



TASER™

The Target Zone, Policy & Training

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©2009 by Attorney Jack Ryan, J.D., PATC Legal & Liability Risk Management Institute

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Over the last couple of weeks, a training bulletin has set off a controversy throughout the law enforcement community. This controversy came to light at the Legal & Liability Risk Management Institute when it was learned that a number of agencies had taken TASER™ ECDs out of service. At the outset it is important to recognize that electronic control devices are a valuable law enforcement tool and are safe for continued use. A great deal of the initial reaction was based in confusion as to the distinction between products liability law and the law related to law enforcement's use of force. This article should be read by all officers who presently or in the future will carry a TASER™ ECD. It should also be read by attorneys who represent law enforcement in TASER™/Use of Force cases.

In issuing TASER™ Training #15, TASER™ International asserted: "Should Sudden Cardiac Arrest occur in a scenario involving a TASER™ discharge to the chest area – it would place the law enforcement agency, the officer, and TASER™ International in the difficult situation of trying to ascertain what role, if any, the TASER™ ECD could have played in a unique situation that cannot be replicated in human clinical safety evaluations. In order to reduce the risk of such an event, and in light of the fact that frontal applications of TASER™ ECDs have been found to be more effective when the probes are targeted at the lower torso (engaging the balancing muscles of the pelvic triangle) we have lowered the recommended point of aim from the center of mass to the lower center of mass for frontal discharges. We believe this recommendation will improve the effective use of TASER™ ECDs while also further increasing safety margins and enhancing the ability to defend such cases in post event legal proceedings."

Broken down simply there are three stated reasons for this change:

1. **Improve the effectiveness of TASER™ deployments**-TASER™ is more effective when engaging the muscles of the pelvic triangle.
2. **Increased the safety margins of TASER™**- Move the targeting area away from the heart to decrease the already extremely low, almost non-existent, possibility of a cardiac event. Also,

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lowering the preferred targeting area moves probe deployments lower to reduce the risk of a probe striking the throat, face, eyes, and female breast.

3. Enhance the ability to defend such cases in post event legal proceedings.

In the media, this was seen as an admission by TASER™ International that a TASER™ may cause death. TASER™ International pointed out in the bulletin: “Researchers have concluded that a close distance between the ECD dart and the heart is the primary factor in determining whether an ECD will affect the heart. This risk is judged to be extremely low in field use.” Thus, although unlikely to cause death, TASER™ recommended lowering the targeting area so as to increase the effectiveness of the ECD while avoiding litigating these issues.

The Legal Reality

As pointed out by TASER™ International in Training Bulletin #15, it is virtually impossible to replicate a study reflecting the impact of TASER™ ECD on the type of person law enforcement may come into contact with on the street. Obviously, finding study subjects who are in the midst of crisis, high on drugs, flooded with alcohol, or in the midst of an excited delirium event is not likely to occur in the laboratory setting. Thus, most of the study subjects are not identical to the people that law enforcement deals with on the street. This is the scientific difficulty in defending cases where it is alleged that the person died as a result of the TASER™ electrical discharge.

It should be noted that one thing made clear by the studies involving TASER™ ECDs, the likelihood of a death following a deployment is unlikely, however, as acknowledged by TASER™, researchers have indicated that probe placement to the chest may decrease the safety margins of the TASER™ ECD.ⁱ Simply stated, although it is unlikely that a deployment of a TASER™ ECD to the chest will cause a cardiac event, it is even less likely if the chest is avoided.

Law Enforcement Liability under §1983

In looking at what this means from a legal perspective one must start by looking at it from the law enforcement perspective as a use of force under the Fourth Amendment. It should be recognized that there has not been a finding against any law enforcement agency or officer that the proper use of a TASER™ ECD is deadly force. In fact, many cases have recognized that electronic control devices generally, and TASER™ ECD specifically, are a low to moderate level use of force.ⁱⁱ Therefore, from a constitutional perspective, TASER™ ECD has not been found to be deadly force. This makes sense in light of standard definitions on deadly force which indicate that deadly force is force which creates a substantial risk of death or serious bodily injury.ⁱⁱⁱ Since the overwhelming majority of TASER™ ECD deployments have not created a “substantial risk of serious bodily harm or death” the current definition of deadly force as adopted by our federal courts does not apply to the deployment of a TASER™ ECD.

Draper v. Reynolds,^{iv} which involved the use of a TASER™ ECD, exemplifies how a court will review this type of force. Stacy Draper filed a lawsuit against Deputy Clinton Reynolds alleging a civil rights violation arising out of a motor vehicle stop and his arrest, during which Deputy Reynolds used a

TASER™ ECD on Draper. The reason for the initial stop was an improperly illuminated registration plate light.

In his lawsuit Draper alleged that Reynolds shined a flashlight in his eyes during a traffic stop and he politely asked Reynolds to refrain from doing so. The initial contact between Reynolds and Draper took place at the side of Draper's truck and could not be seen on the police cruiser's video recorder. Their initial conversation could not be heard on Reynolds's audio recorder either. Draper alleged that Deputy Reynolds used harsh language in this initial contact at the side of the truck.

Deputy Reynolds then ordered Draper to come to the back of his truck. At that point all activity and all audio were recorded by the police vehicle's equipment. The tape showed an uncooperative and belligerent Draper who refused to comply with several polite commands by Deputy Reynolds to produce paperwork from the truck. As many as five times Draper would start toward the truck to retrieve the paperwork, but then would turn and return toward Deputy Reynolds in what Reynolds described as a "threatening" manner which put Reynolds on "the defensive." On the fifth occasion, with Draper yelling and returning toward Reynolds, the deputy discharged his TASER™ ECD at Draper's chest. Draper fell to the ground, was handcuffed and taken into custody. In his allegation of excessive force, Draper alleged that if Deputy Reynolds had simply informed him that he was under arrest he would have complied, thus there was no need to employ the TASER™ ECD.

In rejecting Draper's claim of excessive force the court held: "Reynolds's use of the TASER™ gun to effectuate the arrest of Draper was reasonably proportionate to the difficult, tense and uncertain situation that Reynolds faced in this traffic stop, and did not constitute excessive force. From the time Draper met Reynolds at the back of the truck, Draper was hostile, belligerent, and uncooperative...Draper used profanity, moved around and paced in agitation, and repeatedly yelled at Reynolds." The court noted that a verbal arrest command and attempt to handcuff such a hostile individual as Draper may have escalated the situation into a "serious physical struggle" which was avoided by the use of the TASER™.

In *Buckley v. Haddock*,^v the United States Court of Appeals for the 11th Circuit reviewed a denial of qualified immunity for an officer who faced a lawsuit based on his use of a TASER™ ECD.

The court outlined the facts as follows:

The plaintiff, Buckley was stopped for traffic violations and refused to sign the traffic citation, a violation of Florida law which allows for a custodial arrest. The court noted that [Buckley] pleaded no contest to one count of refusal to sign a speeding ticket and one count of resisting arrest without violence.

"As the deputy started to walk with [Buckley] to the patrol car, [Buckley]—a 23 year-old young man who weighed 180 pounds and was 6 feet, 2 inches tall—dropped to the ground behind his car, crossed his legs, and continued to sob. Deputy Rackard cautioned [Buckley] about the danger of getting hit by traffic on the nearby road. [Buckley] responded, 'My life would be better if I was dead.'

Deputy Rackard asked [Buckley] several times to stand up. [Buckley] did not do so. The deputy then attempted to lift [Buckley] to his feet; but [Buckley] remained limp and did not stand. After repeatedly and plainly warning [Buckley] that a TASER™ [sic] device would be used (to which [Buckley] shouted, "I don't care anymore -- tase me") and after giving [Buckley] some time to comply, the deputy discharged the TASER™. The TASER™ was used for approximately five seconds in the "stun gun"

mode. The deputy applied the ECD's electrodes directly to [Buckley]'s clothed back and chest. After Deputy Rackard discharged the TASER™, he asked [Buckley] again to stand up; but [Buckley] did not comply. Again, the deputy plainly warned [Buckley] that the TASER™ would be used. [Buckley] still did not stand. After some time, Deputy Rackard discharged the TASER™ for another five-second burst. The TASER™ delivers an electrical shock; it hurts.

At this point, Deputy Rackard walked to his patrol car and, by radio, called for backup. [Buckley] remained on the ground. When the deputy returned, he ordered [Buckley] to get up. Again, Deputy Rackard plainly warned [Buckley] that the TASER™ would be used and allowed [Buckley] time to comply. The deputy then attempted a second time to lift [Buckley] to his feet, but to no avail. [Buckley] still did not stand; and the deputy used the TASER™ a third time. Even though [Buckley] continued to resist moving to the patrol car, Deputy Rackard made no more use of the TASER™.

