from the scene of a crime." 466 U.S. at 753. And as *Johnson* established, *Welsh* applies when the police enter the backyard of a third-party to look for a suspect, even when the suspect has evaded prior attempts at arrest (as O'Dell apparently had). *Johnson*, 256 F.3d at 899-900, 907.

The deputies also try to justify the warrantless entry based on a threat to the officers' safety, urging that O'Dell had been categorized as armed and dangerous. But *Steagald* and *Johnson* both counsel that exigent circumstances do not exist just because the police are dealing with a fugitive, even if he is wanted on serious federal drug charges. *Steagald*, 451 U.S. at 207; *Johnson*, 256 F.3d at 900, 908. Moreover, Conley testified that he was not aware of O'Dell's categorization and did not have any information about O'Dell. Conley explained that his gun was drawn during the search because he "intermittently" used the light on his gun to "see what was inside of the sheds." A search cannot be considered reasonable based on facts that "were unknown to the officer at the time of the intrusion." *Moreno v. Baca*, 431 F.3d 633, 639 (9th Cir. 2005). And even if we assume that Pederson knew about the characterization, the district court found that "the deputies lacked any credible information that the suspect, O'Dell, was in Plaintiffs' shack," which explains why Conley "did not feel threatened" before entering the shed. The deputies correctly assert that the exigent circumstances inquiry is objective, not subjective, *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987), but the information they had at the time, as confirmed by the conclusions they reached on the scene, is certainly

pertinent. We agree with the district court that these facts support a conclusion based on the objective "totality of the circumstances" that the deputies "failed to demonstrate 'specific and articulable facts'" of an exigency.[7]

While the deputies' brief urges that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," (emphasis in brief) (quoting *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012) (per curiam)), that argument is inconsistent with the fact that the deputies here did not fear imminent violence. We agree with the district court that on this record the deputies did not demonstrate specific and articulable objective facts of an exigency that would meaningfully differentiate this case from clearly established law.

C

Next, the deputies argue that they could have reasonably assumed that Hughes had consented to a search of the shack. The district court assumed for the sake of analysis that Hughes had authority to consent to a search of the shack, but it reasoned that even if Hughes had allowed the officers to enter her home after officers brought a pick and ram from their patrol car and set the pick against the door, any "consent" was "coerced and consequently invalid." The deputies

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[7] The deputies' brief also contends that there was a possibility of ambush arising from other debris in the yard, including parked cars, but even if so, a threat of ambush from other structures would not justify searching the shack.

argue that because they spoke to another officer (Sergeant Minster) in the Hughes residence before searching the shack, "the defendants would assume the officers were lawfully in the main residence," and they "could reasonably believe the sergeant obtained consent for the search" of the shack.

We are not persuaded by this argument. Given the deputies' position that they lawfully entered the backyard pursuant to an exigent circumstance, it is unclear why the deputies would have thought that the other officers had gained consent to search the house rather than having relied on exigent circumstances as well. And the deputies point to no facts in the record suggesting that they knew Hughes had consented to a search of the shack. The district court correctly determined that the deputies could not have reasonably believed that their search of the shack was consensual.

D

Finally, the deputies argue that their search of the shack was a lawful protective sweep. We note that there is both a split between the circuits and a split within our circuit as to whether a protective sweep may be done "where officers possess a reasonable suspicion that their safety is at risk, even in the absence of an arrest." *United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006) (collecting cases, including *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000), and *United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993)). We assume without deciding that the protective sweep doctrine could apply here. And, although the question is subject to debate, *see* n.5, *supra*, we further assume without deciding that the deputies' entry into Hughes's house was lawful and a

protective sweep could be proper if all other requirements were met.

The district court determined that the officers did not conduct a lawful protective sweep because, even assuming that entry into the Hughes residence was constitutional, the deputies' authority to conduct a protective sweep did not extend to the shack. The court concluded that "there is clearly established law requiring a separate warrant for a separate dwelling, especially when officers are aware of the separate dwelling's existence," so lawful presence in the house did not justify sweeping the shack.

We need not decide whether the district court's qualified immunity analysis was correct, as the deputies' protective sweep argument fails for another reason. To justify a protective sweep, police must identify "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Buie*, 494 U.S. at 327 (internal citations, alterations, and quotation marks omitted). The deputies are incorrect when arguing that even if "there were no exigent circumstances to permit a search of the shed, a reasonable officer could have believed it was proper to search the shed as [part of a] protective sweep." As we have explained, "the protective sweep and exigent circumstances inquiries are related." *United States v. Furrow*, 229 F.3d 805, 811 (9th Cir. 2000), overruled in part on other grounds by Johnson, 256 F.3d at 914. For the same reasons that exigent circumstances did not justify entry into the shack, *see* section III.B., *supra*, the deputies did not have the requisite suspicion of danger to justify a protective sweep.

For the foregoing reasons, we hold that the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant.

IV

The district court also concluded that the deputies violated clearly established law because they did not knock-and-announce their presence at the shack before they entered it. We hold that the deputies violated the knock-and-announce rule, but our law in 2010 was not clearly established in this respect. We reverse on this count and remand for the district court to vacate the nominal damages on this claim.

A

The Fourth Amendment knock-and-announce rule requires officers to announce their presence before they enter a home. *Wilson v. Arkansas*, 514 U.S. 927, 931-34 (1995). Police may be exempt from the requirement, however, when "circumstances present[] a threat of physical violence." *Richards v. Wisconsin*, 520 U.S. 385, 391 (1997) (quoting *Wilson*, 514 U.S. at 936). The district court determined here that because the shack was a separate residence, a fact that the officers knew or should have known, the officers were required to announce their presence at the shack, and that no exception applied for the same reasons that there was no exigency to enter for officer safety.

For the reasons stated above, the district court correctly concluded that no exigency exception applied. *See also United States v. Granville*, 222 F.3d 1214, 1219 (9th Cir. 2000) (holding that a no-knock entry was not justified because the government did not "cite any specific facts" suggesting that Granville posed a

threat to the officers). In *Granville*, we explained, "The government simply relies on generalizations and stereotypes that apply to all drug dealers. Our cases have made clear that generalized fears about how drug dealers usually act or the weapons that they usually keep is not enough to establish exigency." *Id.* Here, the deputies similarly rely on a stereotypical characterization of all parolees-at-large as a threat without pointing to any specific facts known about O'Dell. We conclude that the knock-and-announce exigency exception does not apply.

The officers did, however, announce their presence at Hughes' front door, and we disagree with the district court that existing case law squarely governs the question whether the deputies needed to announce their presence again before entering the shack in the curtilage. We have stated that "officers are not required to announce at [e]very place of entry," *United States v. Valenzuela*, 596 F.2d 1361, 1365 (1979) (citation omitted) (holding that there is no requirement to knock at a garage after properly entering home), and we are not aware of case law clearly establishing that officers must re-announce their presence at a shack in the curtilage, even if it was obvious that it was being used as a residence.

Concluding otherwise, the district court relied on *United States v. Villanueva Magallon*, 43 F. App'x 16 (9th Cir. 2002), which held that the knock-and-announce rule was <u>not</u> violated during the search of a separate house (#784) on the same property because "Villanueva possessed and controlled both 792 and 784 and, in fact, 784 was not being used as a separate residence by some third, innocent party." *Id.* at 17-18. The district court reasoned that because the shack in this case <u>was</u> being

used as a separate residence by a third party, a knock was required. But *Villanueva Magallon* also stated that officers are not required to knock and announce "at each additional point of entry into structures within the curtilage." *Id.* at 18. Because the shack here was in the curtilage, *Villanueva Magallon* does not clearly prohibit the deputies' actions here.

The district court also relied on the proposition in *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001), that entry into a separate dwelling (in *Cannon*, a rental unit in the rear of the house) requires a separate warrant. This proposition is at too high a level of generality to constitute clearly established law on the question whether police are required to separately knock and announce their presence at a shack in the curtilage. *Mullenix*, 136 S. Ct. at 308 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality." (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011))).

In the absence of clearly established law that squarely governs the situation here, qualified immunity is appropriate on the knock-and-announce claim. *Id.* at 309. We reverse and remand for the district court to vacate the award of nominal damages on this claim.

B

To clearly establish the law going forward, *see Pearson v. Callahan*, 555 U.S. 223, 236 (2009), we hold that the deputies violated the Fourth Amendment when they failed to knock at the shack. We do not retreat from the general principle that "officers are not required to announce at [e]very place of entry" within a residence. *Valenzuela*, 596 F.2d at 1365. But we agree with the district court that the deputies here

should have been aware that the shack in the back-yard was being used as a separate residence. The deputies were told that a couple was living behind the house, and the shack itself was surrounded by an air conditioning unit, electric cord, water hose, and clothes locker. And parallel to the district court's reasoning that a knock should be required for a separate residence just as a warrant is, *see Cannon*, 264 F.3d at 879, we hold that officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.

This rule is supported by the purposes of the knock-and-announce rule, which is designed to protect our privacy and safety within our homes. *United States v. Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994). We have recognized that when officers fail to knock and announce, they risk the "violent confrontations that may occur if occupants of the home mistake law enforcement for intruders." *United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005). Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot.

V

Although the district court held that the deputies' shooting of the Mendezes was not excessive force under *Graham v. Connor*, 490 U.S. 386 (1989), the district court awarded damages under the provocation doctrine. "[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." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (citing *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)). 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." *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010). And the consequences of the deputies' position make that position unpersuasive. On their theory, Mendez would ostensibly be entitled to damages if after entry he had intentionally pointed a weapon at the police while shouting "I'll kill you," but here he would be out of luck because he was merely holding a BB gun and didn't intend to threaten the police.

Moreover, this case does not require us to extend the provocation doctrine; we have applied provocation liability in a similar circumstance without requiring the plaintiff to show he acted violently. In *Espinosa*, we found that liability under *Alexander-Billington*

was possible when officers entered an attic and shot a man because an officer "believed that he saw something black in [the man's] hand that looked like a gun," even though the suspect "had not brandished a weapon, spoken of a weapon, or threatened to use a weapon" and "in fact, did not have a weapon." 598 F.3d at 533, 538–39. *Espinosa* thus indicates that the provocation doctrine can apply here even though Mendez did not act violently in response to the deputies' entry.

The deputies also argue that they did not intentionally or recklessly violate Mendez's rights, a prerequisite to provocation liability. *See Billington*, 292 F.3d at 1189. But because qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law," *Stanton*, 134 S. Ct. at 5 (citation and internal quotation marks omitted), our determination that the deputies are not entitled to qualified immunity on the warrantless entry claim necessarily indicates that they acted recklessly or intentionally with respect to Mendez's rights. And the record here bears out Conley and Pederson's recklessness—without a reasonable belief of exigent circumstances, the deputies entered Hughes's property and proceeded to search a shack in an attempt to execute an arrest warrant for a parolee that, at most, may have been on the property, contrary to *Steagald*, 451 U.S. at 211-12, and *Johnson*, 256 F.3d at 907-08. Indeed, the deputies appear to have been simply "conduct[ing] warrantless searches while investigating a suspect's whereabouts," *id.* at 908, which *Johnson* explicitly forbids, *id.*, and *Welsh* prohibits by implication, 466 U.S. at 753.

Finally, even without relying on our circuit's provocation theory, the deputies are liable for the

shooting under basic notions of proximate cause.[8] The Supreme Court has emphasized that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). "Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," and the analysis is designed to "preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citations omitted).

The district court here, discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008), recognized that when many Americans own firearms "to protect their own homes[, a] startling entry into a bedroom will result in tragedy." The court also cited Justice Jackson's decades-old admonition in a case involving a warrantless entry:

> [T]he method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued . . . . Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot . . . . But

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[8] This conclusion follows from the Mendezes' argument on cross-appeal that the district court erred by not awarding "reasonably foreseeable" damages jointly on all claims.

> an officer seeing a gun being drawn on him might shoot first.

McDonald v. United States, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring). Under these principles, the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable. The deputies are therefore liable for the shooting as a foreseeable consequence of their unconstitutional entry even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment. *See Billington*, 292 F.3d at 1190 ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused.").

VI

Lastly, Pederson argues that she cannot be held liable because she did not search the shack. Pederson testified, however, that after clearing the sheds on the south side of the property, she told Sergeant Minster that she was "going to check the rest of the yard," including the shack. Minster testified similarly. Pederson also approached the shack with her weapon drawn alongside Conley. It is inconsequential that only Conley opened the door and pulled the blanket back from the doorframe while Pederson stood by—under our case law, Pederson was an "integral participant" in the unlawful search because she was "aware of the decision" to search the shack, she "did not object to it," and she "stood armed behind [Conley] while he" opened the shack door. *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004).

VII

Because we affirm the district court's conclusion that the deputies are liable for the shooting following their unconstitutional entry, the Mendezes' cross-appeal is waived, and we do not reach the issues therein. The district court judgment is AFFIRMED insofar as it awards damages for the shooting and for the unconstitutional entry. The award of $1 nominal damages for the knock-and-announce violation is REVERSED, and we remand for that nominal damages award to be vacated.

13-56686 is AFFIRMED IN PART and REVERSED IN PART; and 13-57072 is DISMISSED AS MOOT.

ORDER DENYING PLAINTIFFS' REQUEST FOR AMENDED JUDGMENT (SEPTEMBER 17, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET AL.

v.

COUNTY OF LOS ANGELES, ET AL.

