

Nos. 00-36062 and 00-36075

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA BILLINGTON,

Plaintiff-Appellee,

v.

DAVID SMITH, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
Docket No. CV-98-00462 BLW

BRIEF OF *AMICI CURIAE* NATIONAL POLICE ACCOUNTABILITY
PROJECT, CENTER FOR CONSTITUTIONAL RIGHTS, AND ELLA BAKER
CENTER FOR HUMAN RIGHTS, IN SUPPORT OF SUGGESTION FOR
EN BANC REVIEW

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CORPORATE DISCLOSURE STATEMENT

None of *amici curiae* have parent corporations, nor does any publicly held company own 10% or more of any *amici curiae*'s stock.

STATEMENT OF RELATED CASES

Amici know of no related cases pending in this court.

The organizations identified herein respectfully submit this brief as *amici curiae* in support of Plaintiff-Appellee's suggestion for rehearing en banc. *Amici's* motion for leave to submit this brief is filed concurrently.

I. IDENTITY AND INTEREST OF AMICI

The National Police Accountability Project ("NPAP") is a nationwide organization of lawyers and non-lawyers dedicated to curtailing police abuse of authority through coordinated legal action, continuing legal education, public education, and support for grassroots and victims' organizations combating police misconduct. The NPAP is a project of the National Lawyers Guild, which was founded in 1937 as the first racially integrated national bar association. The NPAP is based in Boston, Massachusetts.

The Center for Constitutional Rights ("CCR") is a nonprofit legal, educational, and advocacy organization dedicated to, among other things, advancing and protecting rights guaranteed by the United States Constitution. CCR is located in New York City.

The Ella Baker Center for Human Rights is a national human rights organization that challenges human rights abuses by United States law enforcement through public education, media campaigns, and assistance to victims of police misconduct. The Center's PoliceWatch project, based in San Francisco,

California, receives between ten and twenty calls per day from individuals reporting police abuses happening around the Bay Area.

Amici have three primary interests in this litigation.

First, *amici* believe that preserving the Fourth Amendment as a meaningful limitation on police is critical to protecting individuals from law enforcement abuses, to improving police practices and professional standards, and to maintaining a democratic and free society. *Amici* seek to have the Ninth Circuit reaffirm that the “reasonableness” standard intrinsic to the Fourth Amendment, *see Graham v. Connor*, 490 U.S. 386, 397; 109 S. Ct. 1865; 104 L. Ed. 2d 443 (1989), covers police conduct in the course of a seizure, rather than a heightened standard of recklessness or intent to harm.

Second, *amici* urge this Circuit to continue to consider the “totality of the circumstances” when assessing Fourth Amendment claims, and to safeguard the “classic” Fourth Amendment prohibition of police officers’ use of “excessive” and “unreasonable” tactics that create the situation where deadly force, that would be otherwise unnecessary, becomes necessary as a result of those poor tactics.

Alexander v. City and County of San Francisco, 29 F.3d 1355, 1366 (9th Cir. 1994), cert. den. sub nom. *Lennon v. Alexander*, 513 U.S. 1083, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995); *Duran v. City of Maywood*, 221 F.3d 1127, 1130-31 (9th Cir. 2000).

Third, *amici* urge this Circuit to recognize the extreme importance, literally life and death importance, of having meaningful Constitutional limits on police tactics that result in the use of deadly force.

II. ARGUMENT

A. **En Banc Consideration Is Necessary to Secure or Maintain Uniformity of the Court's Decisions**

The panel opinion in this case, Billington v. Smith, et al., 2002 LEXIS 12280 (filed June 21, 2002), conflicts with precedent from the United States Supreme Court and the Ninth Circuit as exemplified by the these cases:

1. Graham v. Connor, 490 U.S. 386, 397; 109 S. Ct. 1865; 104 L. Ed. 2d 443 (1989) (Fourth Amendment is violated by objectively unreasonable police conduct in the course of a seizure)
2. Alexander v. City and County of San Francisco, 29 F.3d 1355, 1366 (9th Cir. 1994), cert. den. sub nom. Lennon v. Alexander, 513 U.S. 1083, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995) and Duran v. City of Maywood, 221 F.3d 1127, 1130-31 (9th Cir. 2000) (Fourth Amendment is violated when police use excessive and unreasonable tactics that cause an escalation of events that lead to injury); and
3. Deorle v. Rutherford, 272 F.3d 1272, 1282 (9th Cir. 2001) (less intrusive alternatives to the force used may be considered as a part of

the “totality of the circumstances” when deciding whether a police officer’s use of force is excessive).