Once another police officer arrived, [Buckley] promptly relented; and with the assistance of the other officer, Deputy Rackard escorted [Buckley] to the patrol car without incident. [Buckley] suffered sixteen small burn marks on his back from the TASER™ with some scarring (the record does not say whether or not the scars are permanent) and keloid growth around some of the burns. [Buckley] also claims that he suffered emotional injury from the incident: He says that he now finds it difficult to trust police officers and to ask for their assistance.”

In holding that the officer was entitled to qualified immunity the United States Court of Appeals for the 11th Circuit asserted:

“In the light of the undisputed facts established in the record, we conclude that Defendant's use of force in this particular situation was not outside the range of reasonable conduct under the Fourth Amendment. Of particular importance are three facts. First, the incident occurred at night on the side of a highway with considerable passing traffic. Second, the deputy could not complete the arrest -- that is, truly control Plaintiff -- because Plaintiff was resisting. Third, the deputy resorted to using the TASER™ [sic] only after trying to persuade Plaintiff to cease resisting, after attempting to lift Plaintiff, and after repeatedly and plainly warning Plaintiff that a TASER™ would be used and then giving Plaintiff some time to comply.

Although, as the district court observed, the underlying offense of refusing to sign a traffic citation was relatively minor, we nevertheless credit the government with a significant interest in enforcing the law on its own terms, rather than on terms set by the arrestee. The government has an interest in arrests being completed efficiently and without waste of limited resources: police time and energy that may be needed elsewhere at any moment. Even though Plaintiff was handcuffed, he still refused repeatedly to comply with the most minimal of police instructions -- that is, to stand up and to walk to the patrol car. That Plaintiff was resisting arrest weighs in the deputy's favor. In addition, to the extent that the incident occurred beside an active highway at night, we also credit the government's interest in the safety of Deputy Rackard, Plaintiff, and even passing motorists: a legitimate interest to be advanced by putting Plaintiff in the patrol car. Deputy Rackard warned Plaintiff early on that they should not remain exposed alongside the highway for fear of being hit by a passing vehicle.

Against these important governmental interests weigh the nature and quality of the intrusion on Plaintiff's Fourth Amendment interests. Plaintiff alleges that he sustained, as a result of Deputy Rackard's acts, emotional injury as well as sixteen small TASER™ burns, which caused some scarring and keloid growth. Although Plaintiff's injuries are not insignificant, neither are they severe.

Plaintiff points to no evidence in the record that the deputy's use of the TASER™ caused any second-order physical injuries; nor has Plaintiff pointed to evidence that the burns he did sustain required medical attention. **Accordingly, we regard the deputy's use of the TASER™ in this particular case as -- at most -- moderate, non-lethal force...**Never was Plaintiff fully secured until after the second officer arrived. The district court's suggestion that Plaintiff had been fully secured because he was handcuffed is mistaken: Plaintiff was not bound at the feet (so, he could both run and kick), he was moving around on the ground alongside a busy road, and he would not comply with the deputy's repeated instructions to stand up and to move to the patrol car where Plaintiff could be confined. An objectively reasonable police officer could rightly believe that force was therefore necessary to secure the non-compliant Plaintiff in the patrol car and thereby complete the arrest." (emphasis added)

The Court of Appeals concluded that the trial court should have granted the deputy summary judgment meaning that the officer's actions did not violate the Constitution at all. The court went on to hold that even if a constitutional violation had occurred, the deputy would have been entitled to qualified immunity because the law was not clearly established on this type of TASER™ usage.

The most recent case from the United States Court of Appeals for the 11th Circuit, *Oliver v. Fiorino*, involved an event which resulted in death.^{vi} The Court reported the facts as follows:

"Taking the facts in a light most favorable to the plaintiff, this tragic story began on May 13, 2004, at approximately 3:17 p.m. Officer Fiorino was driving her police cruiser; she said she noticed a man, who later turned out to be Anthony Carl Oliver, Sr. ("Oliver"), standing in an eight to ten-foot-wide grassy median on West Colonial Drive near Tampa Avenue in Orlando, waving his arms and attempting to flag her down. Officer Fiorino turned her police cruiser around and parked in the Eastbound turning lane, blocking the turning lane and stopping any traffic in that lane. According to one bystander, Carl Hughley, the officer pulled up and asked Oliver to approach her vehicle. He complied. Oliver then knocked on the rear driver-side window and unsuccessfully attempted to open the locked rear door of the police cruiser. Fiorino used her loud speaker to instruct Oliver to move to the front of her vehicle; again, he complied. Fiorino then directed Oliver to move further away from the vehicle, which he did. Fiorino then exited her vehicle. At this point, Oliver was standing some twenty-three feet away from Fiorino, who was near her vehicle.

Oliver did not speak before Officer Fiorino pulled out her TASER™ gun and asked Oliver what the problem was. Oliver responded to Fiorino's questions, saying "they're shooting at me" several times, and pointing across the street. Fiorino told Oliver to calm down and tell her what was going on. Oliver attempted to walk away; Fiorino asked him to stay and talk. According to Fiorino, Oliver then began to walk quickly toward her. In response, Fiorino raised her TASER™ [sic] gun and told Oliver to step away from her. Oliver complied. Fiorino observed that throughout this encounter, Oliver was "very fidgety." According to Hughley, however, Oliver never acted in a threatening or belligerent manner toward the officers, nor did he even curse at them.

Officer Fiorino asked Oliver for details about who was shooting at him and under what circumstances. She also called her dispatch to inquire whether there had been any reported shootings in the area. Dispatch told her there had been a shooting reported eight or nine miles away, but none in her area. When Fiorino was advised there had been no shooting in the area, she requested back-up.

Shortly thereafter, Officer David Burk arrived on the scene. Burk parked his car so that it, along with Fiorino's car, boxed in the left turning lane where the incident was unfolding. When Burk arrived,

Oliver was standing several feet from Fiorino in the median, speaking loudly and "moving his hands around." Fiorino and Burk testified that they considered taking Oliver into custody under Florida's Mental Health Act, Fla. Stat. § 394-463(1) ("the Baker Act"), because he appeared to them to be mentally unstable. Nonetheless, Fiorino and Burk never informed Oliver of this fact, and never attempted to either arrest Oliver or "Baker Act" Oliver at any time during the entire incident.

Officer Burk approached Oliver, who was still standing in the median, to ask him for his name and identification. Oliver complied, giving Burk his identification card. Burk then decided to coax Oliver across the Eastbound side of the street (across the blocked turning lane and the other lanes) to the sidewalk, so that they could talk when he saw there was "no traffic at all," and once the light turned red. Burk attempted to do so by putting his right hand on Oliver's left shoulder. Oliver responded by trying to back away. Oliver then "momentarily stopped" in the blocked turning lane of the street and began to babble incoherently. When the light changed and the traffic (if any) in the other lanes began to move again, Burk tried to force Oliver across the street, but Oliver struggled and pulled away from him.

During the encounter, Burk held on to Oliver's shirt as Oliver attempted to walk away across the street. At this point, Oliver did not try to grab Burk or to swing at him. Fiorino nevertheless, and without warning, tased [sic] Oliver for the first time.

Fiorino was using a TASER™ M26 Electronic 10 Control Device, which was "designed to cause significant, uncontrollable muscle contractions capable of incapacitating even the most focused and aggressive combatants." [Doc. 143-8 at 28]. "The [T]aser gun fires two probes up to a distance of twenty-one feet from a replaceable cartridge. These probes are connected to the [T]aser gun by high-voltage insulated wire. When the probes make contact with the target, the [T]aser gun transmits electrical pulses along the wires and into the body of the target, through up to two inches of clothing." [Draper v. Reynolds, 369 F.3d 1270, 1273 n.3 \(11th Cir. 2004\)](#). The pulses are five seconds in duration, unless the trigger is held down longer than five seconds. [Doc. 142-43 at 70]. "Each 5-second cycle is a 'window of opportunity' for the arrest team to apprehend the subject and go hands on." *Id.* at 73.

The TASER™ prongs from Officer Fiorino's first tase hit Oliver in his abdomen. According to Carl Hughley, this tase brought Oliver to the ground. While the TASER™ cycled through its five-second shock, Burk tried neither to handcuff Oliver nor to move him. This is so, despite the fact that, according to Hughley, once Oliver was on the pavement after the first tase, he never got back up, and he never hit, kicked, punched, or threatened the officers. Three to four seconds after the first TASER™ cycle ended, Fiorino tased Oliver once again. Ten seconds after the end of the second cycle, she tased Oliver still again for the third time.

After Oliver was shocked by the TASER™, according to Hughley, Oliver was lying on the scorching hot asphalt screaming in pain that it was "too hot." Another bystander, Richandra Nelson, said that Oliver remained on the ground while Burk just stood there and watched Fiorino tase him. Both Nelson and Hughley witnessed Oliver attempting to get up from the ground, but said that they never saw him struggling with, hit, kick, punch, or threaten Burk in any manner. Hughley stated that when Oliver went down, he couldn't roll over. When he tried to sit up, he flopped down like a "wet cloth" because he had no control over his body.