Case No. CV 11-04771-MWF (PJWx)

Before: Honorable Michael W. FITZGERALD, U.S. District Judge

This matter is before the Court on the Plaintiffs' Request for Amended Judgment (the "Request"). (Docket No. 257). The court has read and considered the papers filed on this Request. For the reasons stated below, the Request is DENIED.

On August 13, 2013, this Court issued Findings of Fact and Conclusions of Law (the "Findings") in this matter. (Docket No. 250). On August 19, 2013, the California Supreme Court filed its decision in *Hayes v. County of San Diego*, 57 Cal. 4th 622, 160 Cal. Rptr. 3d 684 (2013). On August 27, 2013, this Court issued the Judgment in this case. (Docket No. 256). On August 28, 2013, the Plaintiffs filed this Request to amend the

Judgment because of the *Hayes* decision. (Docket No. 257). On September 4, 2013, the Defendants filed an Objection to Plaintiffs' Request for Amended Judgment and Request for Time to File an Opposition. (Docket No. 258).

The Court denies the Request on both procedural and substantive grounds. Procedurally, the Plaintiffs failed to comply with Federal Rules of Civil Procedure 52(b) and 59(e), requiring a party who seeks to amend the findings and/or judgment in a case to file a motion, rather than a request, within 28 days after the entry of judgment. *See* F. R. Civ. P. 52(b) & 59(e). Additionally, if Plaintiffs had filed a motion to amend the findings, they would have been required by Local Rule 6-1 to present the motion with a "written notice of motion" that is "filed with the Clerk not later than twenty-eight (28) days before the date set for hearing." Local Rule 6-1. Following the appropriate procedure under Local Rule 6-1 would have allowed Defendants to calculate the deadline for filing an Opposition, which is due 21 days before the hearing. *See* Local Rule 7-9. However, because Plaintiffs failed to comply with the Federal Rules of Civil Procedure and Local Rules, there was no orderly procedure by which Defendants could file an opposition on the merits of Plaintiffs' request.

The Court also denies the Request on substantive grounds. As discussed in the Findings, the Court did not enter judgment on the state negligence claim because "California law does not provide for an analogue to *Billington* provocation under a theory of negligence." (Findings, at 58). However, the Court acknowledged that at the time it issued the Findings, the Ninth Circuit had certified a question to the California Supreme

Court in *Hayes* that was potentially relevant to this case. While the Court "believe[d] that the answer to the certified question in *Hayes* [wa]s unlikely to resolve" the question central to the negligence claim in this case, the Court, nonetheless, stated that it would review the *Hayes* decision after it issued, and the Court would alter or amend the Judgment in this case, if appropriate. (Findings, at 58).

Before entering the Judgment, the Court reviewed *Hayes* and concluded that, as anticipated, *Hayes* does not answer the operative question as applied to this case. In this case, the operative question is whether California negligence law recognizes an analogue to *Billington* provocation. In the Ninth Circuit, "where 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." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (emphasis added). Therefore, *Billington* provocation requires that (1) the officer intentionally or recklessly provoked a violation response, and (2) that provocation is an independent constitutional violation.

In *Hayes*, the California Supreme Court declined to address whether a negligence claim can be sustained by an independent, preshooting violation of duty. The California Supreme Court stated, "because plaintiff did not allege a separate preshooting injury, this case does not raise the question of what independent duty, if any, law enforcement personnel owe with regard to their preshooting conduct, and we have no reason here to decide that question." *Hayes*, 160 Cal. Rptr. 3d at 690. Therefore, the *Hayes* decision does not answer the question whether California negligence law provides

an analogue to *Billington* provocation. Instead, in *Hayes*, the California Supreme Court stated that "[t]he reasonableness of the deputies' preshooting conduct should not be considered in isolation," but "part of the totality of circumstances surrounding the fatal shooting." *Id.* at 695 (emphasis in original).

It would not have been frivolous to argue that, under *Hayes*, the overall conduct could have involved negligence. But that would not have given Plaintiffs anything more than what they already have. The Court does not view the overall conduct of either Defendants or the Sheriff's Department as negligent, apart from the unconstitutional search and their unjustified failure to realize that the disputed shack/shed/structure/home was not another storage shed, identical to the three already searched to the south of the main residence. And even if negligent under *Hayes*, this unconstitutional conduct and resulting damages were captured in the Court's judgment.

In general, the Court has never shared the sense of outrage that Plaintiffs' counsel evidently feel concerning the parolee search. The Court has no intention of appointing itself a special master for the Sheriff's Department in the Antelope Valley. Other persons and institutions exist for that purpose, *de jure* and *de facto*, including the Office of Independent Review, Merrick Bobb as special counsel, the Board of Supervisors, Sheriff Baca himself, the press and, ultimately, the voters.

Additionally, *Hayes* did not substantively affect the law with regard to either the liability of the County of Los Angeles or Plaintiffs' damages. Therefore, *Hayes* does not provide a basis to amend the Judgment on either of those issues.

Accordingly, the Court DENIES the Request for an Amended Judgment.

IT IS SO ORDERED.

DISTRICT COURT JUDGMENT AFTER TRIAL (AUGUST 27, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET L.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES,

Defendants..

CV 11-04771-MWF (PJWx)

Before: Michael W. FITZGERALD.
United States District Judge

Following a trial to the Court, the Court entered its Findings of Fact and Conclusions of Law. (Docket No. 250). Consistent with the Findings of Fact and Conclusions of Law, and pursuant to Rules 54(a) and 58(b)(1)(C) of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment on the merits be entered as follows:

1. On Plaintiffs' Claim that Defendants conducted an unreasonable search (based on warrantless entry) in violation of the Fourth Amendment: Judgment in the sum of $1.00 in nominal damages is entered against Defendant Deputy Christopher Conley only,

and in favor of Plaintiffs Angel Mendez and Jennifer Lynne Garcia (now Jennifer Mendez).

2. On Plaintiffs' Claim that Defendants conducted an unreasonable search (based on failure to knock-and-announce) in violation of the Fourth Amendment: Judgment in the sum of $1.00 in nominal damages is entered, jointly and severally, against Defendants Deputies Conley and Jennifer Pederson, and in favor of Plaintiffs

3. On Plaintiffs' Claim that Defendants used excessive force (based on conduct at the moment of shooting) in violation of the Fourth Amendment: Judgment is entered in favor of Defendants Deputies Conley and Pederson.

4. On Plaintiffs' Claim that Defendants used excessive force (based on Alexander/Billington provocation) in violation of the Fourth Amendment: Judgment is entered, jointly and severally, against Defendants Deputies Conley and Pederson, and in favor of Plaintiffs, as follows:

<u>Plaintiff Angel Mendez</u>

a. Past Medical Bills:	$ 721,056.00
b. Future Medical Care:	
i. Prosthesis upkeep and replacement:	$ 407,000.00
ii. Future surgeries:	$ 45,000.00
iii. Psychological care (5 years):	$ 13,300.00
c. Attendant Care (4 hours/day at $12.00/hour)	$ 648,240.00

d. Loss of Earnings:	$ 241,920.00
e. Non-Economic Damages:	$ 1,800,000.00
Total:	$ 3,876,516.00

Plaintiff Jennifer Lynn Garcia (now Jennifer Mendez)

a. Past Medical Bills:	$ 95,182.00
b. Future Medical Care:	$ 37,000.00
c. Non-Economic Damages:	$ 90,000.00
TOTAL:	$ 222,182.00

5. On Plaintiffs' California tort claims: Judgment is entered in favor of Defendants Deputies Conley and Pederson.

/s/ Michael W. Fitzgerald
United States District Judge

DATED: August 27, 2013

DISTRICT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW (AUGUST 13, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET AL.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES, ET AL.,

Defendants.

Case No. CV 11-04771-MWF (PJWx)

Before: Michael W. FITZGERALD, United States District Court Judge

This matter came on for trial before the Court sitting without a jury on February 26, 27, 28, March 1, and April 19, 2013. Following the presentation of evidence, the parties filed supplemental briefs, and after closing arguments the matter was taken under submission. The Court then ordered, and the parties filed, supplemental briefs regarding *Alexander v. City of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), and *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002).

Having carefully reviewed the record and the arguments of counsel, as presented at the hearing and in their written submissions, the Court now makes the following findings of fact and reaches the following conclusions of law pursuant to Federal Rules of Civil Procedure 52. Any finding of fact that constitutes a conclusion of law is also hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact.

I. FINDINGS OF FACT

1. On October 1, 2010, at approximately 12:30 p.m.. Defendants Los Angeles County Sheriff's Department Deputies Christopher Conley and Jennifer (Pederson) Ballis shot Plaintiffs Angel Mendez and Jennifer Lynn Garcia multiple times. Plaintiffs were living together as a couple when the shooting occurred and thereafter married At trial and in these Findings of Fact and Conclusions of Law, they are therefore typically referred to as Mr. & Mrs. Mendez.

2. When shot, Mr. and Mrs. Mendez were lying on a futon in the shack in which they resided. Deputies Conley and Pederson were searching for a parolee-at-large named Ronnie O'Dell.

3. At all relevant times, Deputies Conley and Pederson were acting under color of authority of their employment with the County of Los Angeles ("COLA").

A. The Search for Mr. O'Dell

4. Sergeant Greg Minster was a supervisor for the Lancaster, California Station Target Oriented Policing ("TOP") Team.

5. Among other things, Sergeant Minster's TOP Team tracked parolees-at-large.

6. Deputies Billy J. Cox and Veronica Ramirez were assigned to Sergeant Minster's TOP Team.

7. Prior to October 2010, Sergeant Minster's TOP Team had been searching for, and attempting to apprehend, Mr. O'Dell.

8. Mr. O'Dell was a wanted felony suspect whom the TOP Team categorized as armed and dangerous.

9. There was a warrant for Mr. O'Dell's arrest.

10. Mr. O'Dell had evaded prior attempts to apprehend him.

B. On October 1, 2010, Mr. O'Dell Reportedly Was Spotted at an Albertson's Grocery Store in Lancaster

11. On the morning of October 1, 2010, Officer Adam Zeko observed a man he believed to be Mr. O'Dell entering an Albertson's grocery store located at the intersection of 20th Street and K Street in Lancaster.

12. Officer Zeko reported to the Lancaster Station that he thought he had seen Mr. Odell.

13. Approximately twelve police officers, including Deputies Conley and Pederson, responded to the Albertson's.

14. Deputies Conley and Pederson were partners assigned to the Lancaster Station Community Oriented Policing ("COPS") Unit.

15. However, on October 1, 2010, Deputies Conley and Pederson were directed to supplement and assist Sergeant Minster's TOP Team.

16. Prior to October 1, 2010, Deputies Conley and Pederson did not have any information regarding Mr. O'Dell.

17. Mr. O'Dell was not found or captured at the Albertson's.

C. The Responding Officers Then Met Behind the Albertson's

18. The responding officers then met behind the Albertson's to debrief.

19. During the debriefing session, Deputy Claudia Rissling received a tip from a confidential informant that a man he believed to be Mr. O'Dell was riding a bicycle in front of 43263 18th Street West in Lancaster, a private residence owned by Paula Hughes.

20. The responding officers then developed a plan in light of the tip regarding Mr. O'Dell's whereabouts.

21. A team of officers would proceed to the residence of Roseanne Larsen, which was located at 43520 18th Street West, Lancaster, California.

22. The officers had information that Mr. O'Dell previously had been at the Larsen residence, and the officers believed that there was a possibility that Mr. O'Dell already had left the Hughes residence.

23. At the same time, Sergeant Minster's TOP Team, as well as Deputies Conley and Pederson, would proceed to the Hughes residence.

24. Deputies Conley and Pederson were assigned to clear the rear of the Hughes property for the officers' safety (should Mr. O'Dell be hiding thereabouts) and cover the back door of the Hughes residence for containment (should Mr. O'Dell try to escape to the rear of the Hughes property).

25. During the debriefing/planning session, Deputy Rissling announced to the responding officers that a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez).

26. Deputies Conley and Pederson heard Deputy Rissling make this announcement. Deputy Pederson testified that she heard the announcement. Deputy Conley testified that he did not recall any such announcement. Either he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made.

D. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson Proceeded to the Hughes Residence

27. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson proceeded to the Hughes residence, arriving in three different patrol cars.

1. The Hughes Residence and Property

28. Ms. Hughes lived in a private residence located at 43263 18th Street West in Lancaster, California.

29. The front of the Hughes residence faced east.

30. The rear of the Hughes residence faced west.

31. To the south of the Hughes residence was a gate that led to the rear of the property.

32. If one walked westward through the south gate, one would pass between the Hughes residence (to the north) and three metal storage sheds (to the south).

33. The three storage sheds were located within a concrete wall that ran the length of the southern boundary of the Hughes property.

34. Behind (*i.e.*, to the west of) the Hughes residence, a short, lightweight fence enclosed a grassy backyard area.

35. To the west of the backyard fence the ground surface was dirt, not grassy.

36. There was debris throughout the rear of the Hughes property, including abandoned automobiles located in the northwest corner of the rear property.

2. The Mendez Shack

37. Ms. Hughes and Mr. Mendez were friends from high school.

38. Mr. and Mrs. Mendez lived in a shack located in the rear of the property owned by Ms. Hughes.

39. The shack was located in the dirt-surface area to the rear of the Hughes property approximately thirty feet west of the Hughes residence—*i.e.*, west of the backyard fence, and southeast of the abandoned automobiles.

