

## Deadly Use of Force Against an Armed Suspect

### Description

Today's case from the Ninth Circuit involves the use of deadly force by a Sergeant, who was subsequently denied qualified immunity which he later appealed. On appeal from a denial of qualified immunity, the court must determine: (1) whether there has been a violation of the constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct. When making this determination the court is bound to view the facts in the light most favorable to the plaintiff. Finally, if there are factual disputes as to what transpired during an encounter between an officer and a suspect, it is the role of the jury to make those factual determinations.

### FACTS

On April 15, 2016, Sergeant Dan Ponder of the Riverside County Sheriff's Department received radio reports of an individual in Lake Elsinore, California, who had allegedly threatened a woman that had a baby with her, and that the individual was destroying property with a bat-like object.

Upon arriving on scene, Sergeant Ponder exited the patrol car with his gun drawn and saw the suspect, Najera, with an object in hand. The Sergeant motioned for the suspect to back away and demanded that he drop the stick in his hand. The suspect refused to comply with the officer's demands, and by some accounts it was noted that the suspect verbally refused to do so. Sergeant Ponder attempted to utilize pepper-spray upon Najera, but a gust of wind caused the substance to blow back into Sergeant Ponder's face and Najera appeared largely unaffected.

At this point, Sergeant Ponder pointed his gun at Najera and ordered him to drop the stick for the second time, but still the suspect did not abide. On behalf of some eyewitness accounts, it was reported that Najera retrieved a baseball bat from nearby bushes and charged quickly toward Sergeant Ponder with one weapon raised. Conflicting with the former mentioned eyewitness reports, other witnesses stated that Najera stood still, holding in his hand only a single stick which was aimed in a downward direction. Despite these conflicting accounts, it is undisputed that Sergeant Ponder, without issuing a warning, shot Najera six times from no more than fifteen feet away. Najera died following the gunshots.

Sergeant Ponder claimed that Najera stood facing him during all six shots, but the coroner's report found that Najera died from two shots to his backside. The bullet paths suggested that Najera had turned away from Sergeant Ponder and was falling to the ground when the two lethal bullets struck.

Three of Najera's children (plaintiffs) sued Sergeant Ponder and Riverside County under 42 U.S.C. § 1983, alleging that Sergeant Ponder violated the deceased's Fourth Amendment right when he utilized excessive force in shooting Najera. The district court denied Sergeant Ponder's defense of qualified immunity and the Sergeant appealed to the Ninth Circuit.

### NINTH CIRCUIT COURT OPINION

The Ninth Circuit Court of Appeals affirmed the district court's denial of qualified immunity to Sergeant Ponder. First, a key fact that was disputed was whether Najera was facing Sergeant Ponder and

coming “on the attack,” as Sergeant Ponder claimed, or, whether Najera was turned away from the officer, as indicated by the coroner’s report. Next, although eyewitnesses agree that Najera was holding at least one bat-like object at the time that he was shot, the manner in which he held and positioned the item was uncertain. Specifically, nothing in the record suggested that Najera was threatening bystanders or advancing toward them when Sergeant Ponder shot him. Based on the plaintiffs’ account of the incident, Najera presented no threat to Sergeant Ponder nor to anyone else when he was shot; therefore, the district court properly found that Officer Ponder’s conduct was not objectively reasonable, and that his use of excessive force violated the Fourth Amendment.

The court concluded that in April 2016, clearly Ninth Circuit case law put Sergeant Ponder on notice that it was unlawful for a police officer to use “deadly force against a non-threatening individual, even if the individual is armed, and even if the situation is volatile.” The court recognized that Sergeant Ponder entered a “potentially volatile” situation when he responded to the calls about Najera, and acknowledging the common difficulties that Sergeant Ponder and other officers face when responding to stressful situations. Nevertheless, even in such situations, officers must not use deadly force against non-threatening suspects, even if those suspects are armed.

In conclusion, the court noted that Sergeant Ponder’s response to these clearly established principles was to repeat his assertion that Najera posed an immediate threat to the officer or bystanders at the time of his death. However, the court reiterated that Sergeant Ponder could neither rewrite the facts to his own liking nor ignore the disputed evidence, as the court could not assume the jury’s role to resolve the disputed question whether Najera presented an immediate threat.

## **TAKEAWAYS**

As the court stated, officers often face volatile and explosive situations during their daily duties. Even in these situations, officers must not use deadly force against non-threatening suspects, even if those suspects are armed. Najera was armed but account of the incident indicate that he was retreating from the situation, not heightening it or threatening to take action against Sergeant Ponder or surrounding community members. As we see similar factual scenarios appearing more frequently, it is necessary to remember that even when a suspect is armed, you should first monitor the situation and only act when a threat is absolutely evident. Considering the weapons that Najera had in possession, the presence of an actual threat would only be indicated by showing that the suspect was running at Sergeant Ponder or those around him. The fact that Najera had his back to Sergeant Ponder indicates that he was no longer considered an immediate threat. Instead, the Sergeant should have proceeded by monitoring Najera.

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