After approximately the third or fourth tase, (sic) one of the TASER™ wires became disconnected from the TASER™ prong and stuck into Oliver's chest. Fiorino loaded a second cartridge into her TASER™ and began tasing Oliver again. This tase and the next three or four tase cycles caused Oliver to be totally immobilized, leaving him clenched up and lying on his back. After the sixth or seventh tase, Oliver was again seen lying on the hot asphalt. Officer Fiorino said that when she tased Oliver for the last time (the eighth recorded tase), he was lying flat and he did not get up.

Fiorino said she was not sure how many times she tased Oliver, but that she just kept pulling the trigger until he stayed on the ground. She said that she believed she tased Oliver approximately eleven or twelve times. Fiorino's TASER™ log shows that she tased Oliver a total of eight times over a two-minute period as follows: (note that each tase lasts five seconds) 1) Tase at 14:18:19 (2:18:19 p.m.); 2) Tase at 14:18:28 (2:18:28 p.m.); 3) Tase at 14:18:43 (2:18:43 p.m.); 4) Tase at 14:19:08 (2:19:08 p.m.); 5) Tase at 14:19:21 (2:19:21 p.m.); 6) Tase at 14:19:31 (2:19:31 p.m.); 7) Tase at 14:19:38 (2:19:38 p.m.); and 8) Tase at 14:20:27 (2:20:27 p.m.).

Nelson observed that once backup arrived at 3:24 p.m., the officers finally handcuffed Oliver. Fiorino stated that after Oliver was handcuffed, he began foaming at the mouth. It appeared as if Oliver's body had gone limp, but he still screamed in pain. After Officer Burk walked Oliver back to the median, Fiorino took some of the TASER™ prongs out of his body, but was unable to remove them all.

At 3:35 p.m., paramedics arrived on the scene. At that point, Oliver was handcuffed and seated on the median, awake but not talking. After Oliver was placed on a stretcher, Burk noticed that Oliver had blood in his mouth. As Oliver was placed in the ambulance, he sat straight up and began to have a seizure. His health deteriorated rapidly; his body temperature was measured at 107 degrees. Oliver was pronounced dead on June 1, 2004, at Florida Hospital.

An autopsy revealed that Oliver had low levels of cocaine in his system, but Dr. Rudner, Plaintiff's expert witness and forensic pathologist opined "to a reasonable degree of medical certainty" that Oliver died as a result of "ventricular dysrhythmia in conjunction with Rhabdomyolysis" as a result of "being struck by a TASER™."

It should be recognized that this case was being reviewed on summary judgment grounds; therefore the court was looking at the facts in the light most favorable to the plaintiff. The denial of summary judgment and qualified immunity means that the case must now proceed to trial where a jury will decide any disputed issues. A disputed issue at trial in this case is likely to be the actual cause of death. It seems undisputed that Smith's body temperature was 107 degrees; however the plaintiff appears to have asserted that this was the result of the TASER™ deployment and the hot asphalt rather than a pre-existing condition.

In its consideration of the officers' appeal of the trial court's decision denying the officers summary judgment and qualified immunity, the United States Court of Appeals for the 11th Circuit first reviewed whether, under these facts, a constitutional violation had occurred. The court asserted:

"In *Draper v. Reynolds*, we addressed the use of a TASER™ shock in the course of an arrest. In that case, we concluded that where the police had used a single TASER™ shock against a "hostile, belligerent, and uncooperative" suspect, not causing any serious injury and leaving the suspect

"coherent" and "calmed" shortly after the shock, the force used was proportionate and reasonable. We observed that under the facts of the case, "the single use of the [T]aser [sic] gun may well have prevented a physical struggle and serious harm to either [the suspect] or [the officer]," and, therefore, "[u]nder the 'totality of the circumstances,' [the officer's] use of the [T]aser gun did not constitute excessive force."

In this case, appellee has conceded that when Oliver struggled to free himself from Officer Burk in the street, he at least arguably placed himself and Officer Burk in some danger, and therefore, under the rationale of *Draper*, the use of an initial, single TASER™ shock to calm the suspect may have been justified.

Here, however, the force used against Oliver did not end there. The officers did not merely shock Oliver once and then attempt to engage him, arrest him, or "Baker Act" him. Rather, again viewing the facts in a light most favorable to Oliver, the first shock brought Oliver down to the burning hot pavement. Without any warning or instruction to Oliver, Officer Fiorino then tased [sic] Oliver once again. Ten seconds later, she tased Oliver still again. When her TASER™ broke and lodged the TASER™ prongs in Oliver, she reloaded and tased him again. The first TASER™ shocks left Oliver unable to roll over, and when he tried to sit up, he flopped down like a "wet cloth" because he had no control over his body. Yet Officer Fiorino continued to tase him several more times over the next minute, leaving him totally immobilized and clenched up. He could not sit up, screaming in pain while lying on the burning hot pavement. Yet the officer tased him still again. When Fiorino tased Oliver for the final (and at least eighth) time, he was already lying on his back. By the time the ambulance came, blood was coming out of Oliver's mouth. His body temperature rose to 107 degrees and he ultimately died as a result of the TASER™ shocks.

The justification for the repeated use of TASER™ force, at least beyond an initial TASER™ shock, was minimal. The plaintiff was not accused of or suspected of any crime, and indeed was not threatened with arrest or apprehension at any time prior to (or after) the use of force. The plaintiff posed no immediate threat of danger to officers beyond the moment of struggle with Officer Burk. He did not act belligerently toward the police officers, and he did not curse or yell at them. In fact, he was largely compliant and cooperative with the officers -- moving away from their vehicle when instructed, stopping and talking the first time he was requested to do so (even though not threatened with detainment), stopping when instructed, providing requested identification, and only attempting to disregard the officer and walk away when the officer attempted a "custodial touch" on Oliver's shoulder.

Moreover, the plaintiff did not pose a grave danger to others. While Oliver did stop in the street and may have attempted to cross the street against the light, viewing the facts in a light most favorable to Oliver, we may infer that Oliver was within the lane that was boxed in by the police cars, and thus not exposed to traffic during the incident. This inference is supported by Officer Burk's statement that the entire incident occurred in "the safe area," that "none of this incident took place in the middle of the intersection," and that he did not recall any traffic passing by, honking, or almost striking him or Oliver during the incident. Finally, Oliver was not actively resisting arrest nor attempting to evade arrest by flight.

Quite simply, though the initial use of force (a single TASER™ shock) may have been justified, the repeated TASER™ discharge of Oliver into and beyond his complete physical capitulation was grossly disproportionate to any threat posed and unreasonable under the circumstances.”

Perhaps what is most important about the court’s analysis is the application of a straight *Graham*^{vii} analysis rather than any reference to a deadly force. In denying the officer’s appeal for qualified immunity the court concluded: “TASER™ing [sic] the plaintiff at least eight and as many as eleven or twelve times over a two-minute span without attempting to arrest or otherwise subdue the plaintiff -- including TASER™ing Oliver while he was writhing in pain on the hot pavement and after he had gone limp and immobilized -- was so plainly unnecessary and disproportionate that no reasonable officer could have thought that this amount of force was legal under the circumstances. When measured against these facts, the officers violated a clearly established right.”

A case which includes both law enforcement liability claims and products liability claims against TASER™ International is *Heston v. City of Salinas*.^{viii}

In the portion of the case dealing with the liability of the officers and the City of Salinas, the court reported the “undisputed” facts as follows:

“On February 20, 2005, Robert Sr. called 911 requesting police to remove Robert Jr. from the Heston residence because Robert Jr. was on drugs. Several Salinas Police Officers responded to the call but left after concluding that Robert Jr. had done nothing illegal and could not be arrested. Shortly after the police left, Robert Sr. called 911 again, reporting that Robert Jr. had knocked him down and was breaking items in the house.

Officer Dominici and Officer Fairbanks, who had responded to the first call, returned to the scene to find Robert Jr. throwing household objects out the front door of the Heston residence. When they arrived, Robert Sr. was on the floor, having been knocked down by Robert Jr. Officer Dominici, looking through the open front door of the Heston residence, observed Robert Jr. drag Robert Sr. out of sight of the doorway into the home.

Robert Jr. then returned to the doorway and resumed throwing objects out of the house and threw one object directly at Officer Dominici. About a minute later, Officer Dominici fired his TASER™ [sic] at Robert Jr. One of Officer Dominici's TASER™ probes missed Robert Jr. and lodged in the door jam. Officer Dominici's TASER™ did not bring Robert Jr. down. Officer Fairbanks then fired his TASER™. Officer Fairbanks' TASER™ did not bring Robert Jr. down.