40. Mr. Mendez had constructed the shack out of wood and plywood.

41. Mr. and Mrs. Mendez had been living in the shack for approximately ten months.

42. Mr. and Mrs. Mendez were not yet married.

43. Mrs. Mendez was five-months pregnant.

44. The shack was approximately seven-feet wide, seven-feet long, and seven-feet tall.

45. The shack had a single doorway entrance that faced east toward the Hughes residence.

46. The doorway was approximately six-feet tall and three-feet wide.

47. In the doorway, from the top of the door-frame, hung a blue blanket.

48. Outside of the blue blanket was a hinged wooden door, which opened to the outside of the shack.

49. Outside of the wooden door was a hinged screen door, which opened to the outside of the shack.

50. The shack did not have any windows or other points of entry or exit.

51. Located a few feet to northeast of the shack was a white gym storage locker that contained clothes, coats and other possessions.

52. There were also clothes and other possessions located a few feet to the east of the shack.

53. There was a tree to the north of the shack and the white gym storage locker.

54. There was a blue tarp covering the roof of the shack.

55. There was an electrical cord running into the shack.

56. There was a water hose running into the shack.

57. There was an air conditioner mounted on the north side of the shack.

58. Inside the shack was a full-size futon.

59. The futon ran lengthwise against the back (western) interior wall of the shack.

60. The other (eastern) side of the futon was approximately three feet from the doorway to the shack.

61. Mr. Mendez kept a BB gun rifle in the shack in order to shoot rats, mice and other pests.

62. The BB gun rifle had a black barrel, brown stock and orange safety switch.

63. The butt end of the BB gun rifle had been broken off from the barrel after someone had stepped on it.

64. The Court examined the BB gun rifle at trial, but the BB gun rifle was not admitted as an exhibit. The BB gun rifle closely resembled a small caliber rifle.

65. Ms. Hughes sometimes would open the door to the shack unannounced to "prank" or play a joke on Mr. and Mrs. Mendez.

E. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson Approached the Hughes Residence

66. When Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson arrived at the Hughes residence, they observed a bicycle on the front lawn.

67. The officers did not have a search warrant to search the Hughes residence.

68. Sergeant Minster directed Deputies Conley and Pederson to proceed to the back of the Hughes residence through the south gate.

69. Sergeant Minster and Deputies Cox and Ramirez went to the front door of the Hughes residence.

70. Sergeant Minster banged on the security screen outside the front door.

71. Sergeant Minster testified that if both the front door and the security screen had been open, he would have gone to the front door to see if someone was going to come to the front door and then contacted that person.

72. From within the Hughes residence, a woman (Ms. Hughes) asked what the officers wanted.

73. Sergeant Minster asked Ms. Hughes to open the door.

74. Ms. Hughes asked if the officers had a warrant.

75. Sergeant Minster said that they did not, but that they were searching for Mr. O'Dell and had a warrant to arrest him.

76. Sergeant Minster then heard running within the Hughes residence, toward the back of the residence.

77. Sergeant Minster believed Mr. O'Dell was within the Hughes residence.

78. Sergeant Minster directed Deputies Cox and Ramirez to retrieve the pick and ram because Ms.

Hughes no longer was communicating from within the residence.

79. Deputy Cox set the pick into the left side of the doorframe.

80. At that point, Ms. Hughes again communicated from within the residence.

81. Sergeant Minster again stated that the officers were looking for Mr. O'Dell.

82. Ms. Hughes responded that Mr. O'Dell was not at her residence.

83. Sergeant Minster again requested that the officers be allowed to search her residence.

84. Ms. Hughes opened the front door and the security screen.

85. Ms. Hughes was pushed to the ground and handcuffed.

86. Deputy Ramirez placed Ms. Hughes in the backseat of one of the patrol cars.

87. Sergeant Minster and Deputy Cox searched for Mr. O'Dell in the Hughes residence.

88. The officers did not find Mr. O'Dell, or anyone else, in the Hughes residence.

F. Deputies Conley and Pederson Cleared the Three Storage Sheds

89. Meanwhile, Deputies Conley and Pederson headed west through the south gate of the Hughes residence—*i.e.*, the gate to the south of the Hughes residence that led to the rear of the property.

90. Deputies Conley and Pederson checked each of three storage sheds between the Hughes residence and the southern wall bordering the Hughes property.

91. Deputies Conley and Pederson had their guns drawn because they were searching for Mr. O'Dell, whom they believed to be armed and dangerous.

92. Deputies Conley and Pederson did not find Mr. O'Dell, or anyone else, in the three storage sheds between the Hughes residence and the southern wall bordering the Hughes property.

93. At the time Deputies Conley and Pederson entered the backyard of the Hughes residence, the back door of the Hughes residence was open; Sergeant Minster and Deputy Cox were inside the Hughes residence.

94. Deputy Pederson informed Sergeant Minster that she and Deputy Conley would clear the remainder of the property to the rear of the Hughes residence.

95. Sergeant Minster assented.

G. Deputies Conley and Pederson Approached the Mendez Shack

1. The Deputies' Point of View

96. Deputies Conley and Pederson proceeded west into the dirt-surface area to the rear (west) of the Hughes property.

97. Deputies Conley and Pederson did not have a search warrant to search the shack.

98. Deputies Conley and Pederson did not "knock and announce" their presence at the shack.

99. Deputies Conley and Pederson recognized that the shack had a door.

100. Deputies Conley and Pederson were trained not to approach or stand in front of a door in case there was a threat behind the door.

101. Consequently, Deputies Conley and Pederson approached the shack from the south—*i.e.*, to the left of the door (from the Deputies' point of view).

102. As they approached the shack, Deputy Conley was in front of Deputy Pederson.

103. The wooden door to the shack was closed; the screen door to the shack was open.

104. Prior to opening the door to the shack, Deputy Conley did not feel threatened.

105. Deputy Conley and Deputy Pederson both testified that they did not perceive the shack to be a habitable structure. The Court finds that they acted as they did because they believed the shack to be simply another storage shed, similar to the three on the south side of the property that they had already searched. Therefore, it was their perception that the only person who might have been in the shack would have been Mr. O'Dell, trying to remain hidden.

106. Having listened to the testimony and examined numerous photographs of the Hughes property, the Court finds that this perception of Deputies Conley and Pederson was not reasonable. They had been told that the shack was inhabited. The shack was a different structure from the sheds. The shack was in a different location. The following were all indicia of habitation: The air conditioner, electric cord, water hose, and clothes locker.

107. In photographs of the scene admitted into evidence, the door to the clothes locker was open. Neither Mr. Mendez, Mrs. Mendez, nor Deputy Pederson testified to whether the door of the clothes locker was open at the time of the incident. Deputy Conley testified that he did not remember whether the door was open.

108. Deputy Conley opened the wooden door to the shack.

109. Deputy Conley pulled back the blue blanket that was hanging from the top of the doorframe.

110. As Deputy Conley pulled back the blue blanket, Deputies Conley and Pedersen saw the silhouette of an adult male (Mr. Mendez) holding—what they believed to be—a rifle.

2. Mr. and Mrs. Mendez's Point of View

111. Mr. and Mrs. Mendez were napping on the futon inside the shack.

112. Mr. and Mrs. Mendez were lying with their bodies in a north-south direction and with their heads to the north side of the futon/shack.

113. Mr. and Mrs. Mendez were lying side-by-side on the futon with Mrs. Mendez to Mr. Mendez's right—west of him.

114. Mrs. Mendez was closer to the back (western) interior wall of the shack.

115. Mr. Mendez was closer to the door of the shack (on the east side of the shack).

116. Mr. Mendez had the BB gun rifle next to him on the futon—to his left, east of him.

117. The barrel of the BB gun rifle pointed south.

118. When Mr. Mendez perceived the wooden door being opened, he thought it was Ms. Hughes playing a joke.

119. As the wooden door opened, Mr. Mendez picked up the BB gun rifle to put it on the floor of the shack so that he could put his feet on the floor of the shack and sit up.

120. Mrs. Mendez also perceived the door opening but was lying on her right side, facing the back (western) interior wall of the shack.

3. Whether the BB Gun Rifle Was Pointed at Deputies Conley and Pederson

121. The witness testimony conflicts as to how and where Mr. Mendez was holding the BB gun rifle, whether and in what direction he was moving the BB gun rifle, and whether Mr. Mendez pointed the BB gun rifle (intentionally or otherwise) at Deputies Conley and Pederson.

122. In court, Mr. Mendez attempted a reenactment of his getting out of bed with the BB gun rifle. Based on that demonstration and the testimony of the all the witnesses, the Court finds that the barrel of the BB gun rifle would necessarily have pointed somewhat south towards Deputy Conley, even if the intent of Mr. Mendez was simply to use the BB gun rifle to help him sit-up.

123. Deputies Conley and Pederson perceived Mr. Mendez holding the BB gun rifle.

124. Deputies Conley and Pederson reasonably believed that the BB gun rifle was a firearm rifle.

125. Deputies Conley and Pederson reasonably believed that the man (Mr. Mendez) holding the firearm rifle (a BB gun rifle) threatened their lives.

H. Deputies Conley and Pederson Fired Their Guns

126. Almost immediately, Deputy Conley yelled, "Gun!"

127. And, almost immediately, both Deputies Conley and Pederson fired their guns in the direction of Mr. Mendez, fearing that they would be shot and killed.

128. At the time they fired their guns, neither Deputy Conley nor Deputy Pederson saw Mrs. Mendez.

129. Mr. Mendez screamed, "Stop shooting! Stop shooting!"

130. Deputy Conley fired ten times while moving backward (east) away from the shack.

131. Deputy Pederson fired five times while moving backward (east) and to her left (south).

132. According to their training, Deputies Conley and Pederson were "shooting and moving" until there was no threat.

133. Mr. O'Dell was not found in the shack or captured elsewhere that day.

134. No one was inside the shack other than Mr. and Mrs. Mendez.

I. Mr. and Mrs. Mendez Were Injured

135. The gunshots injured both Mr. and Mrs. Mendez.

136. Mr. and Mrs. Mendez were shot multiple times and suffered severe injuries.

137. Mr. Mendez was shot in the right forearm, right shin, right hip/thigh, right lower back, and left foot.

138. Mr. Mendez's right leg was amputated below the knee.

139. Mrs. Mendez was shot in the right upper back/clavicle, and a bullet grazed her left hand.

140. The Sheriff's Department documented nine bullet holes in and around the shack and collected four bullets.

141. The Sheriff's Department did not determine which bullets were fired from Deputy Conley's gun and which were fired from Deputy Pederson's gun.

142. The Sheriff's Department did not determine how many or which bullets struck Mr. and/or Mrs. Mendez or whether Deputy Conley or Deputy Pederson fired each or any of the bullets that struck Mr. and/or Mrs. Mendez.

J. Damages

143. Mr. and Mrs. Mendez's medical bills were admitted into evidence.

144. Jalil Rashti, M.D., an orthopedic surgeon, testified to his treatment of Mr. and Mrs. Mendez.

145. Dr. Rashti also testified to Mr. and Mrs. Mendez's future medical care and provided an estimate as to the cost of future attendant care for Mr. Mendez.

146. There was no testimony regarding Mr. or Mrs. Mendez's life expectancy.

147. Mr. Mendez testified that, prior to the incident, he had earned from $1,400 to $2,400 per month as a construction "freelancer" or "gopher," landscaping, and working for a sanitation company.

148. Mr. Mendez also testified that he had not worked since 2008.

149. Mr. and Mrs. Mendez each testified to their emotional and psychological suffering.

150. Lawrence J. Coates, Ph.D., a licensed psychologist, testified to his treatment of Mr. and Mrs. Mendez.

151. Plaintiffs filed a Statement of Damages. (Docket No. 230). Defendants filed Objections to Plaintiffs' Statement of Damages. (Docket No. 234). Certain of the objections were well taken; moreover, certain requested amounts were logically unsupported or simply grandiose. Nonetheless, some amount of damages for certain categories are undoubtedly deserved. The Court examined the underlying exhibits and used common sense in deciding the various sums for damages.

152. The position of Plaintiffs is that Mr. Mendez's life expectancy is 81 years but did nothing to establish that number in the record. To the limited extent it matters, the Court believes that 70 years would be more appropriate, given the pre-shooting circumstances of Mr. Mendez's life.

153. The Court did not discount the medical damages to the present value, in recognition of inflation in general and the undoubted rise in the costs of medical care in particular. The Court discounted the requested amount of future earnings, both because of the sporadic nature of Mr. Mendez's employment as a manual laborer and very roughly to reflect present value.

II. CONCLUSIONS OF LAW

Pursuant to 42 U.S.C. § 1983, Mr. and Mrs. Mendez allege various claims under the Fourth Amendment (as applied to Defendants through the Fourteenth Amendment) of the United States Constitution. Mr. and Mrs. Mendez also allege several related California tort claims. Defendants argue that Mr. and Mrs. Mendez's Fourth Amendment claims fail because Deputies Conley and Pederson are shielded from liability by qualified immunity, and that Mr. and Mrs. Mendez's tort claims fail because the Deputies' conduct was reasonable under the circumstances.

A. Qualified Immunity

When the defense of qualified immunity is raised, there are two threshold questions a court must answer. First, was there a violation of a constitutional right? Second, was that right clearly established? *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001). Under the second *Saucier* prong, the question is whether the constitutional right at issue was clearly established "'in light of the specific context of the case.'" *Scott*, 550 U.S. at 377 (quoting *Saucier*, 533 U.S. at 201). "Under *Saucier*'s qualified immunity inquiry, the second question requires the court to ask whether a reasonable officer could have believed that his conduct was lawful." *Dixon v. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003).