1. The Panel Opinion Incorrectly Holds that Intentional or Reckless Conduct Is Necessary to Prove that a Police Officer’s Use of Force Is Objectively Unreasonable under the Circumstances.

The panel opinion states that a police officer acts “objectively unreasonably” under the Fourth Amendment in his seizure-related conduct leading up to a shooting only if the officer acts “intentionally” or “recklessly.” 2002 LEXIS at 33-37 (opinion text from f.n. 70 through f.n. 82).

In Graham v. Connor, *supra*, the Supreme Court wrote:

Today we make explicit what was implicit in [*Tennessee v. Garner*]'s analysis, and hold that *all* claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

* * *

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. ... An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

490 U.S. at 395, 397 (emphasis in original). This Circuit has consistently heeded the Supreme Court’s mandate to apply the “objective reasonableness” standard to

Fourth Amendment claims. *See, e.g.,* Hammer v. Gross, 932 F.2d 842, 845-846 (9th Cir. 1991) (en banc); Robinson v. Solano County, 278 F.3d 1007, 1009 (9th Cir. 2002) (en banc).

The Panel Opinion radically departs from this established road by attempting to define “objectively unreasonable” conduct as that which is reckless or intentional.

Further, the Billington panel’s purported authority for this radical departure from precedent does not even address the level of force necessary to support a Fourth Amendment claim. *See*, 2002 LEXIS at 35-36, f.n. 79, 80, and 81. For instance, Daniels v. Williams, 474 U.S. 327; 106 S. Ct. 662; 88 L. Ed. 2d 662 (1986), addressed the level of culpability necessary to establish a *due process* violation; not a Fourth Amendment violation. In fact, in holding that a due process claim requires a showing of more than negligence, the Court specifically stated, “we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care.” 474 U.S. at 334.

Similarly, the panel opinion relies on an out of context quotation from Brower v. County of Inyo, 489 U.S. 593, 596-597; 103 L. Ed. 2d 628; 109 S. Ct. 1378 (1989) (a Fourth Amendment seizure occurs “only when there is a governmental termination of freedom of movement through means intentionally applied”). Brower only decided what constitutes a seizure under the Fourth Amendment; not the level of culpability required to prove that a particular seizure is unlawful.

Brower does not support the panel's attempt to equate "objectively unreasonable" conduct under the Fourth Amendment with reckless or intentional conduct.¹

2. The Panel Opinion Incorrectly Construes the Law of this Circuit Concerning the "Classic Fourth Amendment" Claim that Police May Not Use Excessive Force that Creates the Situation where Deadly Force Becomes Necessary.

The Panel Opinion states that "We read Alexander, as limited by Duran, 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." 2002 LEXIS at 33 (text from f.n. 70 to f.n. 72). Respectfully, the panel's reading of Alexander and Duran is in conflict with those decisions.

In, Alexander, supra, the Ninth Circuit held that a claim of excessive force based on a showing that officers "used excessive force in *creating the situation* which caused [the decedent] to take the actions he did," states "**a classic Fourth Amendment violation**" under Graham v. Connor, supra. Alexander, 29 F.3d at 1366. The viability of such a theory was reaffirmed in 1996 in Reynolds v. County of San Diego, 84 F.3d 1162, 1169 (9th Cir. 1996) and again in Duran v. City of

¹ Moreover, the panel's distinction of the Fourth Amendment's "reasonableness" standard from the "reasonable care" standard under tort law is not only unsupported, but is also an unnecessary holding that would constrict the consideration of the particular tort law standards of individual states within the Ninth Circuit as they might relate to a Fourth Amendment claim. *See, e.g.* Ward v. City of San Jose, 967 F.2d 280, 286-287 (9th Cir. 1992).

Maywood, 221 F.3d 1127, 1130-31 (9th Cir. 2000) (“‘Alexander Instruction’ 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”).²

In Alexander, the police were serving a “forcible entry warrant” regarding health department complaints on an emotionally disturbed man in his home. The man was described as “mentally unstable, elderly..., overweight, and half-blind.” The man had previously threatened that he was “going to get [his] gun and use it.” The police cordoned off the area, and a member of the hostage negotiating team tried to talk to the man. After nearly an hour, the police executed a plan to enter the house by breaking down the door and entering with their guns drawn. The man appeared at the top of the staircase holding a handgun. The police told him to drop the gun, but the man shot at the officers instead. The officers shot back and killed the man. 29 F.3d at 1358.