Officer Ruiz then arrived at the scene. After observing the events and receiving a hurried briefing from Officer Dominici, Officer Ruiz fired his TASER™ at Robert Jr. Officer Livingston, arriving just a few moment earlier, also fired his TASER™ at Robert Jr. After being struck by Officer Ruiz and Officer Livingston's TASER™s, Robert Jr. moved back into the house but did not fall down.

Officer Livingston and Officer Ruiz followed Robert Jr. into the house. Officer Livingston "cycled" his TASER™ a second time inside the house. At this point, Officer Godwin had arrived on the scene. Officer Godwin observed Officer Ruiz and Officer Livingston fire their TASER™s and followed the Officers into the house. Officer Dominici also followed Officer Godwin into the house.

Inside the house, Officer Godwin fired his TASER™ at Robert Jr. Robert Jr. then collapsed to the ground, hit his head on a table as he fell, and ended up prone on his stomach with his arms underneath him. While Robert Jr. was on the ground, Officer Godwin cycled his TASER™ at least three times, as did Officer Livingston, and Officer Ruiz.

Officer Paredez then entered the house and tried to obtain control of Robert Jr.'s left arm. When Officer Paredez grabbed Robert Jr.'s arm, he felt a TASER™ shock. Officer Simpson had also arrived and attempted to assist Officer Paredez in pulling Robert Jr.'s left arm out from underneath him for handcuffing. Meanwhile, Officer Fairbanks had also entered the house and was attempting to remove Robert Jr.'s right arm.

Officer Godwin, believing Robert Jr. was intentionally keeping his arms underneath him, cycled his TASER™ again. Officer Godwin, assuming his TASER™ was having no effect, removed the cartridge from his TASER™, and replaced it with a new one. Officer Godwin then fired his TASER™ directly into Robert Jr.'s back. After Officer Godwin's TASER™ cycled one more time, the Officers were able to pull out Robert Jr.'s hands and handcuff him.

When Robert Jr. was handcuffed, Officer Godwin observed his head turning purple. Officers rolled Robert Jr. over and observed him to be in medical distress. Officer Dominici and Officer Fairbanks called for an ambulance. Officer Godwin began rescue breathing. Robert Jr. was taken to the hospital where he died the following day without regaining consciousness.” (citation and footnotes omitted).

In the trial court's consideration of the officers' and city's motion for summary judgment and qualified immunity for the officers, the court opined that “Considering Robert Jr.'s vulnerability, and the coroner's testimony that the ‘application of TASER™’ partially caused Robert Jr.'s death, it would not be unreasonable for a jury to find the applied force to be deadly... In sum, viewing the above factors in the totality of the circumstances, it appears that a reasonable jury could find that the Officers used unreasonable force in tasing Robert Jr. multiple times after he had fallen and had hit his head on the table. Even if the use of TASER™ was not deadly, it may still have been unreasonable given the testimony of Plaintiffs' experts. A jury could also reasonably find that Officers Godwin, Ruiz and Livingston's use of TASER™ to be non-lethal yet excessive considering that Robert Jr. was already on the ground, that he was not a suspect for a serious crime, and that **less intrusive means** were available to effect his arrest.”

It should be noted that this “**less intrusive means**” language has never been an element of use of force analysis by the United States Supreme Court and is contrary to all of the other United States Circuits.^{ix} There are cases where the United States Court of Appeals for the 9th Circuit has rejected this type of analysis.^x There has been some consistency among courts within the 9th Circuit in cases where officers have used deadly force and plaintiff claims that some lesser alternative should have been considered.^{xi}

The court concluded that the officers were not entitled to summary judgment or qualified immunity and the case proceeded to trial. “The case was tried to a jury. On June 6, 2008, the Jury returned a verdict finding that the police officers did not use excessive force when they deployed their TASER™ ECDs against Robert C. Heston. Thus, the jury found that the police officers did not violate the constitutional rights of the deceased or his parents, nor did the officers commit a battery. Since there

was no finding against the individual officers, the jury, as instructed, did not make a finding with respect to the City of Salinas.”^{xii}

“With respect to Defendant TASER™, the Jury found that on February 19, 2005, Salinas police officers subjected Robert C. Heston to a prolonged deployment from TASER™s [sic]; that Defendant TASER™'s failure to warn of the risks associated with a prolonged deployment was a substantial factor in causing the police officers to administer a prolonged deployment; and that as a consequence of the prolonged deployment, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest, leading to his death. (See Jury Verdict, Docket Item No. 323.) In sum, the Jury found that reasonably prudent manufacturers of electronic control devices knew or should have known that prolonged administration of electricity from the devices pose a danger, i.e., a risk of acidosis, to a degree which posed a risk of cardiac arrest. The jury found that Defendant TASER™ failed to warn purchasers of those risks.”^{xiii} The jury found that the decedent, Robert C. Heston, was 85% responsible for his death due to his toxic use of methamphetamines and related activity, and that TASER™ International was 15% responsible. It should be noted that TASER™ International is appealing the decision reached in this case.

Products Liability

As apparent from *Heston*, the legal dilemma from a products liability perspective is different than the law enforcement liability under the Constitution. The jeopardy that a manufacturer may face for failing to warn the end users of dangers associated with their product can lead to awards against that manufacturer including punitive damage awards. As anyone knows some of these cases reach such ridiculous points that manufacturers begin issuing far-reaching warnings that should be obvious to anyone. Imagine, McDonalds, as a distributor of coffee, following a lawsuit, placed a warning on their cups indicating that the coffee was dangerous because it was hot in order to avoid future cases where a customer might bring a lawsuit after they were burned by spilled coffee. In many cases, these warnings are not given based on a belief that the actual danger will occur, but instead to avoid the costs of litigating future claims.

In cases where it is shown that the end user was aware of the danger with the product, the manufacturer is less likely to have any liability. *Torres v. City of Madera et. al.* provides an example involving TASER™.^{xiv} In *Torres*, Officer Noriega of the City of Madera Police Department shot and killed Torres who was handcuffed in the backseat of her police vehicle. The shooting occurred when Officer Noriega reached to deploy her TASER™ ECD but accidentally grabbed her firearm instead. At the time of this event, City of Madera officers were carrying their TASER™ ECDs on the strong side.^{xv} Torres's family and the City of Madera sued TASER™ International in products liability. The allegation by the City of Madera was that TASER™ International had failed to warn the police department of the possibility of accidentally deploying a firearm when the TASER™ ECD is carried in the strong-side carry position, notwithstanding prior accidental shootings in Sacramento, California and Rochester Minnesota.

The court outlined the claim as follows:

“In 2002, Torres' parents brought suit in federal court under *42 U.S.C. § 1983* against Officer Noriega and the City of Madera for the death of Torres. Later, the City and Noriega brought suit, essentially for indemnification, against Defendant in a separate state court proceeding. Defendant [TASER™

International] removed to this Court. In their suit against Defendant [TASER™ International], Plaintiffs [City of Madera and Officer Noriega] allege strict products liability for defective design and failure to warn, negligent design of the M26 and accessories, negligent warning/training, breach of implied and express warranties, equitable indemnification, and contribution. Plaintiffs [City of Madera and Officer Noriega] pray for damages and costs, a declaration of the proportionate negligence/fault of Defendant which proximately caused or contributed to Plaintiffs' loss, damage or injury and a corresponding order that Defendant be required to reimburse Plaintiffs [City of Madera and Officer Noriega] in that proportionate amount for any judgment for which Plaintiffs [City of Madera and Officer Noriega] are found liable to Torres in the underlying lawsuit, and, if Plaintiffs are held liable to Torres in the underlying action, judgment in the same amount together with attorney's fees, investigative expenses and courts costs according to proof, be rendered against Defendant. Defendant now moves for summary judgment on all claims.”