"The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L.Ed.2d

565 (2009) (citing *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed.2d 1068 (2004)).

Furthermore, "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*,—U.S.—, 132 S. Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (citation and internal quotation marks omitted). "In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (citation and internal quotation marks omitted). "This 'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can reasonably . . . anticipate when their conduct may give rise to liability for damages." *Id.* (citation and internal quotation marks omitted).

However, the "question is not whether an earlier case mirrors the specific facts here. Rather, the relevant question is whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'" *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (citing *Bull v. City of San Francisco*, 595 F.3d 964, 1003 (9th Cir. 2010) (en banc) ("[T]he specific facts of previous cases need not be materially or fundamentally similar to the situation in question.")); *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000) ("Closely analogous preexisting case law is not required to show that a right was clearly established.") (citations omitted); *see also Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) ("If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end. On the other hand,

when there are relatively few cases on point, and none of them are binding, we may inquire whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results." (citation and internal quotation marks omitted)).

B. Fourth Amendment: Unreasonable Search

Mr. and Mrs. Mendez first argue that Deputies Conley and Pederson violated their Fourth Amendment right to be free from an unreasonable search.

Under the Fourth Amendment, "we inquire, serially, whether a search has taken place; whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement; whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive; and, finally, whether the search was conducted in a reasonable manner." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 641-42, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989) (citations omitted).

The Court addresses each of these elements in turn below.

1. Expectation of Privacy

The United States Supreme Court "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735,

740-41, 99 S. Ct. 2577, 61 L.Ed.2d 220 (1979) (citing cases).

"In accordance with the common law, our Fourth Amendment precedents recogniz[e] . . . that rights such as those conferred by the Fourth Amendment are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched." *Minnesota v. Carter*, 525 U.S. 83, 101, 119 S. Ct. 469, 142 L.Ed.2d 373 (1998) (citation and internal quotation marks omitted). "The claimant must establish that he personally had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises." *McDonald v. City of Tacoma*, No. 11-cv-5774-RBL, 2013 WL 1345349, at *3 (W.D. Wash. Apr. 2, 2013) (citing *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 58 L.Ed.2d 387 (1978)).

"To establish a constitutionally protected reasonable expectation of privacy, [the plaintiff] must demonstrate both a subjective and objective expectation of privacy." *United States v. Rivera*, 10 F. App'x 617, 620 (9th Cir. 2001) (citing *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L.Ed.2d 210 (1986)). Mr. and Mrs. Mendez "have the burden of establishing that, under the totality of the circumstances, the search or the seizure violated their legitimate expectation of privacy." *United States v. Silva*, 247 F.3d 1051, 1055 (9th Cir. 2001) (citation omitted).

In this case, the question is whether Mr. and Mrs. Mendez had a legitimate expectation of privacy in the shack.

a. The Mendez Shack Was Within the Curtilage of the Hughes Residence

"The presumptive protection accorded people at home extends to outdoor areas traditionally known as 'curtilage'—areas that, like the inside of a house, 'harbor[] the intimate activity associated with the sanctity of a [person's] home and the privacies of life.'" *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010) (citing *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L.Ed.2d 326 (1987)).

"[C]ourts have [therefore] extended Fourth Amendment protection to the curtilage to a home, defining the extent of the curtilage with reference to four factors":

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."

Id. at 739 (citation and internal quotation marks omitted) (citing *Dunn*, 480 U.S. at 301). "Every curtilage determination is distinctive and stands or falls on its own unique set of facts." *United States v. Depew*, 8 F.3d 1424, 1426 (9th Cir. 1993).

In this case, the shack was approximately thirty feet from the Hughes residence. While the shack was not within the fence that enclosed the grassy backyard area, it was located in the dirt-surface area that was part of the rear of the Hughes property. Mr. Mendez himself had constructed the shack. Mr. and Mrs. Mendez had lived in the shack for ten months before

the date of the incident. Finally, there is no evidence in the record that people passing by the Hughes residence on 18th Street West could observe the shack without passing through the south gate and entering the rear of the Hughes property.

Therefore, under the *Dunn* factors, the shack was within the curtilage of the Hughes residence.

b. Even if the Shack Was Without the Curtilage of the Hughes Residence, It Was a Protected Structure

Moreover, the "Fourth Amendment protects structures other than dwellings. '[O]ne may have a legally sufficient interest in a place other than her own house so as to extend Fourth Amendment protection from unreasonable searches and seizures in that place. [A] structure need not be within the curtilage in order to have Fourth Amendment protection.'" *United States v. Santa Maria*, 15 F.3d 879, 882-83 (9th Cir. 1994) (citing *United States v. Broadhurst*, 805 F.2d 849, 851, 854 n.7 (9th Cir. 1986)) (citing *United States v. Hoffman*, 677 F. Supp. 589, 596 (E.D. Wis. 1988) ("[A] person can have a protected expectation of privacy in buildings (*i.e.*, barns, garages, boathouses, stables, etc.) that are located far outside the area of the curtilage of the home.")) (citing cases); *see also United States v. Burke*, No. CR. S-05-0365 FCD, 2009 WL 173829, at *12 (E.D. Cal. Jan. 23, 2009) ("[A]s with a residence, the court looks to the totality of the circumstances in determining whether a defendant has a legitimate expectation of privacy in a storage area." (citing *United States v. Silva*, 247 F.3d 1051, 1056 (9th Cir. 2001)).

For the same reasons discussed above, even if the shack was without the curtilage of the Hughes residence, the shack was a protected structure.

c. The Shack Was a Separate Dwelling Unit

Regardless of whether the shack was within or without the curtilage of the Hughes residence, "there is no Fourth Amendment rule that provides for protection only for traditionally constructed houses." *United States v. Barajas-Avalos*, 377 F.3d 1040, 1046 (9th Cir. 2004) (internal quotation marks omitted) (discussing Fourth Amendment rights in twelve-foot travel trailer). "It is quite true that a person has a right to privacy in his dwelling house, or temporary sleeping quarters, whether in a hotel room, a trailer, or in a tent in a public area . . . ." *Id.* at 1055.

"Because the home is accorded the full range of Fourth Amendment protections against unlawful searches and seizures, an unconsented police entry into a residential unit (whether a house, apartment, or hotel room) constitutes a search for which a warrant must be obtained." *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001) (citations and internal quotation marks omitted).

In *Cannon*, there were two structures within the fence that surrounded the defendant's residence at 1250 Hemlock Street in Chico, California. *Id.* at 877. The government agent "reasonably assumed" that the second structure was a garage. *Id.* at 878 (emphasis added) ("In the evidentiary hearing, the district court found that before executing the warrant on 1250 Hemlock, the DEA agent reasonably believed the rear building to be a garage.").

However, the defendant (Mr. Cannon) had converted the rear building from a garage into a self-contained residential unit approximately twenty years earlier. *Id.* Mr. Cook rented the rear building's residential unit from Mr. Cannon. The rear building itself consisted of three areas with separate entrances: Mr. Cook's dwelling unit and two storage rooms. *Id.*

Based on the facts of that case, the Ninth Circuit concluded that the "rental unit was clearly a separate dwelling for which a separate warrant was required" and that it could not "be viewed as an extension of the main house." *Id.* at 879 (citation omitted) ("Similarly, a search of a guest room in a single family home which is rented or used by a third party, and, to the extent that the third party acquires a reasonable expectation of privacy, requires a warrant." (citing *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 58 L.Ed.2d 387 (1978)).

Significantly, the Ninth Circuit concluded that Mr. Cook's residential unit was a separate dwelling even though the "entire rear building at 1250 Hemlock qualifie[d] as curtilage of Cannon's residence." *Id.* at 881 ("Cook possessed a reasonable expectation of privacy in the rear building rooms he rented . . . ."). Indeed, the Ninth Circuit concluded further that, on the facts of that case, the "storage rooms were an extension of defendant Cannon's residence." *Id.* garages in Chico had often been converted without permits into student residences. *Id.* at 878. Had the rear structure still been a garage, then the warrant for the main house would have covered that garage as well. *Id.* at 880.

United States v. Greathouse, 297 F. Supp. 2d 1264 (D. Or. 2003), is illustrative. In *Greathouse*, the district court began its analysis by noting the Ninth Circuit's

observation in *Cannon* that the "rental unit contained its own kitchen appliances and its own bathroom." *Id.* at 1274. The district court continued:

> The government argues that because the defendant's bedroom was not a self-contained unit with its own appliance and bathrooms, and because there was no separate lock, number or entrance, the officers necessarily acted reasonably in concluding that the entirety of the residence was occupied in common.
>
> First, I note that the focus under *Maryland v. Garrison* must be upon the reasonableness of the officers' actions under the circumstances. When they entered the residence, they did not know that the defendant in fact kept to himself in his bedroom. However, I disagree with the government's assertion that the physical layout is dispositive. Doorbells, deadbolts and separate appliances are certainly indicia of separate units, but nothing in the case law indicates that these are prerequisites. Nor is there any support for the assumption that unrelated people who share a house, but maintain separate bedrooms have no independent right to privacy in bedrooms maintained for their exclusive use. In this case, there is no dispute that the kitchen, bathroom and living room areas were occupied in common. There is also no dispute that the defendant's bedroom door was closed when the officers and agents entered and that he had a "Do Not Enter" sign posted on his door.

> There was no lock on the door, no number and no separate door bell.
>
> However, the agents and officers were immediately advised by [another resident] that the defendant was a renter and that he lived in the back bedroom on the first floor. It was also apparent to the officers that there was no familial relation between any of the residents; they were simply a group of people sharing a house. I find that, upon learning this information from [the resident], when coupled with the sign on the defendant's door and the apparent absence of any familial or other connection between the residents, the agents at that point should have known there were separate residences within the house and should have stopped and obtained a second warrant for the defendant's bedroom. There is no question that they could have secured the area and obtained a telephonic warrant without fear of destruction of evidence. Their failure to do [so] is an alternative basis for suppression of the evidence.

Id. at 1274-75 (emphasis added).

In *United States v. Flyer*, No. CR051049TUC-FRZ(GEE), 2006 WL 2590460 (D. Ariz. May 26, 2006), the district court distinguished *Cannon* on the facts, concluding that *Cannon* did not "support[] the necessity of a separate warrant to search the defendant's room in this case." *Id.* at *4. In *Flyer*, the district court ruled that "there was no need for a separate search warrant before searching the defendant's room" based on the following facts:

> The defendant's room was within the single family residence described in the affidavit and search warrant There was no separate entrance to his room from the outside of the residence. While he apparently was free to eat meals in his room, he had no refrigerator or cooking stove in his room and no separate bathroom. Although his mother described him as a "boarder", she admitted he paid no rent and was free to eat the food she purchased for the household. Although the defendant expected other household members would "respect" his privacy and not enter his room without his consent, he did not affix another lock to his room to insure his privacy. There is no evidence the defendant objected to the search of his room during the execution of the warrant.

Id.

Several other cases that predate *Cannon* are instructive. In *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L.Ed.2d 72 (1987), the police officers obtained and executed a warrant to search the person of Lawrence McWebb and the "premises known as 2036 Park Avenue third floor apartment." *Id.* at 80. While the officers "reasonably believed" that there was only one apartment on the premises, the third floor was divided into two apartments, one occupied by Mr. McWebb and the other by the defendant. *Id.* But before the officers executing the warrant realized that they were in a separate apartment occupied by the defendant, they discovered the contraband that provided the basis for his later conviction. *Id.*

According to the United States Supreme Court,

> If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant.

Id. at 86-87. Therefore, the question was whether the failure of the officers to recognize the overbreadth of the warrant was reasonable. *Id.*

In *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000), the officers secured a warrant to search a "poor house"—"a residence with a large number of subjects residing in a residence designed for one family." *Id.* at 1035. The plaintiffs, who owned the residence, argued that the search violated their constitutional rights because, "even after realizing that there were multiple units within the [plaintiffs'] house, the police searched the entire premises, including the individual residential units." *Id.* at 1038. The Ninth Circuit rejected the defendant officers argument that the "execution of the search was valid because probable cause existed to search the entire premises, not just [the suspect]'s room and the common areas." *Id.* The Ninth Circuit determined that the officers should have realized that the house in fact consisted of a

multi-unit residential dwelling, and therefore were obliged to limit their search. *Id.*

Here, *Cannon* is determinative for these reasons:

First, Deputies Conley and Pederson differentiated (or should have differentiated) the shack from the three storage sheds next to (to the south of) the Hughes residence. The shack was located in a different area of the rear of the Hughes property at a distance from the Hughes residence and the storage sheds. The storage sheds were metal. The shack was wood.

Second, Deputies Conley and Pederson observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate residential unit: the shack had a doorway; the shack had a hinged wooden door and a hinged screen door; a white gym storage locker was located nearby the shack; clothes and other possessions also were located nearby the shack; a blue tarp covered the roof of the shack; an electrical cord ran into the shack; a water hose ran into the shack; and an air conditioner was mounted on the side of the shack.

Third, and importantly, Deputies Conley and Pederson had information that a man and woman lived in the rear of the Hughes property. In light of this information, and unlike *Cannon* and similar cases, Deputies Conley and Pederson could not have "reasonably assumed" that the shack was another storage shed.