The Ninth Circuit held that these facts supported a “classic Fourth Amendment claim” that the force the police used “was unreasonable under *all* the circumstances.” 29 F.3d at 1366 (emphasis in original). The claim in Alexander was based on the argument that the officers “**used excessive force in creating the**

² Such a claim was also intimated in Brower v. County of Inyo, on remand, 884 F.2d 1316, 1318, n.1 (9th Cir. 1989) (“It is not clear from Garner that the ‘substantial threat’ requirement is satisfied by danger that is present only as a result of police pursuit”).

situation which caused [the decedent] to take the actions he did.” *Id.* *In other words, danger that is created by a police officer’s own unreasonable conduct does not justify the use of deadly force that would otherwise be unnecessary.*

The Alexander Court was careful to point out that this claim was not based on a view of the facts from only the moments before the shooting. *Id.* (“Plaintiff does not argue that once Quade pointed his gun at the officers and pulled the trigger, the officers used unreasonable force in shooting to kill”). Rather, the claim is based on whether the force used by police was “unreasonable under *all* of the circumstances.” *Id.* (emphasis in original).

This is exactly the inquiry required by Graham v. Connor, which incorporated the “totality of the circumstances” test from Tennessee v. Garner, 471 U.S. 1, 8-9; 105 S. Ct. 1694; 85 L. Ed. 2d 1 (1985) (“the question was whether *the totality of the circumstances* justified a particular sort of search or seizure”).³

³ The Third Circuit came to a similar conclusion in a cogently analyzed opinion, Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999), concluding that it was required to take into account events prior to the actual shooting in assessing the reasonableness of a seizure. The Third Circuit rejected cases from other circuits to the contrary:

[W]e do not see how these cases can reconcile the Supreme Court’s rule requiring examination of the ‘totality of the circumstances’ with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. ‘Totality’ is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer’s use of force.

The Billington panel misconstrues Alexander and Duran, as well as the Supreme Court cases from which those opinions evolved, inserting a requirement that the officer's creation of the situation must have been based on his intentional or reckless provocation that was also an independent Fourth Amendment violation.

3. The Panel Opinion Incorrectly Holds that Alternatives of Less Intrusive Means of Force Need Not Be Considered as Part of the Totality of the Circumstances.

The Panel Opinion also states that Alexander is limited by Scott v. Henrich 39 F.3d 912 (9th Cir. 1994), such that less intrusive alternatives to the force used by a police officer need not be considered as a part of the “totality of the circumstances.” 2002 LEXIS at 30 (text from f.n. 57 to f.n. 60). This holding is also in conflict with more recent holdings of this Circuit. *See, Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001), and cases cited therein.

The Billington panel, while purporting to follow established law, actually creates sweeping changes in the law that are in direct conflict with the prior holdings of the Supreme Court and the Ninth Circuit.

B. The Proceeding Involves a Question of Exceptional Importance.

The foregoing issues – i.e., whether the Fourth Amendment is violated by objectively unreasonable police conduct or whether reckless or intentional misconduct must be shown, the continued viability of the Alexander “creation of

the situation” theory, and whether less intrusive alternatives to the force used may be considered when deciding whether an officer’s force is excessive – are all of exceptional importance. These questions go to the very heart of how the government will be allowed to seize, or kill, individuals (presumed innocent) in this country.

Moreover, the application of the principals re-decided in the Billington panel opinion to deadly shooting cases like this one means that these questions will literally mean “life or death” for many people. And, too often, as this Circuit has observed, the victims in deadly force situations are emotionally disturbed individuals whose lives could be preserved by the use of more enlightened police practices. *See, Deorle*, 272 F.3d at 1282-1283.⁴ Such “enlightened” police practices become much less likely in the wake of the Billington panel opinion.

⁴ “The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. *See Alexander*, 29 F.3d at 1366 (holding that the police used excessive force, considering all the circumstances, in “storming the house of a man whom they knew to be a mentally ill ... recluse who had threatened to shoot anybody who entered”). Even when an emotionally disturbed individual is “acting out” and inviting officers to use deadly force to

These important principals, with such grave consequences, deserve the attention of an en banc panel of this court.

Dated: July 9, 2002

Respectfully Submitted,

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subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under Graham, the reasonableness of the force employed.”

272 F.3d at 1282-1283 (footnote omitted).

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(A)(7)(C)
AND CIRCUIT RULE 32-1

For Case Nos. 00-36062 and 00-36075

Pursuant to F.R.A.P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that the attached opening brief is proportionally spaced, has a typeface of 14 points or more, and contains 2,132 words.

Dated: July 9, 2002

Respectfully Submitted,

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