In rejecting the claim against TASER™ International, the court relied on the fact that Officer Noriega and the department, through its supervisors, were aware of the danger of accidentally drawing a firearm when intending to deploy a TASER™ ECD. The court asserted:

“Prior to the incident with Everardo Torres, Officer Noriega was involved in another incident in which she had confused her M26 and her Glock service weapon; that incident occurred in the field, when she pulled her gun instead of her TASER™ [sic]. The prior incident in which Noriega confused her TASER™ and her Glock happened in a cold month near the time Plaintiffs first got the M26's. After Noriega had mistakenly drawn her gun instead of her M26, she told her sergeant (Sergeant Lawson) as well as the officer who was on call with her, that she had done so. After Noriega told Sergeant Lawson about the prior incident in which she had confused her gun for her TASER™, she never received any additional training in the use of her M26. Sergeant Lawson, however, did instruct Noriega that she needed to practice more. Lawson testified that he told Noriega to practice drawing her Glock and M26 "so that she could become comfortable with them and wouldn't have any confusion.”^{xvi}

The court also noted that TASER™ International had issued a training bulletin in April of 2001, approximately a year and a half before the October of 2002 shooting of Torres warning of the issues associated with a strong-side carry:

“TRAINING ISSUE: HOLSTER THE ADVANCED TASER™ IN A CROSS-DRAW: To eliminate any risk of confusion between lethal and less-lethal force, we strongly advocate carrying lethal force on your strong-hand side and all less-lethals on your weak hand side in cross-draw to prevent any muscle memory confusion from a firearm to a less-lethal. Chief Instructor Hans Marrero requests keeping less-lethals on one side (the left for a right-hander) but still using the strong-arm with gross motor skill indifference for shooting. If agencies are using right-handed holsters they can be easily moved to the cross-draw without the need for a new holster. More on this topic on our website.”^{xvii}

In conclusion, the court held:

Defendants [TASER™ International] have now moved for summary judgment on the claims by Plaintiffs [City of Madera and Officer Noriega] which serve as the basis for equitable indemnity: strict products liability, breach of warranties, and negligence.

With respect to strict products liability under design defect theory, the evidence indicates that the M26 was not "used" during the shooting of Torres. Because use is a requirement under the risk/benefit design defect theory, summary judgment in favor of Defendant is appropriate. Similarly, the TASER™ thigh holster was not used in the shooting. Moreover, the defect identified by Plaintiffs appears to be based on a faulty premise and Plaintiffs have not shown that the holster was anything but an insubstantial or negligible factor in the shooting of Torres. Accordingly, summary judgment is appropriate on these claims.

With respect to the failure to warn, the evidence indicates that **Plaintiffs were aware of the possibility of weapons confusion, especially Noriega's own tendency in light of her prior incident which she disclosed to Sgt. Lawson.** Moreover, assuming that Plaintiffs's allegations that the M26 is defectively similar to a handgun in functionality, design, and muscle memory, then the possibility of weapons confusion is obvious, especially when the M26 is worn close to a firearm. **Under these circumstances, there is no duty to warn.** The same is also true of the holster. **With respect to "training," training is a service and thus, not subject to strict products liability.** With respect to training materials, the evidence suggests that the materials were used incidentally to the provision of training, a service. Moreover, Plaintiffs have failed to show how the training materials are sufficiently like aeronautical charts such that the materials could be considered products. Rather, the evidence suggests that they are more comparable to printed works, which are not subject to strict products liability theories. Accordingly, summary judgment is appropriate on these claims.

With respect to Plaintiffs' breach of warranty claims, privity is a requirement for both express and implied warranties in California. The evidence shows that ALD, not Defendant, sold the M26's and holsters to Plaintiffs. Plaintiffs have not shown sufficient conduct under *U.S. Roofing* to establish privity, nor have they presented sufficient evidence to establish agency. Because Plaintiffs have failed to show that they are in privity with Defendant, summary judgment is appropriate as to these claims.

With respect to Plaintiffs' negligence claims, Plaintiffs' negligent warning claim is not persuasive because, as discussed under strict liability, there is no duty to warn of obvious, readily recognizable risks, or risks that a person is already aware. The evidence shows that the risk of weapons confusion was already known to Plaintiffs and/or readily recognizable or obvious. There is thus, no duty to warn. Plaintiffs's negligent training/training materials claim is essentially a variation on the failure to warn claim. Because there was no duty to warn under the facts of this case, there is no actionable negligence under Plaintiffs's negligent training claims. With respect to negligent design of the M26 and the holster, Plaintiffs have made only general and conclusory arguments. Noriega's testimony is only general and there is never an explanation or a link between the conduct of Defendant/negligent design of the M26 and holster and the shooting. In other words, Plaintiffs have not presented specific evidence that shows how the conduct of Defendant/negligent design of the M26 and holster was actually a substantial factor in this shooting by Noriega. Accordingly, summary judgment is appropriate as to these claims.

Finally, in order for Plaintiffs to be entitled to equitable indemnification, there must be a cause of action that the Torres's would have been successful against Defendant. Summary judgment is appropriate as to the only causes of action relied on by Plaintiffs as the basis for indemnity (strict products liability, negligence, and breach of warranty). Because there appears to be no identifiable theory that the Torres-plaintiffs could recover as to Defendant, summary judgment is appropriate.

Accordingly, IT IS HEREBY ORDERED that Defendant TASER™ International's motions for summary judgment are GRANTED.”^{xviii} (emphasis added)

One thing is clear from the *Torres* case, where the manufacturer has given notice or the end user is on notice of dangers related to the product, the manufacturer of the product will not face liability for a failure to warn. The opposite is also true; a manufacturer will have liability in cases where they fail to warn the end user of potential dangers.

The jury’s finding in Heston raised the issue of TASER™ International’s liability exposure where it is claimed that there was a failure to warn end users of potential dangers:

“With respect to Defendant TASER™, the Jury found that on February 19, 2005, Salinas police officers subjected Robert C. Heston to a prolonged deployment from TASER™s; that Defendant TASER™’s failure to warn of the risks associated with a prolonged deployment was a substantial factor in causing the police officers to administer a prolonged deployment; and that as a consequence of the prolonged deployment, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest, leading to his death. (See Jury Verdict, Docket Item No. 323.) In sum, the Jury found that reasonably prudent manufacturers of electronic control devices knew or should have known that prolonged administration of electricity from the devices pose a danger, i.e., a risk of acidosis, to a degree which posed a risk of cardiac arrest. The jury found that Defendant TASER™ failed to warn purchasers of those risks.”^{xix}

Additionally there are studies indicating “that factors such as thin stature and dart placement in the chest may lower the safety margin for cardiac dysrhythmia.”^{xx} The Braidwood Commission Study on Conducted Energy Weapon Use made several assertions with respect to cardiac events following a TASER™ deployment. “First, the greatest risk of ventricular fibrillation arises when the probes are vectored across the heart. Second, the risk of ventricular fibrillation increases as the tips of the probes get closer to the wall of the heart.”^{xxi} It was noted by the author of this report:

“**Seventh**, while I have concluded that a conducted energy weapon is capable of triggering ventricular capture that may lead to ventricular tachycardia and/or fibrillation, **I do not have enough information to quantify that risk with any degree of precision.** Further, the risk appears to vary, depending on several factors, which I will discuss later in this part. (emphasis added)

Eighth, in deaths proximate to use of a conducted energy weapon, there is often a lack of physical evidence on autopsy to determine whether arrhythmia was the cause of death, which opens the door to debate about whether the weapon or some preexisting medical condition was responsible. While alcohol or drug intoxication may complicate the pathological analysis in some cases, other explanations must be found in cases where alcohol or drugs were not involved.”^{xxii}

Braidwood asserted the following with respect to the lack of any cardiac events in nearly 700,000 training deployments:

“Before moving on to an examination of circumstances in which the risk may increase, I would like to comment on a statistic cited by one of the medical researchers, that there have been over 700,000 conducted energy weapon discharges during the manufacturer’s training classes, with no reported collapses, cardiac arrests, or fatalities. On its face, this is an impressive record of safety. However, I

approach this data with caution for the following reason. The information before me points to the *capacity* of a conducted energy weapon to cause heart arrhythmia even in healthy adults, but the risk varies depending on the existence of several factors, such as the location of the probes (*i.e.*, across the heart), the timing of the discharge (*i.e.*, during the T-wave), the proximity of the tip of the probe to the heart wall, and the duration of the discharge.”

As a result of the combination of the *Heston* case and studies related to issues raised in studies, TASER™ International is left in the position of warning law enforcement about these issues or face dramatic products liability exposure. Irrespective of whether one agrees with the studies or not, TASER™ International is aware of the warnings issued by these reports and had little choice but to warn law enforcement of the unlikely possibility of a death related to a deployment to the chest.

TASER™ ECDs are NOT Deadly Force for Purposes of Law Enforcement Liability

Presently no court has concluded that an officer’s use of a TASER™ ECD constitutes deadly force. In fact, as previously noted, courts have concluded that the use of TASER™ ECD is a moderate use of force.^{xxiii} The question that must be considered by law enforcement is whether a possibility of death, means that a deployment to the chest constitutes deadly force. While there is no TASER™ case on point with this question there are several cases involving use of canines that deal with the issue of how a court determines whether a particular law enforcement tool is deadly force for Fourth Amendment purposes.

On September 22, 1999, Kuha went out drinking with some friends. On his way home he ran into a curb causing a flat tire. He walked to a friend’s house for help and returned with his friend to change the tire. Kuha continued his trip home at approximately 5:30 a.m. when he passed a police car traveling in the opposite direction. When Kuha failed to dim his headlights for the oncoming patrol car, the officer did a u-turn and pulled Kuha over. As the officer approached Kuha’s vehicle, Kuha bailed out and ran into a swampy area with dense brush, high grass and foliage. The officer waited for the arrival of backup before beginning a search for Kuha.