Therefore, the shack was a separate dwelling unit under *Cannon*.

d. Mr. and Mrs. Mendez Had a Reasonable Expectation of Privacy in the Shack

The "Fourth Amendment protects people, not places." *United States v. Jones*, 132 S. Ct. 945, 950, 181 L.Ed.2d 911 (2012) (citing *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967)). Consequently, the question is not whether the shack was a protected structure, but whether Mr. and Mrs. Mendez had a reasonable expectation of privacy in the shack.

Mr. Mendez himself had constructed the shack. Before the date of the incident, Mr. and Mrs. Mendez had lived in the shack for ten months. Their possessions were in or around the shack. It was their home. The fact that Ms. Hughes sometimes would open the door to the shack unannounced to "prank" or play a joke on them is insufficient to show that Mr. and Mrs. Mendez did not have a subjective expectation of privacy in the shack or that this expectation was unreasonable.

Accordingly, Mr. and Mrs. Mendez had a subjective expectation of privacy in the shack. And this expectation was reasonable under *Cannon*.

e. Overnight Guest Status

In addition, the "Supreme Court has carefully examined the surrounding circumstances to determine whether a guest's status is sufficiently like home-occupancy so as to give rise to a reasonable expectation of privacy. In so doing, the Court has distinguished between 'overnight guests' and those who were simply on the premises with the owner's permission":

> In the case of the overnight guest, the Supreme Court reasoned that an overnight guest

> seeks shelter in the host's home "precisely because it provide[d] him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows." Thus, the overnight guest's expectation of privacy is recognized and a shared societal norm. The Court contrasted overnight guests with persons simply present on the premises, even with the owner's permission, and concluded that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."

McDonald, 2013 WL 1345349, at *3 (citing *Minnesota v. Carter*, 525 U.S. 83, 87-90, 119 S. Ct. 469, 142 L.Ed.2d 373 (1998)).

Based on the same set of facts, Mr. and Mrs. Mendez—at the very least—were long-term, overnight guests staying within a protected structure within or without the curtilage of the Hughes residence. For the reasons discussed above, Mr. and Mrs. Mendez had a subjective and objective expectation of privacy in the shack.

2. Search

"Under the traditional approach, the term 'search' is said to imply" the following:

> some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or

> constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search."

1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.1(a) (5th ed. 2012) ("The Supreme Court, quite understandably, has never managed to set out a comprehensive definition of the word 'searches' as it is used in the Fourth Amendment.").

Here, Deputy Conley searched the shack when he opened the wooden door and pulled back the blue blanket that hung from the top of the doorframe. Deputy Pederson, however, did not search the shack.

3. Probable Cause/Warrant Requirement

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973) (citations omitted).

It is undisputed that Deputy Conley did not have a warrant to search the shack, nor do any of the exceptions to the warrant requirement apply.

a. Consent

The "consent of one who possesses common authority over premises or effects is valid as against

the absent, nonconsenting person with whom that authority is shared." *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974). "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. 218, 228.

The Court assumes for purposes of this analysis that Ms. Hughes could have consented to a search of the shack. Ms. Hughes opened her front door and the security screen only after Sergeant Minster and Deputies Cox and Ramirez had brought the pick and ram out from the patrol car and set the pick against her doorframe. To the extent that this can be construed as "consent," it was coerced and consequently invalid. Nor, for that matter, did Ms. Hughes give any indication of consent to Deputy Conley's search of the shack.

Furthermore, Mr. and Mrs. Mendez did not consent to the search of the shack.

b. Parolee Search

"[B]efore conducting a warrantless search [of a residence] pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched." *United States v. Franklin*, 603 F.3d 652, 656 (9th Cir. 2010) (citation and internal quotation marks omitted).

There is no evidence in the record that Mr. O'Dell was a resident of the Hughes residence—on the date of the incident or otherwise. This warrant exception does not apply.

c. Exigency/Emergency Exceptions

"In particular, [t]here are two general exceptions to the warrant requirement for home searches: exigency and emergency." *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010) (citation and internal quotation marks omitted). The Ninth Circuit has "described these exceptions as follows":

> The "emergency" exception stems from the police officers' "community caretaking function" and allows them "to respond to emergency situations" that threaten life or limb; this exception does "not [derive from] police officers' function as criminal investigators." By contrast, the "exigency" exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is "necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

Id. (citations omitted). "To succeed in invoking these exceptions, the government must . . . show that a warrant could not have been obtained in time." *Id.* (citation and internal quotation marks omitted) (emphasis added). The "police bear a heavy burden when attempting to demonstrate an urgent need that might justify

warrantless searches or arrests." *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 80 L.Ed.2d 732 (1984).

Significantly, [t]here's no disputing that the [Supreme] Court considers the curtilage to stand on the same footing as the home itself for purposes of the Fourth Amendment." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1122 (9th Cir. 2010). "When the warrantless search is to home or curtilage, we recognize two exceptions to the warrant requirement: exigency and emergency." *Sims v. Stanton*, 706 F.3d 954, 960 (9th Cir. 2013) ("[C]urtilage is protected to the same degree as the home . . . ."); *United States v. Perea-Rey*, 680 F.3d 1179, 1185 (9th Cir. 2012) ("Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches." (citation omitted)).

d. Exigent Circumstances

"[W]arrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *United States v. Snipe*, 515 F.3d 947, 950 (9th Cir. 2008) (citation and internal quotation marks omitted). "It is clearly established Federal law that the warrantless search of a dwelling must be supported by probable cause and the existence of exigent circumstances." *Struckman*, 603 F.3d at 739 (citation and internal quotation marks omitted).

"[W]hen the government relies on the exigent circumstances exception [to the Fourth Amendment warrant requirement], it . . . must satisfy two requirements: first, the government must prove that the officer

had probable cause to search the house; and second, the government must prove that exigent circumstances justified the warrantless intrusion." *Id.* (citations omitted).

(i). Probable Cause

"Generally, if a structure is divided into more than one occupancy unit, probable cause must exist for each unit to be searched." *Mena*, 226 F.3d at 1038 (citation omitted). "This rule, however, is not absolute. For example, we have held that a warrant is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect." *Id.* (citations omitted) (concluding that the officers had probable cause to search, at most, the suspect's room and one other room, in addition to the common areas, but not any of the other rooms); *see also United States v. Whitten*, 706 F.2d 1000, 1008 (9th Cir. 1983) ("[A] warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises if they are occupied in common rather than individually, if a multiunit building is used as a single entity, if the defendant was in control of the whole premises, or if the entire premises are suspect."); *United States v. Whitney*, 633 F.2d 902, 907-08 (9th Cir. 1980) (discussing exceptions to rule that "when the structure under suspicion is divided into more than one occupancy unit, probable cause must exist for each unit to be searched."); *United States v. Gilman*, 684 F.2d 616, 618 (9th Cir. 1982) ("Even if a warrant authorizes the search of an entire premises containing multiple units while reciting probable cause as to a portion of the premises only, it

does not follow either that the warrant is void or that the entire search is unlawful.").

Here, Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson were proceeding based on the tip from a confidential informant—relayed by Deputy Rissling at the debriefing/planning session behind the Albertson's—that a man he believed to be Mr. O'Dell was riding a bicycle in front of the Hughes residence. When the officers arrived at the Hughes residence, they observed a bicycle on the front lawn. While Deputies Conley and Pederson were to cover the back door of the Hughes residence should Mr. O'Dell attempt to escape to the rear of the property, they also were ordered to clear the rear of the property should Mr. O'Dell be hiding somewhere thereabouts. Nothing about the confidential informant's tip was specific to the Hughes residence as opposed to the rear of the property, including the shack.

Therefore, the officers had probable cause to search for Mr. O'Dell inside the Hughes residence, and Deputy Conley had probable cause to search for Mr. O'Dell inside the shack.

(ii). Exigency

"The exigent circumstances exception is premised on few in number and carefully delineated circumstances, in which the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 743 (citations and internal quotation marks omitted). "We have previously defined those situations as (1) the need to prevent physical harm to the officers or other persons, (2) the need to prevent the imminent destruction of relevant evidence,

(3) the hot pursuit of a fleeing suspect; and (4) the need to prevent the escape of a suspect." *Id.* (citations omitted). "Because the Fourth Amendment ultimately turns on the reasonableness of the officer's actions in light of the totality of the circumstances, however, there is no immutable list of exigent circumstances; they may include some other consequence improperly frustrating legitimate law enforcement efforts." *Id.* (citations and internal quotation marks omitted). "The government bears the burden of showing specific and articulable facts to justify the finding of exigent circumstances." *Id.* (citation and internal quotation marks omitted).

In this case, an important predicate question is whether the Court should make the determination of exigent circumstances with respect to the Hughes residence and its curtilage or separately as to the shack itself.

Cannon holds that a search of a separate dwelling unit, even if within the curtilage of the main residence, requires a separate warrant. In this case, the shack is akin to the Cook residential unit in *Cannon*. Consequently, if Deputy Conley had had a warrant to search the Hughes residence (and its curtilage), he nevertheless would have needed a separate warrant to have searched the shack itself. *See Cannon*, 264 F.3d 875, 877-79 (separate dwelling required separate warrant).

Therefore, Deputy Conley must invoke a warrant exception as to the shack itself, rather than as to the Hughes residence (and its curtilage). As the Supreme Court has made clear, the "most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth

Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971) (citation and internal quotation marks omitted). "The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. [T]he burden is on those seeking the exemption to show the need for it." *Id.* (citation and internal quotation marks omitted).

The determinative question, then, is whether there was exigency to search the shack itself. Specifically, the question is whether under the totality of the circumstances it was reasonable—on account of exigency—for Deputy Conley to search the shack itself without a warrant.

The question is not whether there was any exigency to search the Hughes residence (and its curtilage). Consequently, the Court reaches no conclusion as to whether Sergeant Minster and Deputies Cox and Ramirez's warrantless search of the Hughes residence was reasonable pursuant to the exigent circumstances exception to the warrant requirement.

With respect to the shack itself, Defendants essentially argue that there was exigency for the warrantless search to prevent Mr. O'Dell's possible escape and for the safety of the five officers on the scene. The shack had a single doorway. If Mr. O'Dell had been within the shack, he was trapped. If Mr. O'Dell had been elsewhere on the Hughes property, then there was no exigent reason to search the shack. Deputy Conley could have obtained a warrant "in time."

Likewise with respect to officer safety, if Mr. O'Dell was within the shack, he was trapped. There was no apparent threat to officer safety. Tellingly, Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened. If Mr. O'Dell had been elsewhere on the Hughes property, Defendants have failed to show that a search of the shack was "imperative" to officer safety. Moreover, the possibility that Mr. O'Dell was in the shack hiding but nobody else would have been in the shack was premised on the unreasonable belief that the shack was not a dwelling.

Defendants have failed to satisfy their burden in this regard. Rather than second-guess Deputy Conley's conduct with the benefit of the hindsight, the Court concludes only that Defendants have failed to demonstrate "specific and articulable facts" justifying a warrantless search of the shack based on any supposed exigency. Therefore, under the totality of the circumstances, the Court concludes that Deputy Conley's warrantless search was not reasonable pursuant to the exigent circumstances exception to the warrant requirement.

e. Emergency Exception

"The need to protect or preserve life or avoid serious injury is one such justification for what would be otherwise illegal absent an exigency or emergency." *Snipe*, 515 F.3d at 950-51 (citation and internal quotation marks omitted). The Ninth Circuit has "adopt[ed] a two-pronged test that asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or

themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *Id.* at 952.

Similarly, Defendants argue that the "immediate need to protect" the officers themselves presented an emergency justifying the warrantless search of the shack. For the same reasons discussed above, the Court disagrees. There was no emergency to search the shack on the basis of officer safety, and Deputy Conley's search was therefore unreasonable.

Accordingly, Deputy Conley violated Mr. and Mrs. Mendez's constitutional right to free from an unreasonable search.

f. Qualified Immunity

Defendants argue that Deputy Conley is entitled to qualified immunity in this regard because he was following orders from his superior, Sergeant Minster. But, "[c]ourts have widely held that a party's purported defense that he was 'just following orders' does not occup[y] a respected position in our jurisprudence." *Peralta v. Dillard*, 704 F.3d 1124, 1134 (9th Cir. 2013) (citations and internal quotation marks omitted). "Instead, officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." *Id.* (citation and internal quotation marks omitted); *Dirks v. Grasso*, 449 F. App'x 589, 592 (9th Cir. 2011) ("[The defendants] cite no binding authority holding that following a superior's orders entitles officers to qualified immunity, and none exists.").

Preliminarily, it is not clear that Sergeant Minster ordered Deputy Conley (or Deputy Pederson) to search

the shack. Regardless, the question is whether a reasonable officer could have believed that Deputy Conley's conduct was lawful.

Deputy Conley had information that people lived in the rear of the Hughes property. In addition, as discussed above, Deputy Conley observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate dwelling unit. Moreover, Deputy Conley did not have a warrant to search the shack. And, under the totality of the circumstances, no reasonable officer could have believed that a warrantless search of the shack was justified under the exigency or emergency exceptions.

Rather, Deputy Conley opened the door (and pulled back the blanket) to a dwelling in which he knew—or should have known—people lived. Although Deputy Conley was searching for a parolee-at-large, the shack had a single doorway. If Mr. O'Dell had been within the shack, he would have been trapped. He could not have escaped. Regardless of whether Mr. O'Dell was within the shack, there was no apparent threat to officer safety. Deputy Conley himself did not feel threatened prior to opening the door to the shack.

Finally, Sergeant Minster did not tell the Deputies that the shack was not inhabited and did not specifically order them not to provide knock-notice (discussed below).

Every reasonable officer in Deputy Conley's position would have understood that what he was doing violated Mr. and Mrs. Mendez's right to be free from an unreasonable search. Accordingly, Mr. and Mrs. Mendez's right to be free from an unreasonable search was clearly established in this case.

4. Manner of Entry

a. Knock-Notice

"The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one." *Hudson v. Michigan*, 547 U.S. 586, 589, 126 S. Ct. 2159, 165 L.Ed.2d 56 (2006) (citation omitted). "Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law and is currently codified at 18 U.S.C. § 3109." *Id.* (citation omitted). Finally, in *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L.Ed.2d 976 (1995), the United States Supreme Court concluded that the "rule was also a command of the Fourth Amendment." *Id.* (citation omitted).

"The requirements of [the federal knock-and-announce statute] have been held to cover warrantless searches and entries of a home to make an arrest." William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 6:7 n.2 (2d ed. 2013) (citing cases) (citing *United States v. Flores*, 540 F.2d 432, 436 (9th Cir. 1976) ("[A] warrantless entry normally requires the officer to give notice of his authority and purpose before using force to enter.")). Furthermore, the federal knock-and-announce statute requirements have been incorporated into the Fourth Amendment. *United States v. Valenzuela*, 596 F.2d 824, 830 (9th Cir. 1979).

As the Ninth Circuit has explained,

> The general practice of physically knocking on the door, announcing law enforcement's presence and purpose, and receiving an actual refusal or waiting a sufficient amount

> of time to infer refusal is the preferred method of entry. This method is preferable because it provides a clear rule that law enforcement can follow. It also promotes the goals of the knock and announce principle: protecting the sanctity of the home, preventing the unnecessary destruction of private property through forced entry, and avoiding violent confrontations that may occur if occupants of the home mistake law enforcement for intruders.

United States v. Combs, 394 F.3d 739, 744 (9th Cir. 2005) (citations omitted); *Richards v. Wisconsin*, 520 U.S. 385, 387, 117 S. Ct. 1416, 137 L.Ed.2d 615 (1997) ("[T]he Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry.").

There is no dispute that Sergeant Minster and Deputies Cox and Ramirez complied with the knock-notice requirement as to the Hughes residence. Here, however, the question is whether Deputies Conley and Pederson were required to knock-and-announce at the door of the shack itself.

As a general rule, law enforcement officers "are not required to [knock and announce] at each additional point of entry into structures within the curtilage." *United States v. Villanueva Magallon*, 43 F. App'x 16, 18 (9th Cir. 2002) (citations omitted); *see also United States v. Crawford*, 657 F.2d 1041, 1044 (9th Cir. 1981) ("There are no decisions directly on point dealing with [whether], after having complied with the dictates of [the federal knock-and-announce statute] at the front door, the arresting officers were then

required to comply with [the statute] at the inner bedroom door. The Ninth Circuit has consistently held that where the first or contemporaneous entry is lawful under [the statute], a defendant cannot complain of the unlawfulness of subsequent entries.").

For example, the Ninth Circuit has "assumed for purposes of the [statutory] knock-and-announce rule . . . that a garage is part of a house." *United State v. Frazin*, 780 F.2d 1461, 1467 n. 6 (9th Cir. 1986); *Valenzuela*, 596 F.2d at 1365 ("[T]he garage entry was made only after the proper entry at the residence, and officers are not required to announce at [e]very place of entry; one proper announcement under [the federal knock-and-announce statute] is sufficient." (citation and internal quotation marks omitted)).

Villanueva Magallon, 43 F. App'x 16, is instructive. In that case, the government had a warrant to search the premises at 792 Ada Street, Chula Vista, California ("792"). Another garage and house were on the same property—784 Ada Street, Chula Vista, California ("784"). Law enforcement officers entered both 792 and 784 and discovered drugs in the latter. *Id.* at 17. The Ninth Circuit rejected the defendant's argument that, "even if the warrant was valid, the agents did not knock and announce before they entered 784," remarking, "This boots him nothing," because it was "undisputed that the agents did knock and announce at 792." *Id.* at 18.

However, the Ninth Circuit also observed that, "[a]t any rate, nobody was in the house at 784, so [the defendant] cannot show any detriment from th[e] failure" to knock and announce before entering 784." *Id.* More importantly, the Ninth Circuit concluded that the defendant "possessed and controlled both 792

and 784 and, in fact, 784 was not being used as a separate residence by some third, innocent party." *Id.* at 17-18 (emphasis added) ("From the record, it is clear that 784 was within the curtilage of 792.").

Here, as discussed above, Deputies Conley and Pederson knew (or should have known) that the shack was a separate residence being used by third parties—*i.e.*, not Ms. Hughes. Deputies Conley and Pederson, however, did not knock-and-announce at the shack. Under *Cannon* and *Villanueva Magallon*, Deputies Conley and Pederson were required to knock-and-announce their presence at the door of the shack itself.

b. No-Knock Entry Exceptions

The "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 929 ("[T]he method of an officer's entry into a dwelling [i]s among the factors to be considered in assessing the reasonableness of a search or seizure.").

"This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* at 934 ("[T]he common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.").

"*Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce." *Hudson*, 547 U.S. at 589 "It is not necessary when circumstances presen[t] a threat of physical violence, or if there is reason to believe that

evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile." *Id.* at 589-90 (citations and internal quotation marks omitted). "We require only that police have a reasonable suspicion . . . under the particular circumstances that one of these grounds for failing to knock and announce exists, and we have acknowledged that [t]his showing is not high." *Id.* at 590 (citation and internal quotation marks omitted) ("When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do.").

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards*, 520 U.S. at 394. "This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." *Id.* (citations omitted). "This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Id.* at 394-95.

In this context, however, the Supreme Court has "treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that

turn out to be important in a given instance, and without inflating marginal ones." *United States v. Banks*, 540 U.S. 31, 35, 124 S. Ct. 521, 157 L.Ed.2d 343 (2003).

Moreover, where the "police claim exigent need to enter," the "crucial fact in examining their actions" is the "particular exigency claimed." *Id.* at 39.

The analysis here is similar to that above with respect to exigency/emergency. Defendants again argue that a no-knock entry was justified on the bases of effective apprehension of Mr. O'Dell and officer safety. But the shack had only a single doorway—anyone inside was trapped. And Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened—there was no apparent danger. If Mr. O'Dell was not within the shack, then there was no exigency for a no-knock entry.

Under the totality of the circumstances of this case, Defendants failed to introduce sufficient evidence that Deputies Conley and Pederson had a reasonable suspicion that knocking-and-announcing would have been dangerous or futile, or that it would have inhibited the effective apprehension of Mr. O'Dell. Given that the knock-and-announce requirement is part of the Fourth Amendment reasonableness inquiry, the Court cannot say that the failure to knock-and-announce in this case was reasonable.

Accordingly, Deputies Conley and Pederson violated Mr. and Mrs. Mendez's constitutional right to free from an unreasonable search based on the manner of entry.

c. Qualified Immunity

Again, the determinative question is whether a reasonable officer could have believed that the conduct of Deputies Conley and Pederson was lawful. As discussed above, Deputies Conley and Pederson knew (or should have known) that the shack was a separate dwelling unit. Accordingly, a reasonable officer would have recognized the need to knock-and-announce his presence before searching the shack. Nor would a reasonable officer have believed that knocking-and-announcing would have been dangerous (Deputy Conley himself did not feel threatened before opening the shack door) or futile or would have inhibited effective apprehension of Mr. O'Dell (anyone inside could not have escaped). Indeed, Sergeant Minster recognized the need to provide knock-notice before a search of the main Hughes residence.

Every reasonable officer in Deputies Conley and Pederson's position would have understood that what they were doing violated that right. Accordingly, Mr. and Mrs. Mendez's right to be free from an unreasonable search—in the absence of Deputies Conley and Pederson's having knocked-and-announced their presence and provided Mr. and Mrs. Mendez with an opportunity to open the door to the shack—was clearly established in this case.

C. Fourth Amendment: Excessive Force (At the Moment of Shooting)

1. Constitutional Violation

Mr. and Mrs. Mendez next argue that Deputies Conley and Pederson violated their Fourth Amendment right to be free from excessive force:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment 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. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because "[t]he test of reasonableness under the Fourth Amendment 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, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989) (citations omitted).

As recently elaborated by the Ninth Circuit, the *Graham* factors (which are incorporated into the applicable Model Jury Instruction 9.22) "are not exclusive and we must consider the totality of the circumstances." *Gonzalez v. City of Anaheim*,—F.3d—2013 WL 1943326, at *2 (9th Cir. May 13, 2013). The second *Graham* factor, immediacy of the threat posed to other officers or civilians, is characterized as the most important factor. *Id.* at *3.

Courts are directed to give "careful attention to the facts and circumstances of each particular case" noting that "[t]he '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." *Graham*, 490 U.S. at 396 (citation omitted). Furthermore, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The reasonableness inquiry is therefore highly fact specific and objective. *See Scott v. Harris*, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L.Ed.2d 686 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'"). "A reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)).

For example, in *Garcia v. Santa Clara County*, No. C 02-04360 RMW, 2004 WL 2203560 (N.D. Cal. Sept. 29, 2004), it was undisputed that defendant Deputy Dawson shot and killed the decedent (Mr. Garcia). *Id.* at *4. The district court granted the defendants' motion for summary judgment, concluding that "Dawson's use of deadly force was objectively reasonable" and therefore that "no constitutional violation occurred." *Id.* at *8. The evidence in that case established that

"Dawson had probable cause to believe that Garcia posed a significant threat of death or serious physical injury to Dawson." *Id.* at *6. "First, Dawson observed that Garcia was in possession of a firearm. Second, Dawson saw Garcia pick up the gun, and begin to twist backwards towards Dawson, and move his arm holding the gun in Dawson's direction. Third, the events occurred during a foot pursuit in which Garcia was attempting to escape." *Id.*

Mr. and Mrs. Mendez do not dispute that Deputies Conley and Pederson's use of deadly force—at the moment of shooting—was objectively unreasonable under the totality of the circumstances. Indeed, in their closing argument, counsel for Mr. and Mrs. Mendez conceded that (again, at the time Deputy Conley opened the shack door) Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives.

Mr. and Mrs. Mendez instead argue that Deputies Conley and Pederson violated the Fourth Amendment because they "created" the incident that led to the shooting. That argument is discussed below.

2. Qualified Immunity

Because Mr. and Mrs. Mendez have failed to prove a violation of their constitutional right to be free from excessive force in this regard, the Court need not reach the question of qualified immunity.

D. Fourth Amendment: Excessive Force (Provocation)

Mr. and Mrs. Mendez's excessive force claim, indeed their entire theory of the case, is premised upon the

law of Fourth Amendment provocation. In the Ninth Circuit, "where 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." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (emphasis added); *Alexander v. City of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) ("[The] plaintiff argues that defendants used excessive force in creating the situation which caused [the decedent] to take the actions he did.").

The Ninth Circuit has explained this rule as follows:

> In *Alexander*, the officers allegedly used excessive force because they committed an independent Fourth Amendment violation by entering the man's house to arrest him without an arrest warrant, for a relatively trivial and non-violent offense, and this violation provoked the man to shoot at the officers. Thus, even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.
>
> [. . .]
>
> *Alexander* must be read consistently with the Supreme Court's admonition in *Graham v. Connor* that courts must judge the "reasonableness of a particular use of force . . . from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." That goes for the events leading

> up to the shooting as well as the shooting. Our precedents do not forbid any consideration of events leading up to a shooting. But neither do they permit a plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.
>
> [. . .]
>
> But if, as in *Alexander*, an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force.

Billington, 292 F.3d at 1189-91 (citations omitted) (emphasis added).

Reductively, an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation.

1. Predicate Constitutional Violation: Unreasonable Search

For example, in *Federman v. County of Kern*, 61 F. App'x 438 (9th Cir. 2003), the Ninth Circuit concluded

that the defendants' illegal entry was (1) a constitutional violation, (2) reckless, and (3) not protected by qualified immunity. Specifically,

> [the] plaintiffs ha[d] alleged constitutional violations: the threshold inquiry under *Saucier*. The Sheriff department's alleged reckless entry of [the decedent]'s home with a SWAT team constitutes excessive force under the Fourth Amendment. This aggressive entry without warning or a warrant, to detain [the decedent] for psychiatric examination due to his odd but relatively trivial, non-criminal behavior, provoked [the decedent] to resist and turned a relatively minor situation into a fatal shooting. No reasonable police officer could have believed that he was entitled to make such an entry.

Id. at 440 (citation omitted) (affirming, on interlocutory appeal, the district court's judgment denying qualified immunity to the individual defendants on the plaintiffs' excessive force claims).

Similarly, *Espinosa v. City of San Francisco*, 598 F.3d 528 (9th Cir. 2010), involved an illegal entry. *Id.* at 533. The Ninth Circuit concluded that the district court "properly denied defendants' summary judgment motion on whether the officers were entitled to qualified immunity for allegedly violating [the decedent]'s Fourth Amendment rights by intentionally or recklessly provoking a confrontation." *Id.* at 538. The Ninth Circuit concluded that, "[v]iewing the evidence in the light most favorable to the plaintiffs, there is evidence that the illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." *Id.* at 539

(emphasis added) (citing *Alexander*) ("If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation in which force was necessary and such force would have been legal but for the initial violation.").