Officer Anderson responded to the scene along with his canine partner, “Arco.” While searching for Kuha, Officer Anderson had Arco on a leash. After nearly 30 minutes, Arco alerted and bounded into some three foot tall grass. Arco was trained to “bite and hold” until receiving a command to release. When Officer Anderson observed that Kuha was holding Arco’s head, he ordered Kuha several times to release the dog’s head and further instructed that he would not call the dog off until Kuha followed this command. Once Kuha released the dog, Officer Anderson ordered the dog to release. The entire apprehension lasted approximately ten to fifteen seconds. As a result of the bite, Mr. Kuha’s femoral artery was severed and he suffered severe blood loss. He recovered from these injuries and brought a lawsuit alleging excessive force by the officers as well as agency liability with respect to policy and training on the use of canines.

In its review of the claims against the officers, the court began with a straightforward review of use of force as interpreted by the United States Supreme Court in *Graham v. Connor*^{xxiv} and *Tennessee v. Garner*^{xxv}. In doing so the court rejected Kuha’s argument that the use of a canine amounted to deadly force. The court cited numerous cases, including cases alleging use of a canine was deadly force and one that ended in the death of a suspect at the mouth of a canine, where sister circuits rejected the idea that canines trained to “bite and hold” were instruments of deadly force.^{xxvi}

The court asserted:

"Before reviewing Kuha's specific claims, we briefly address, and reject, Kuha's contention that a police dog constitutes deadly force. No federal appeals court has held that a properly trained police dog is an instrument of deadly force, and several have expressly concluded otherwise. See, e.g., *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1998^{xxvii}) (defining "deadly force" as "that force which is reasonably likely to cause death" and finding the possibility of death from a properly trained police dog too remote to constitute deadly force); *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) (holding that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm'" (footnote omitted, and quoting definition of "deadly force" from Model Penal Code § 3.11(2)). In *Robinette*, the only published case where a suspect was actually killed by a police dog, a burglary suspect was hiding beneath a car and the police dog seized the suspect's exposed neck. *Id.* at 911. The *Robinette* court concluded that deadly force was not at issue because there was no showing that the unusual circumstances which resulted in the suspect's death were foreseeable. *Id.* at 912 (describing incident as "an extreme aberration from the outcome intended or expected").^{xxviii}

The court concluded:

"The mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." 854 F.2d at 913; see also *Vera Cruz*, 139 F.3d at 661 ("We do not read *Garner* as covering all uses of force that might result in death, no matter how remote the possibility."). We find the **likelihood of death** from the use of a properly trained police dog to apprehend a suspect **sufficiently remote as to preclude its characterization as deadly force**. See *id.* at 663 (assuming "that a properly trained police dog could kill a suspect under highly unusual circumstances," but concluding that "the prospect of such an aberration doesn't convert otherwise nondeadly force into deadly force"). Accordingly, review of excessive force claims involving police dogs is properly governed by the general standard established in *Graham* rather than the deadly force standard of *Garner*."

The court's recognition that where the likelihood of death is sufficiently remote, the court will not view the tool as deadly force is important when dealing with TASER™ ECDs since the likelihood of death in a TASER™ deployment, according to the studies, is remote.^{xxix}

A second case, *Robinette v. Barnes*, involving a canine bite and hold which led to a death is also instructive.^{xxx} The court outlined the facts of the case as follows:

"Shortly after midnight on July 10, 1984, the 'K-9' team of Barnes and Casey was summoned to the Superb Motors car dealership in Nashville, Tennessee. A burglar alarm inside the building had been activated. According to the district court, by the time Barnes arrived at the dealership, 'officers already on the scene had located a point of entry, a broken glass door, and had seen a suspect inside the building looking out at them.' Barnes and another officer stated in depositions that while they were outside the building, they saw a white male inside of it.

Barnes and Casey entered the building and stood in a small entry room. Barnes shouted a warning that he had a police dog and that anyone inside the building should come out or he would turn the dog loose. Approximately thirty seconds later, Barnes repeated the warning. After another thirty

seconds passed, Barnes released Casey. The dog ran to a closed door at one end of the room. Barnes opened the door for the dog. According to his deposition, 'the dog took a few steps out there and I shouted again, You'd better come out. Then the dog turned around and came back to me. . . .'

As soon as Casey returned, Barnes gave the command, 'Find him.' Barnes and the dog then began to search the building. The dog ran ahead of Barnes while the officer checked some closed doors that Casey bypassed. Eventually, Barnes followed Casey into a darkened bay area of the car dealership. His flashlight revealed that Casey had the suspect's neck in his mouth. The man was lying face down on the floor with half of his body underneath a car. He did not move. A substantial amount of blood had collected around him and more was oozing from his neck.

Barnes ordered Casey to come to him, leashed the dog and then called for an ambulance. The suspect, Daniel Briggs, was pronounced dead on arrival."^{xxxix} An action was brought against the officers alleging that the use of the canine was deadly force and should be judged against deadly force standards.

In its review of the case the court outlined how a particular use of force that results in death should be analyzed. The court asserted:

"Thus, whether deadly force has been used to seize a criminal suspect must be determined in the context of each case. The Model Penal Code drafted by the American Law Institute acknowledges this fact by proposing the following definition: 'deadly force' means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force. Model Penal Code § 3.11(2) (Proposed Official Draft 1962). We find this definition a useful statement of the two factors most relevant to the determination of whether the use of a particular law enforcement tool constitutes deadly force: **the intent of the officer to inflict death or serious bodily harm, and the probability, known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a 'substantial risk of causing death or serious bodily harm.'**"^{xxxix}

While numerous court decisions make reference to the model penal code for defining deadly force it must be noted that the Model Penal Code provides a definition to be used in criminal cases that includes the officer's intent in using the particular force. The standard adopted for Fourth Amendment purposes, while having its foundation in the Model Penal Code, does not include the subject intent portion of the definition. This was pointed out by the United States Court of Appeals for the 9th Circuit in *Smith v. City of Hemet*,^{xxxix} in adopting the "universal" definition of deadly force for Fourth Amendment purposes asserted:

"However, the definition of deadly force used in the other circuits in [§ 1983](#) cases, while frequently labeled the Model Penal Code definition, is designed for use in implementing the [Fourth Amendment](#) and necessarily differs in one minor respect from the Model Penal Code's definition. For [Fourth Amendment](#) purposes, the objective part of the test must be employed. See [Graham, 490 U.S. at 397](#). In short, courts do not use the subjective alternative when they apply the "deadly force" test in [§ 1983](#) cases. **We simply look to the objective part of the test: whether the force employed 'creates a substantial risk of causing death or serious bodily injury.'** That the definition courts

describe varies to this extent from the full Model Penal Code version is no reason for us not to employ a test that is now universally accepted throughout the country.^{xxxiv}

A similar conclusion was reached recently in *Thomson v. Salt Lake County*.^{xxxv} The United States Court of Appeals outlined the facts of the case as follows:

“At approximately 2:00 a.m. on April 19, 2004, while out for an evening of drinking, Chad Thomson, called his wife, Amy Thomson. She was at a friend's apartment. During the course of this telephone call, Mr. Thomson became angry and threatened to act violently. He told Ms. Thomson to meet him at their residence. Ms. Thomson telephoned her mother, who was at that residence, and told her about this conversation. Ms. Thomson's mother then called 911. When Ms. Thomson arrived at the residence with her friend, she went to check on the firearms that the couple kept in their basement. She unexpectedly saw Mr. Thomson there; he pointed a gun at her. Ms. Thomson fled upstairs, and her friend made another call to 911, during which her friend told the 911 dispatcher about the gun-pointing incident and also told the dispatcher that Mr. Thomson had been talking about suicide. Mr. Thomson left the home sometime thereafter.

Salt Lake County Sheriff's deputies John Shire, Walter Jarvis, and Alan Morriscal arrived at the Thomsons' home in response to the second 911 call. They learned that Mr. Thomson had threatened Ms. Thomson with a weapon, was likely armed and potentially suicidal, and had left his truck parked on a nearby street. Believing Mr. Thomson to be nearby, the officers--aided by Chaos, Deputy Morriscal's police dog--searched the Thomson residence and yard, but they did not find Mr. Thomson. They did, however, confirm that a firearm was missing from the Thomson residence.

The officers then began a yard-by-yard search. While the officers were searching the darkened neighborhood, Ms. Thomson's friend, who had previously spoken to Mr. Thomson, was able to reach Mr. Thomson on her cellular telephone from her car parked outside the Thomson residence. She handed the telephone to Lieutenant Michael Wardle of the Salt Lake County Sheriff's Office, who identified himself and began to speak to Mr. Thomson. After Lieutenant Wardle told Mr. Thomson that he did not want to see anyone get hurt, Mr. Thomson told Lieutenant Wardle that if he did not want his officers to get hurt, he should have them leave the area. Lieutenant Wardle could hear a dog barking in the background of the call, so he radioed the officers to tell them that they must be close to Mr. Thomson's location, told them that Mr. Thomson wanted them to back off, and warned them to be careful.