As discussed above, Deputy Conley violated Mr. and Mrs. Mendez's Fourth Amendment right to be free from an unreasonable search in searching the shack without a warrant (or applicable warrant exception). Deputies Conley and Pederson violated Mr. and Mrs. Mendez's Fourth Amendment right to be free from an unreasonable search in and in failing to knock-and-announce before the search. As a result, Mr. Mendez picked up the BB gun rifle while sitting up on the futon within the shack, and Deputies Conley and Pederson fired their guns.

Under *Billington*, Deputies Conley and Pederson's predicate constitutional violations "provoked" Mr. Mendez's response, which in turn resulted in Deputies Conley and Pederson's subsequent use of force.

2. Intentional or Reckless Provocation

Mr. and Mrs. Mendez do not argue that Deputy Conley or, for that matter, Deputy Pederson intentionally provoked the violent response from Mr. Mendez.

With respect to "reckless" provocation, the Ninth Circuit in *Billington* stated, "We read *Alexander*, as limited by [*Duran v. City of Maywood*, 221 F.3d 1127 (9th Cir. 2000)], to hold that where 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." 292 F.3d at 1189 (emphasis added). However, the Ninth Circuit's opinion in *Alexander* does not use the word "reckless" or any derivative thereof. *See* 29 F.3d 1355.

Furthermore, the Ninth Circuit's opinion in *Duran* uses the word "reckless" (and any derivative thereof) only once:

> The Plaintiffs' first argument is that the district court erred when it refused to give an *Alexander* instruction. This instruction is based on the case of [*Alexander*], and applies when there is evidence that a police officer's use of excessive and unreasonable force caused an escalation of events that led to the plaintiff's injury. Here, the Plaintiffs claim that this instruction should have been given because the manner in which the two officers approached the Duran residence "virtually assured a police shooting." Specifically, they point to the fact that the officers walked up the driveway with their guns drawn and never announced their presence. The Plaintiffs claim that this "stealth" approach "raised the likelihood" that "whomever they surprised would point a gun at them."
>
> Accordingly, they argue the district court erred when it refused to give the *Alexander* instruction . . . .
>
> Plaintiffs proposed instruction reads as follows: "If you find that [the defendant officer] recklessly, intentionally and/or unreasonably created a situation where the accidental or purposeful use of deadly force

> upon [the decedent] would become likely, such conduct would be a violation of [the decedent]'s Fourth Amendment right to be free from unreasonable seizures."

221 F.3d at 1130-31 & n.1 (emphasis added). Instead, the Ninth Circuit explained the relevant standard as follows:

> In order to justify an *Alexander* instruction, there must be evidence to show that the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting. Here, no such facts exist. The two uniformed officers simply walked up a driveway silently with their guns drawn. Contrary to the Plaintiffs' assertions, nothing about these actions should have provoked an armed response. As a result, the district court did not abuse its discretion in denying the Plaintiffs' request to give an *Alexander* instruction.

Id. at 1131 (emphasis added).

Returning to the Ninth Circuit's opinion in *Billington*,

> *Alexander*'s requirement that the provocation be either intentional or reckless must be kept within the Fourth Amendment's objective reasonableness standard. The basis of liability for the subsequent use of force is the initial constitutional violation, which must be established under the Fourth Amendment's reasonableness standard. Thus, if a police officer's conduct provokes a violent response, as in *Duran*, but is objectively reasonable

> under the Fourth Amendment, the officer cannot be held liable for the consequences of that provocation regardless of the officer's subjective intent or motive. But if an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused.
>
> [. . .]
>
> Under *Alexander*, the fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself. The Fourth Amendment's "reasonableness" standard is not the same as the standard of "reasonable care" under tort law, and negligent acts do not incur constitutional liability. An officer may fail to exercise "reasonable care" as a matter of tort law yet still be a constitutionally "reasonable" officer. Thus, even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation.

292 F.3d at 1190 (emphasis added).

Therefore, for purposes of *Billington* provocation, the Ninth Circuit equates "reckless" (and intentional) conduct with conduct that is unreasonable under the Fourth Amendment. In this regard, such "reckless" conduct is distinguished from "bad tactics" and conduct that is merely negligent as a matter of tort law.

For liability to attach under *Billington*, such "reckless" conduct need only be unreasonable under the Fourth Amendment. Specifically, "reckless" conduct for purposes of *Billington* provocation need not be "reckless" as a matter of tort law, so long as it is unreasonable under the Fourth Amendment. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 2 ("A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.").

The Ninth Circuit's opinion in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), confirms this understanding of the rule. In *Glenn*, the police confronted the decedent outside of his home. *Id.* at 867-68. An officer fired several beanbag rounds from a shotgun, which struck the decedent. *Id.* at 869. After the decedent was hit with the beanbag rounds, he began moving toward the house. *Id.* Because the decedent's parents were inside the house (and potentially threatened by the movement), two other officers then fired their semiautomatic weapons, killing the decedent. *Id.*

After quoting the general rule from *Billington* ("[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."), the Ninth Circuit concluded as follows:

> Because there is a triable issue of whether shooting [the decedent] with the beanbag shotgun was itself excessive force, under *Billington* there is also a question regarding the subsequent use of deadly force. Even assuming, as the district court concluded, that deadly force was a reasonable response to [the decedent's] movement toward the house, a jury could find that the beanbag shots provoked [the decedent's] movement and thereby precipitated the use of lethal force. If jurors conclude that the provocation—the use of the beanbag shotgun—was an independent Fourth Amendment violation, the officers "may be held liable for [their] otherwise defensive use of deadly force."

Id. at 879 (citing *Billington*) (emphasis added) (reversing the district's ruling on summary judgment that the officers' use of force did not violate the decedent's Fourth Amendment rights).

In *Glenn*, the determinative question under *Billington* clearly was only whether there had been a predicate violation of the Fourth Amendment. Notwithstanding the general rule statement, the Ninth Circuit did not require a separate showing that the officers' conduct was "reckless" as a matter of tort law, or in any way other than under the Fourth Amendment's reasonableness standard.

Consequently, the Court need not conclude that Deputies Conley and Pederson's predicate constitutional violations were "reckless" as a matter of tort law (or otherwise). Under *Billington* and its progeny, it is sufficient that this conduct was unreasonable under

the Fourth Amendment and provoked a violent confrontation in which Deputies Conley and Pederson used deadly force.

Defendants argue that "there is no liability under *Alexander* where defendants' conduct was undeserving of a violent response." (Docket No. 242 at 3 (emphasis in original)). But the Ninth Circuit has indicated that the predicate constitutional violation (here, illegal entry) need not be menacing or "provocative" in the sense of inciting a violent response. Rather, for purposes of *Billington/Alexander* provocation, it is sufficient that the predicate constitutional violation "created the need to use force" (*Billington*) or "created a situation which led to the shooting" (*Espinosa*).

Glenn, 673 F.3d 864, is in accord. In that case, the defendant officers did not act "provocatively" or menacingly or in a way that necessarily "deserved" a violent response. Indeed, the decedent did not react violently. Yet the Ninth Circuit concluded that the theory of *Billington/Alexander* provocation applied based on the (potential) predicate excessive force violation.

Nor is Defendants' reliance on *Duran*, 221 F.3d 1127, persuasive in this regard. In *Duran*, the Ninth Circuit provided the following background:

> At approximately 6:30 a.m., on August 15, 1994, Officer Curiel and Officer William Wallace responded to a dispatch call regarding loud music and shots fired in the vicinity of 52nd and Carmelita Street in the City of Maywood. When the officers arrived at the location, they heard music coming from inside the Duran's garage. The officers pulled

> out their firearms and silently walked up the driveway toward the source of the music.
>
> As they approached, the officers heard the sound of a person racking a pistol. Immediately upon hearing this sound, Officer Wallace yelled to his partner, "He just racked one." At the same moment, Officer Curiel saw Eloy Duran emerge from behind a pickup truck in the garage holding a weapon. Officer Curiel testified that he shouted in Spanish, "Police, drop the gun," but Duran ignored Officer Curiel's command and pointed his weapon at the officers. Officer Curiel then fired four shots at Duran, causing him to fall to the floor. When Office Curiel approached Duran to disarm him, Duran pointed the gun at him. Officer Curiel stated that he shouted loudly, "Don't, don't, don't." When Duran failed to respond, Officer Curiel fired two more rounds into Duran's chest. At this point, Duran stopped moving and Officer Curiel removed the gun.

Id. at 1129-30 ("In order to justify an *Alexander* instruction, there must be evidence to show that the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting.").

On the *Alexander* issue, the Ninth Circuit stated as follows:

> Contrary to the Plaintiffs' assertions, the officers did not make a "stealth" approach. Officer Curiel testified that he and Officer Wallace arrived at the scene in marked police

> cars and that both men were wearing police uniforms. They testified further that he and Wallace met on the sidewalk in front of the Duran's residence and walked, side-by-side, up the driveway toward the music in the garage. Although Plaintiffs are correct in pointing out that the officers had their guns drawn and did not announce their presence, these actions were entirely reasonable given that they were responding to a call that shots had been fired.

Id. at 1131 (concluding that the "district court did not abuse its discretion in denying the Plaintiffs' request to give an *Alexander* instruction.").

Arguably, this reasoning could be read to indicate that the district court rightly denied the *Alexander* instruction because the officers' conduct was "undeserving" of a violent—*i.e.*, not menacing or incitingly provocative—and therefore not "excessive" or "unreasonable" or "intentional or reckless" under *Alexander*.

However, the Court understands this reasoning to indicate that the district court rightly denied the *Alexander* instruction because there was no evidence of a predicate constitutional violation—*i.e.*, the officers' conduct was reasonable under the Fourth Amendment and therefore not "excessive" or "unreasonable" or "intentional or reckless" under *Alexander*.

Similarly, *Duran* can be distinguished on its facts. For example, in this case, with respect to the shack if not the Hughes residence, Deputies Conley and Pederson arguably did make a "stealth" approach.

Defendants also argue that there was no violent confrontation based on Plaintiffs' own theory of the

case (*i.e.*, Mr. Mendez simply was moving the BB run to sit up). Again, *Glenn* suggests otherwise—the decedent in that case did not react violently or in a confrontational manner.

Accordingly, Deputies Conley and Pederson violated Mr. and Mrs. Mendez's right to be free from excessive force under a theory of *Billington* provocation. The predicate (unreasonable search) constitutional violations render their "otherwise reasonable defensive use of force unreasonable as a matter of law."

The Court recognizes that Deputy Pederson did not technically search the shack, as discussed above. Nevertheless, the Court concludes that Deputy Pederson is liable under *Billington* for two reasons. First, there is no indication in the case law that only the officer who commits the predicate constitutional violation should be held liable for the subsequent use of deadly force. Tellingly, in *Glenn*, one officer shot the decedent with the beanbag rounds (the predicate violation), and two different officers killed the decedent (the subsequent use of deadly force).

Second, as discussed above, Deputy Pederson (as well as Deputy Conley) violated Mr. and Mrs. Mendez's right to be free from an unreasonable search in the absence of a proper knock-and-announce—itself a predicate constitutional violation that directly provoked the violent confrontation and subsequent use of deadly force. If the Deputies had announced themselves, then this tragedy would never have occurred.

Third, even if "reckless" were construed in its traditional tort sense and "undeserved" meant what Defendants contend, the Court's ruling would be the same. As discussed below, the multiple indicia of

residency—including being told that someone lived on the property—means that the conduct rose beyond even gross negligence. And it is inevitable that a startling armed intrusion into the bedroom of an innocent third party, with no warrant or notice, will incite an armed response. Any other ruling would be inconsistent with the Second Amendment, as discussed below.

3. Qualified Immunity

Again, the question is whether a reasonable officer could have believed that the conduct of Deputies Conley and Pederson was lawful. As in *Federman* and *Espinosa*, Deputies Conley and Pederson's unreasonable search and manner of entry constituted the predicate, provocative constitutional violation that renders their subsequent use of force unreasonable as a matter of law. For the reasons discussed above, all of Mr. and Mrs. Mendez's rights in this regard were clearly established. Every reasonable officer in Deputies Conley and Pederson's position would have understood that what they were doing violated those rights.

In particular, both during trial and in the briefs following testimony, Deputies Conley and Pederson claim their actions were reasonable because they reasonably did not perceive the shack to be inhabited or, indeed, habitable. Based on the Court's Findings of Fact, their perception was unreasonable. Had this mistake of fact been reasonable, then there would have been no liability.

4. Actual and Proximate Causation

A plaintiff must prove that the defendant's "actions were both the actual and the proximate cause" of the

plaintiff's injury. *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990); *see Billington*, 292 F.3d at 1190 ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused." (emphasis added)).

A defendant's conduct is an actual cause of the plaintiff's injury "only if the injury would not have occurred 'but for' that conduct. *White*, 901 F.2d at 1506 (citation omitted). Mr. and Mrs. Mendez would not have been injured but for Deputies Conley and Pederson's intrusion into the shack. Therefore, the conduct of Deputies Conley and Pederson was an actual cause of Mr. and Mrs. Mendez's injuries.

Furthermore, the "requirement of actual cause is a 'rule of exclusion.' Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury." *Id.* (citation and internal quotation marks omitted). "This question is generally referred to as one of proximate cause." *Id.*

A defendant's conduct is not a proximate cause of the plaintiff's injury "if another cause intervenes and supersedes his liability for the subsequent events." *Id.* (citation omitted). Importantly, whether a plaintiff's own conduct, as an intervening cause of his injury, supersedes the defendant's liability for the results of his own conduct "depends upon what was reasonably foreseeable to [the defendant] at the time." *Id.*

"The courts are quite generally agreed that [foreseeable] intervening causes . . . will not supersede the

defendant's responsibility." *Id.* (citation and internal quotation marks omitted). "Courts look to the original foreseeable risk that the defendant created. When one person's conduct threatens another, the normal efforts of the other . . . to avert the threatened harm are not a superseding cause of harm resulting from such efforts, so as to prevent the first person from being liable for that harm." *Id.* (citations and internal quotation marks omitted).