Having received this information from Lieutenant Wardle, Deputy Morriscal released Chaos into the third yard they searched in an attempt to locate Mr. Thomson. Chaos did not return when Deputy Morriscal called for him, but the officers could hear noises coming from the yard. The officers, however, could not initially determine the source of the noise, possibly because it was raining heavily that night. The officers later determined that the source of the noise was Mr. Thomson.

As the three officers approached, they could hear Mr. Thomson yelling for them to call off the dog and threatening to shoot, although it was unclear if Mr. Thomson was threatening them or Chaos. The officers advanced and fanned out into the yard; Deputies Shire and Morriscal could see Mr. Thomson holding a rifle and standing behind an object in the yard, but Deputy Jarvis could not see Mr. Thomson from where he was positioned. The officers ordered Mr. Thomson to put the gun down and come out with his hands up, stating they would then call off the dog. When Mr. Thomson did not follow the officers' instructions, they repeated their warning.

The exact sequence of events that transpired next is unclear. Deputy Morrival has stated that he saw Mr. Thomson place the barrel of his gun into his own mouth briefly, then take it out and move the barrel quickly toward Deputy Morrival. Deputy Shire, however, did not see Mr. Thomson put the barrel into his mouth but did see the gun first being pointed at Chaos--who was biting Mr. Thomson--and then the barrel being raised in Deputy Shire's direction. Deputy Shire thus prepared to fire his own weapon by depressing the trigger of his gun slightly. It is undisputed that Mr. Thomson was moving the gun very quickly and although the officers repeatedly ordered Mr. Thomson to drop his weapon, he refused to do so. The facts taken in the light most favorable to Plaintiffs indicate that at one point, Mr. Thomson had the gun in his mouth, and that immediately before he was shot, the gun was pointed upwards, near and toward Mr. Thomson's head.

It is undisputed, however, that at some point shortly before Mr. Thomson was killed, he was aiming the gun in the direction of the officers. Both Deputies Morrival and Shire perceived Mr. Thomson's conduct as physically threatening to them and prepared to shoot him based upon that conduct. Before Deputy Shire fully pulled his partially depressed trigger, Deputy Morrival fired one shot into Mr. Thomson's head, killing him. Events were unfolding extremely quickly; the entire sequence of events from when the officers entered the backyard and could see Mr. Thomson until the time that he was shot took place in perhaps as little as ten seconds.

Both Deputies Shire and Jarvis initially believed that Mr. Thomson had killed himself and reported as much to Lieutenant Wardle via radio. Deputy Morrival requested and received permission from Lieutenant Wardle to secure his dog, Chaos, in the police car; it was not until after Deputy Morrival had done so that he informed Lieutenant Wardle that he had fired one shot at Mr. Thomson.^{»xxxvi}

The United States Court of Appeals for the 10th Circuit in its analysis cited to the model penal code definition used by the other circuits in asserting: "Deadly force is such force that "create[s] a substantial risk of causing death or serious bodily harm."^{»xxxvii}

The court continued:

“It is no secret that many tools in law enforcement can potentially inflict serious bodily harm or even death. See *Robinette*, 854 F.2d at 912 (noting that an officer’s nightstick and vehicle both “possess the potential for being deadly force”). Some of these tools, however, also have great potential to resolve situations without resort to comparatively more lethal force. The Sixth Circuit has opined that police dogs often can help prevent officers from having to resort to deadly force: ‘[t]he use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect.’ *Id.*; *cf. Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir.1994) (acknowledging the truth in the argument that the release of a police dog in lieu of firing a gun at a suspect might have led to a better result for the suspect). **‘[T]he mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force.’** *Robinette*, 854 F.2d at 913. We see no need to deprive police officers of the benefit of these useful tools (i.e., police dogs) solely because they carry the potential to cause serious harm. *Cf. id.* at 914 (‘[W]e are not persuaded ... that the remote possibility that the use of a police dog to apprehend a felon might, under extraordinary circumstances, cause death, outweighs the dogs’ proven benefits for effective law enforcement.’).”

Perhaps most important is the United States Court of Appeals for the 10th Circuit's recognition that just because a tool is dangerous does not make it per se deadly force. Equally important is the court's recognition that although a tool may have the potential to cause serious bodily harm or death they also may resolve a situation short of deadly force.

Although the foregoing cases deal with the use of canines as a law enforcement use of force tool, the application of the law to electronic control devices should be the same. Language from a new case out of the Federal District Court for the Middle District of Alabama further supports the conclusion that TASER™ ECDs are not deadly force.^{xxxviii} In rejecting a training claim against the agency the court asserted:

“The use of a firearm against a person is presumptively the use of deadly force, while the use of a TASER™ is not presumptively the use of deadly force. Indeed, TASER™s are marketed by their manufacturer and purchased for use by police departments precisely because they are a nonlethal alternative to firearms. In this respect, TASER™s are more similar to police batons than firearms: although a rogue police officer might unreasonably apply a TASER™ with deadly force, when used properly by a reasonable police officer, a TASER™ is designed to avoid death and not cause it.”^{xxxix}

Conclusion and Expectations

- In accordance with the current state of the law related to use of force under the Fourth Amendment, the deployment of an electronic control device or TASER™ ECD is not deadly force since no court has made such a finding as a matter of law.
- It is unlikely that a court will find that a TASER™ deployment to the chest is deadly force based on a remote possibility that a deployment may result in death. Simply stated, even if one were to adopt the findings of all of the studies conducted, a TASER™ ECD has not been found to “create a substantial likelihood of serious bodily harm or death.”
- Notwithstanding the foregoing, it must be recognized by officers that in a lawsuit involving the deployment of a TASER™ ECD where the probes have struck the chest, an issue will be made with respect to whether the officer properly used this tool.
- In light of the recommended preferred targeting change, officers can be assured that plaintiff's attorney will be prepared to cross-examine the officer on proper targeting in an effort to show a jury that the officer acted unreasonably by failing to follow the preferred targeting in such deployments.
- In cases where a deployment strikes the chest, irrespective of injury, officers should be prepared to document why the deployment struck the chest rather than the recommended preferred targeting zone in the lower center of mass. In some cases, deadly force would have been justified under the facts but the officer utilized a TASER™ ECD instead of transitioning to deadly force. In such cases, clearly the deployment would be legally justifiable irrespective of the preferred targeting zone.

- In some cases the officer may be targeting the lower center mass but due to the dynamic and fluid nature of the event including the suspect's movement; the probes may strike the chest. Again, officers should ensure, irrespective of whether there is injury or not, why the deployment struck the chest rather than the recommended preferred targeting zone.
- These suggestions are made, not because a deployment to the chest is deadly force, but simply because an officer is likely to be confronted with the targeting zone in any case where the probes strike the chest and a lawsuit follows.

Agency Policy & Training Recommendations

Agency policy and training should be changed to reflect the new targeting area recommended by TASER™ International. Immediate training should be conducted for all officers who are allowed to carry these devices.

The Legal & Liability Risk Management Institute will be monitoring the case law to determine if this new change to the targeting zone has any impact on the liability of officers and their agencies.

ⁱ See: "Studies of Death Following Electro Muscular Disruption-Interim Report" National Institute of Justice, June 2008: www.ncjrs.gov/pdffiles1/nij/222981.pdf : There is currently no medical evidence that CEDs pose a significant risk for induced cardiac dysrhythmia when deployed reasonably. **Research suggests that factors such as thin stature and dart placement in the chest may lower the safety margin for cardiac dysrhythmia.** There is no medical evidence to suggest that exposure to a CED produces sufficient metabolic or physiologic effects to produce abnormal cardiac rhythms in normal, healthy adults. (emphasis added)

ⁱⁱ See, *Buckley v. Haddock*, 292 Fed. Appx. 791 (11th Cir. 2008) "Accordingly, we regard the deputy's use of the TASER in this particular case as -- at most -- moderate, non-lethal force. See also *Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008) (viewing "the use of a TASER as an intermediate or medium, though not insignificant, quantum of force").

ⁱⁱⁱ See, e.g., *Smith v. City of Hemet* 394 F.3d 689 (9th Cir. 2005); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (deadly force "creates a substantial risk of death or serious bodily injury"); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997) (same); *In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3rd Cir. 1995) (adopting the Model Penal Code definition); *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987) (same); *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) (same); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (same); *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) (en banc), vacated as moot sub nom., *Ashcroft v. Mattis*, 431 U.S. 171, 52 L. Ed. 2d 219, 97 S. Ct. 1739 (1977) (same).

^{iv} *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004).

^v *Buckley v. Haddock*, 292 Fed. Appx. 791 (11th Cir. 2008)

^{vi} *Oliver v. Fiorino*, 2009 U.S. App. LEXIS 23579 (11th Cir. 2009) (decided October 26, 2009)

^{vii} *Graham v. Connor*, 490 U.S. 386 (1989).

^{viii} *Heston v. City of Salinas*, 2007 U.S. Dist. LEXIS 98433 (N.Dist. CA. 2007). (Note-there are several additional citations related to various aspects of this case.)

^{ix} See e.g., *Williams v. Holt*, 2006 U.S. Dist. LEXIS 55148 (E. Dist. Tennessee 2006) "Contrary to Williams' exhaust-other-means argument, "[t]he **Fourth Amendment** does not require law enforcement officers to exhaust every alternative before using justifiable deadly force." *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997). See also *Deering v. Reich*, 183 F.3d 645, 652-53 (7th Cir. 1999)(same). As the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") has said: "**The fourth amendment reasonableness standard does not turn on the availability of less intrusive alternatives.**" *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989). Clearly, Williams's proposal deadly force is justified only after all other options have proven futile has no basis in the law and is frivolous." (emphasis added)

^x *Id.*

^{xi} See e.g., *Meceachern v. Manhattan Beach*, 623 F. Supp. 2d 1092 (Central Dist. California 2009) (rejecting the proposition that the officer should have utilized his law enforcement canine rather than deadly force under a lesser alternative available argument)

^{xii} See *Heston v. City of Salinas*, 2009 U.S. Dist. LEXIS 10096 (N. Dist. Cal. 2009).

^{xiii} *Id.*

^{xiv} *Torres v. City of Madera*, 2005 U.S. Dist. LEXIS 34672 (E. Dist Cal. 2005).

^{xv} *Id.*

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} *Id.*

^{xix} *Id.*

^{xx} “Studies of Death Following Electro Muscular Disruption-Interim Report” National Institute of Justice, June 2008: www.ncjrs.gov/pdffiles1/nij/222981.pdf : There is currently no medical evidence that CEDs pose a significant risk for induced cardiac dysrhythmia when deployed reasonably. **Research suggests that factors such as thin stature and dart placement in the chest may lower the safety margin for cardiac dysrhythmia.** There is no medical evidence to suggest that exposure to a CED produces sufficient metabolic or physiologic effects to produce abnormal cardiac rhythms in normal, healthy adults.” (emphasis added)

^{xxi} “Restoring Public Confidence, Restricting Use of Conducted Energy Weapons in British Columbia”, Braidwood Commission Study on Conducted Energy Weapon Use, Thomas Braidwood June 2009.

^{xxii} *Id.*

^{xxiii} See, *Buckley v. Haddock*, 292 Fed. Appx. 791 (11th Cir. 2008) “Accordingly, we regard the deputy's use of the TASER in this particular case as -- at most -- moderate, non-lethal force. See also [Sanders v. City of Fresno](#), 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008) (viewing "the use of a TASER as an intermediate or medium, though not insignificant, quantum of force").

^{xxiv} *Graham v. Coonor*, 490 U.S. 386 (1989).

^{xxv} *Tennessee v. Garner*, 471 U.S. 1 (1985).

^{xxvi} See, *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) (notwithstanding suspect's death, court held that use of properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm'; See also, *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998).

^{xxvii} *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998) was overruled by *Smith v. City of Hemet*, 394 F.3d 689, 706 (9th Cir.2005) (en banc) (insofar as the appropriate definition for deadly force. In *Smith v. City of Hemet*, the court adopted the definition used by other circuits, specifically, force which creates a substantial likelihood of death or serious bodily harm.)

^{xxviii} *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

^{xxix} See: “Studies of Death Following Electro Muscular Disruption-Interim Report” National Institute of Justice, June 2008: www.ncjrs.gov/pdffiles1/nij/222981.pdf : There is currently no medical evidence that CEDs pose a significant risk for induced cardiac dysrhythmia when deployed reasonably. **Research suggests that factors such as thin stature and dart placement in the chest may lower the safety margin for cardiac dysrhythmia.** There is no medical evidence to suggest that exposure to a CED produces sufficient metabolic or physiologic effects to produce abnormal cardiac rhythms in normal, healthy adults. (emphasis added)

^{xxx} *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

^{xxxi} *Id.*

^{xxxii} *Id.*

^{xxxiii} *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) (en banc).

^{xxxiv} *Id.*

^{xxxv} *Thomson v. Salt Lake County*, 2009 U.S. App. LEXIS 23677 (10th Cir. 2009) decided October 27, 2009.

^{xxxvi} *Id.*

^{xxxvii} *Id.* At footnote 3: (The origin of the quoted language is the Model Penal Code ("MPC")). See Model Penal Code § 3.11(2) (1985) (defining "deadly force"). The MPC's definition of "deadly force" includes an alternative subjective element, focusing on whether an individual used the force "with the purpose of causing ... a substantial risk of ... death or serious bodily injury." *Id.* (emphasis added). Although we have recited the full MPC definition of deadly force in the § 1983 context, we do not appear to have relied on the subjective component of the definition. See *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n. 2 (10th Cir.2004); *Ryder v. City of Topeka*, 814 F.2d 1412, 1417 n. 11 (10th Cir.1987) (noting simply that defendant police officer's actions in shooting plaintiff "clearly constitute the 'use of deadly force' in the constitutional sense"). The en banc Ninth Circuit has suggested that such reliance would be inappropriate. See *Smith v. City of Hemet*, 394 F.3d 689, 706 (9th Cir.2005) (en banc). *Smith* has "attribute[d] the inclusion of an alternative subjective component in the Model Penal Code definition to the fact that the Model Penal Code is primarily designed to govern criminal liability," instead of the civil liability at issue under § 1983. *Id.* Further, it contends that our sister circuits have embraced the MPC's definition of "deadly force," in the § 1983 context, *but deviated*--albeit more or less tacitly--to the extent of eschewing reliance on that definition's subjective element. *Id.* ("[T]he definition of deadly force used in the other circuits in § 1983 cases, while frequently labeled the Model Penal Code definition, is designed for use in implementing the Fourth Amendment and necessarily differs in one minor respect from the Model Penal Code's definition. For Fourth Amendment purposes, the objective part of the test must be employed. In short, courts *do not use* the subjective alternative when they apply the 'deadly force' test in § 1983 cases." (emphasis added) (citation omitted)); see also Floyd R. Finch, Jr., Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 Harv. C.R.- C.L. L.Rev. 361, 363 (1976) (citing the MPC's definition of "deadly force" in excessive force

context but describing the concept in objective terms, as "such force as under normal circumstances poses a high risk of death or serious injury to its human target"); *cf. Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir.1988) (describing the MPC's objective deadly force inquiry as the "[m]ore important[]" one). Although we focus in the text of this opinion on the objective component of the MPC's "deadly force" definition, we need not definitively opine on whether the subjective component has a role to play in the qualified immunity context. Even if the subjective component was not categorically inapposite, on the facts of this case we would reach the same ultimate disposition concerning the deadly force questions. As detailed *infra*, Plaintiffs argue that deadly force was unconstitutionally used when Deputy Morriscal (1) released his police dog Chaos, and (2) fatally shot Mr. Thomson. As to the latter, the precise contours of the deadly force definition are not at issue because there is no dispute that Deputy Morriscal's shooting of Mr. Thomson was an act of deadly force. Rather, the question presented is whether that use of force was excessive (i.e., unconstitutional); we conclude *infra* that it was *not* excessive. As to the former, the definitional boundaries of "deadly force" *are* implicated by the release of Chaos because Plaintiffs argue that such a release constituted an act of deadly force. However, even if we employed the subjective component, we would conclude that Plaintiffs have not carried their burden of establishing that Chaos's release was an act of deadly force. For the reasons noted *infra*, we determine that it was not an act of deadly force under the objective component. And, specifically as to the subjective component, Plaintiffs have offered no evidence that Deputy Morriscal released Chaos with the purpose of causing a substantial risk of death or serious bodily injury; accordingly, the release cannot be found to be an act of deadly force under the subjective component. Therefore, application of the subjective component of the MPC's "deadly force" definition would not alter the outcome as to the deadly force questions in this particular case. According, we may leave for another day the determination of whether that component is categorically inapposite in the qualified immunity context.)

^{xxviii} *Estate of Gilliam v. City of Prattville*, 2009 U.S. Dist. LEXIS 99616 (Middle District, Alabama 2009) (decided 10/26/09) It is noted that the officers who used the TASERS in this case were denied qualified immunity based on the facts viewed in the light most favorable to the plaintiff.

^{xxix} *Id.*