Here, Justice Jackson's concurring opinion in *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948), is informative. In *McDonald*, the defendant rented a room in a residence that the landlady operated as a rooming house. *Id.* at 452. The defendant had been under police surveillance based on suspicion that he was running a "numbers game." *Id.* On the day of the defendant's arrest three police officers surrounded the house during the midafternoon. The officers did not have a warrant for arrest nor a search warrant. One of the officers thought that he heard an adding machine, which frequently was used in numbers games. *Id.* Believing that the numbers game was in process, one of the officers opened a window leading into the landlady's room and climbed through. *Id.* at 452-53. He identified himself and then let the other officers into the house. *Id.* at 453. The officers arrested the defendant in an end bedroom on the second floor. *Id.*

According to Justice Jackson,

> When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

> . . . the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

Id. at 460-61 (Jackson, J., concurring).

As Justice Jackson foretold, a foreseeable risk of an unreasonable search is that the offending officers will be threatened by the resident. Indeed, this is one of the bases for the knock-and-announce rule. *See United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005) ("protecting the sanctity of the home, preventing the unnecessary destruction of private property through forced entry, and avoiding violent confrontations that may occur if occupants of the home mistake law enforcement for intruders.").

In this case, it was foreseeable that opening the door to the shack without a warrant (or warrant exception) and without knocking-and-announcing could lead to a violent confrontation. Mr. Mendez's "normal efforts" in picking up the BB gun rifle to sit up on the futon do not supersede Deputies Conley and Pederson's responsibility. Therefore, the conduct of Deputies Conley and Pederson was the proximate cause of Mr. and Mrs. Mendez's injuries.

This conclusion is consistent with the tenet that the "Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 628, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008) ("[T]he need for defense of self, family, and property is most acute" in the home). Americans own firearms for many reasons, including hunting, sport and collecting, but one of the main reasons is to protect their own homes. A startling entry into a bedroom will result in tragedy.

E. Liability

1. Personal Liability

An officer only can be held liable for his or her "'integral participation' in the unlawful conduct." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996) (Section 1983 does not "allow group liability in and of itself without individual participation in the unlawful conduct").

However, "'integral participation' does not require that each officer's actions themselves rise to the level of a constitutional violation." *Boyd v. Benton County*,

374 F.3d 773, 780 (9th Cir. 2004); *see also Hernandez v. City of Napa*, No. C-09-02782 EDL, 2010 WL 4010030, at *11 (N.D. Cal. Oct. 13, 2010) (the "integral participant" rule "extends liability to those actors who were integral participants in the constitutional violation, even if they did not directly engage in the unconstitutional conduct themselves").

Moreover, in a situation where "each defendant might have committed an act that is a tort when injury results (for there is no tort without an injury), but it is unclear which defendant's act was the one that inflicted the injury—both shot at the plaintiff, one missed, but we do not know which one missed. . . . both are jointly and severally liable." *Richman v. Sheahan*, 512 F.3d 876, 884 (7th Cir. 2008) (citing *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948)) (discussing liability for excessive force under the Fourth Amendment).

Here, Deputy Conley is liable for unreasonably searching the shack without a warrant or applicable warrant exception. Deputies Conley and Pederson are jointly and severally liable for unreasonably failing to knock-and-announce their presence.

On the provocation claim, there is no evidence as to which bullet(s) caused each injury. Deputies Conley and Pederson are jointly and severally liable for unreasonable, excessive force under a theory of *Billington* provocation.

2. Vicarious Liability

"A municipality or other local government may be liable under [Section 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation.

But, under § 1983, local governments are responsible only for 'their own illegal acts.' They are not vicariously liable under § 1983 for their employees' actions." *Connick v. Thompson*, 131 S. Ct. 1350, 1359, 179 L.Ed. 2d 417 (2011) (citations omitted).

In this case, there is no direct claim for liability under Section 1983 against COLA. Nor can COLA be held vicariously liable under Section 1983 for the wrongful conduct of Deputies Conley and Pederson. This formal lack of liability is not meant to undermine the legal obligation of COLA to pay the forthcoming judgment.

F. Damages

The "basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 254, 98 S. Ct. 1042, 55 L.Ed.2d 252 (1978). "[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L.Ed.2d 249 (1986) (citations omitted).

"[N]o compensatory damages may be awarded in a § 1983 suit absent proof of actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S. Ct. 566, 121 L.Ed.2d 494 (1992) (citation omitted). However, the "law of this circuit entitles a plaintiff to an award of nominal damages if the defendant violated the plaintiff's constitutional right, without a privilege or immunity, even if the plaintiff suffered no actual damage." *Wilks v. Reyes*, 5 F.3d 412, 416 (9th Cir. 1993).

In awarding non-economic damages, the Court awarded an amount for Mr. Mendez that is sufficient—if invested prudently and not squandered—to raise his family in dignified circumstances. The gist of Mr. Mendez's testimony was that the loss of his leg caused a loss of dignity and self-sufficiency. In awarding non-economic damages to Mrs. Mendez, the Court is mindful that she was pregnant at the time she was shot.

G. State Law Claims

As noted above, Mr. and Mrs. Mendez also allege various tort claims under California law.

1. Assault and Battery

Under California law, battery claims for excessive force by a law enforcement official are governed by the same reasonableness standard of the Fourth Amendment. *See Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-74, 74 Cal. Rptr. 2d 614 (1998) ("By definition then, a *prima facie* battery is not established unless and until plaintiff proves unreasonable force was used."); *see also* CACI 1305, Battery by Peace Officer; *Evans v. City of San Diego*, —F. Supp. 2d—, 2012 WL 6625286, at *9 (S.D. Cal. Dec. 19, 2012) ("Plaintiff's [claim] for assault and battery flows from the same facts as her Fourth Amendment excessive force claim, and is measured by the same reasonableness standard of the Fourth Amendment.").

For the reasons discussed above, Deputies Conley and Pederson's use of force, at the moment of shooting, was objectively reasonable. Accordingly, Mr. and Mrs. Mendez's claim for assault and battery fails. In addition, the Court notes that there appears to be no

basis under California law to apply a theory of *Billington* provocation to an assault and battery claim.

2. Negligence

Likewise, under California law "negligence is measured by the same standard as battery and excessive use of force under the Fourt[h] Amendment." *Morales v. City of Delano*, 852 F. Supp. 2d 1253, 1278 (E.D. Cal. 2012); *McCloskey v. Courtnier*, No. C 05-4641 MMC, 2012 WL 646219, at *3 (N.D. Cal. Feb. 28, 2012) (same) (citing cases).

For the reasons discussed above, Deputies Conley and Pederson's use of force, at the moment of shooting, was objectively reasonable. Accordingly, Mr. and Mrs. Mendez's claim for negligence fails—in this respect.

However, whether California law recognizes an analogue to *Billington* provocation under a theory of negligence is an open question. Importantly, in *Hayes v. County of San Diego*, 658 F.3d 867 (9th Cir. 2011), the Ninth Circuit certified to the California Supreme Court a question relating to "deputies' preshooting conduct in the context of the claim to negligent wrongful death." *Id.* at 869 ("[W]e request that the California Supreme Court answer the following question: Whether under California negligence law, sheriff's deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him.").

For example, in *Hayes* the Ninth Circuit discussed the California Supreme Court's decision in *Hernandez v. City of Pomona*, 46 Cal.4th 501, 94 Cal. Rptr. 3d 1 (2009):

> In *Hernandez*, the court granted review to consider the following question: "When a

federal court enters judgment in favor of the defendants in a civil rights claim brought under 42 United States Code section 1983 . . . , in which the plaintiffs seek damages for police use of deadly and constitutionally excessive force in pursuing a suspect, and the court then dismisses a supplemental state law wrongful death claim arising out of the same incident, what, if any, preclusive effect does the judgment have in a subsequent state court wrongful death action?" The court held "that on the record and conceded facts here, the federal judgment collaterally estops plaintiffs from pursuing their wrongful death claim, even on the theory that the officers' preshooting conduct was negligent."

In doing so, the California Supreme Court did not hold that law enforcement officers owed no duty of care in regards to preshooting conduct, as the [California] lower courts . . . had. Instead, the court found that the officers' specific preshooting conduct did not breach applicable standards of care. In light of this conclusion, the court in *Hernandez* declined to address the officers' claim that "they owed no duty of care regarding their preshooting conduct."

The court's extended analysis of whether the officers' preshooting conduct breached the relevant standard of care indicated, however, that it would likely not adopt the broad rule from [the California lower courts] that officers owe no such duty. Indeed, in a concurring opinion, Justice Moreno argued that the court

> should not have reached the issue "because plaintiffs are entitled to amend their complaint to allege preshooting negligence." The majority responded, stating "we find that plaintiffs have adequately shown how they would amend their complaint to allege a pre-shooting negligence claim, and that we must determine whether any of the preshooting acts plaintiffs have identified can support negligence liability."
>
> There is disagreement within this court as to whether this discussion in *Hernandez* suggests that the California Supreme Court would not follow the holdings in [the California lower courts] . . . .

Id. at 872 (citations omitted).

In the absence of clear direction from the California Supreme Court, the Court concludes that California law does not provide for an analogue to *Billington* provocation under a theory of negligence. Furthermore, the Court believes that the answer to the certified question in *Hayes* is unlikely to resolve this question as it would bear on this case. Accordingly, Mr. and Mrs. Mendez's claim for negligence fails.

However, after the California Supreme Court decides the certified question in *Hayes*, this Court will review that decision. As appropriate, and on its own motion, the Court will alter or amend the judgment in this case pursuant to Rule 59(e).

3. Intentional Infliction of Emotional Distress ("IIED")

Under California law, the "elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendants with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Campos v. City of Merced*, 709 F. Supp. 2d 944, 965 (E.D. Cal. 2010) (citing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001, 25 Cal. Rptr. 2d 550 (1993) (citation omitted). "For conduct to be extreme and outrageous, it must be 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" *Id.* at 965-66(citing *Potter*, 6 Cal. 4th at 1001).

"In order to establish the second element, a plaintiff must show the conduct was especially calculated to cause severe mental distress." *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 1126 (C.D. Cal. 2007) (citing *Ochoa v. Superior Court*, 39 Cal. 3d 159, 216 Cal. Rptr. 661 (1985)); *Ochoa*, 39 Cal. 3d at 165 n.5 (Under California law, "the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind" (emphasis in original)).

Although the totality of Deputies Conley and Pederson's conduct was reckless as a matter of tort law, there is no evidence that their conduct was calculated to cause mental distress, and the actual

decision to shoot was, by itself, justified. Mr. and Mrs. Mendez's IIED claim fails.

III. VERDICT

In favor of Plaintiffs Mr. and Mrs. Mendez and against Defendants Deputies Conley and Pederson.

On the Fourth Amendment unreasonable search claim (based on warrantless entry, the Court awards Mr. and Mrs. Mendez $1.00 in nominal damages. As discussed above, only Deputy Conley is liable on this claim.

On the Fourth Amendment unreasonable search claim (based on failure to knock-and-announce), the Court awards Mr. and Mrs. Mendez $1.00 in nominal damages. As discussed above, Deputies Conley and Pederson are jointly and severally liable on this claim.

On the Fourth Amendment excessive force claim (based on conduct at the moment of shooting), the Court rules in favor of Deputies Conley and Pederson.

On the Fourth Amendment excessive force claim (based on *Alexander/Billington* provocation), as discussed above, Deputies Conley and Pederson are jointly and severally liable. On this claim, the Court awards the following damages:

Plaintiff Angel Mendez

Past Medical Bills:	$721,056
Future Medical Care:	
Prosthesis upkeep and replacement:	$407,000
Future surgeries:	$45,000

Psychological care (5 years):	$13,300
Attendant Care (4 hours/day at $12.00/hour)	$648,240
Loss of Earnings:	$241,920
Non-Economic Damages:	$1,800,000
Total:	$3,876,516
Plaintiff Jennifer Lynn Garcia	
Past Medical Bills:	$95,182
Future Medical Care:	$37,000
Non-Economic Damages:	$90,000
Total:	$222,182

On the California tort claims, the Court finds in favor of Deputies Conley and Pederson.

The Court will enter a separate judgment pursuant to Federal Rule of Civil Procedure 54 and 58(b).

/s/ Michael W. Fitzgerald
United States District Court
Judge

Dated: August 13, 2013

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (SEPTEMBER 6, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees/
Cross-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy;
JENNIFER PEDERSON,

Defendants-Appellants/
Cross-Appellees.

Nos. 13-56686, 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

Before: GOULD and BERZON, Circuit Judges, and STEEH III,* District Judge.

The panel voted to deny Appellees' Petition for Rehearing.

Judges Gould and Berzon voted to deny Appellees' Petition for Rehearing En Banc, and Judge Steeh has so recommended.

The full court has been advised of Appellees' Petition for En Banc Rehearing and no judge of the court has requested a vote on the Petition for En Banc Rehearing. Fed. R. App. P. 35.

Appellees' Petition for Rehearing and the Petition for En Banc Rehearing are DENIED.

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* The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.