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**Taser[®] Electronic Control Devices (ECDs):
An “Intermediate” Use of Force?**

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Introduction

Electronic control devices (ECDs), particularly Taser[®] ECDs, have increasingly been used by law enforcement in recent years, and in some circumstances also serve as one alternative to the use of deadly force. A number of past articles in this publication have discussed their use in the context of [Fourth Amendment claims for excessive force](#), [use against juveniles and inadequate training claims](#), and [use against detainees and disabled or disturbed persons](#).

As use of such ECDs has become more widespread, the law concerning their proper use continues to be developed and refined. In a recent widely discussed decision, a federal appeals court appears to have set forth a somewhat new and different framework for analysis, while still situating that analysis squarely within the existing Fourth Amendment requirement that the use of force be objectively reasonable based on an examination of the situation the officer appears to be confronting. At this time, that particular federal appeals court, the Ninth Circuit, stands alone in putting forward this approach.

In this case, [Bryan v. McPherson](#), #08-55622, 2009 WL 5064477, 2009 U.S. App. Lexis 28413 (9th Cir.), the court characterized use of the ECD in probe mode deployment as non-lethal force, but also as an "intermediate or medium, though not insignificant" use of force, requiring justification by a "strong governmental interest" compelling the use of

such force, in light of the pain and incapacitation it causes, and the possibility of injury from resulting falls. In order to use such force, the court stated, “objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.”

The case is only binding precedent in the states within the jurisdiction of the Ninth Circuit, which are Nevada, Washington, Montana, Idaho, Oregon, California, and Arizona.

Still, the case presents one approach that the other courts are certain to respond to, whether in agreement or not, and is therefore a case worth being familiar with. This article briefly summarizes the facts, analysis, and holding of the case, and makes a few tentative statements concerning how to regard it.

At the conclusion of the article, a number of useful resources and references concerning Taser ECDs are listed.

Taser ECDs: An “Intermediate” Use of Force?

The *Bryan* case had its origins in the summer of 2005, when a California motorist was stopped by an officer for a seatbelt law violation. Upon being stopped, the motorist realized that he had forgotten to buckle his seatbelt following his stop earlier that morning by a California Highway Patrolman who gave him a speeding ticket.

The motorist simply stared straight ahead and did not respond when the officer asked him if he knew why he had been stopped. He complied, however, with the officer’s orders to turn down his radio and pull over to the curb.

When the motorist stepped out of his vehicle, he was “agitated,” and “yelling gibberish and hitting his thighs, clad only in his boxer shorts and tennis shoes.” The federal appeals court found that it was undisputed that he did not verbally threaten the officer, was standing twenty to twenty-five feet away, and did not try to flee. While the officer later asserted that he had told the motorist to stay in his vehicle, the motorist claimed not to have heard this instruction.

The officer later testified that the motorist took one step towards him, but the motorist denied this, and the appeals court said that physical evidence indicated that the motorist was facing away from the officer. “Without giving any warning,” the officer then shot the motorist with his Taser ECD in probe mode deployment.

One probe from the ECD lodged in the side of his upper left arm, and the motorist was immobilized by the ECD’s delivered electrical charge. This caused him to fall face first into the ground, suffering injuries which included four fractured teeth and contusions on his face. He was taken to the hospital by ambulance, as well as arrested for resisting and

opposing an officer in the performance of his duties, charges later dropped after a trial resulted in a hung jury.

The motorist subsequently filed a federal civil rights lawsuit asserting that the use of the ECD against him by the officer constituted an excessive use of force in violation of his Fourth Amendment rights. The officer asserted a defense of qualified immunity.

A federal trial court denied the officer qualified immunity and he appealed. For purposes of its review, the federal appeals court construed the facts in the light most favorable to the plaintiff.

Utilizing the objective reasonableness test of [Graham v. Connor](#), #87-6571, 490 U.S. 36 (1989), the court sought to examine whether the officer acted reasonably, taking into account the facts and circumstances confronting him. To do this, the court had to balance the amount of force applied against the need for that force.

The court noted that the ECD caused the motorist to experience both paralysis and “intense pain throughout his body, as well as resulting physical injury from his fall. It further noted that federal courts, including the Ninth Circuit have held that ECDs and stun guns fall into a category of “non-lethal force.”

Non-lethal, the court cautioned, however, does not necessarily equate to non-excessive, since all use of force, whether lethal or non-lethal, must be “justified by the need for the specific level of force deployed.” The court further reasoned that not all non-lethal force is the same, and that a “blast of pepper spray and blows from a baton are not constitutionally equivalent levels of force simply because they are both non-lethal.”

The court found that the high levels of pain, physiological effects, and foreseeable risk of physical injury caused by the ECD and similar devices caused it to conclude that they are a “greater intrusion than other non-lethal methods of force we have confronted.”

Such devices, the court acknowledged, can play an important role in law enforcement, giving an officer the ability to “defuse” dangerous confrontations from a distance without the need to use deadly force.

Such devices are an “intermediate, significant level of force that must be justified by” the presence of a strong government interest compelling its use.

In the immediate case, the appeals court stated, while the motorist’s “volatile” and “erratic” conduct could cause an officer to “be wary,” there were no objective facts indicating that he posed an immediate threat to the officer or a member of the public.

He was unarmed, made no verbal or physical threat against the officer, did not attempt to flee, and was standing some distance away without making any move towards the officer. (The court rejected, for purposes of the appeal, the officer’s claim that the

motorist took a step towards him, although the officer is free to attempt to convince the fact-finder of this at trial).

But even had the motorist taken the single step towards the officer that was claimed, the court said, this would not have turned him into an immediate threat justifying the level of force used by the officer. Additionally, the motorist had been stopped for a relatively minor traffic offense of failing to wear his seatbelt, which is punishable only by a fine, rather than for a serious offense more likely to justify the need for significant force.

Even if the officer, following the stop, reasonably came to believe, as he stated he did, that the motorist had also committed misdemeanors of resisting him, failing to comply with a lawful order, and using or being under the influence of a controlled substance, the court asserted that none of these were inherently dangerous or violent, and he “posed little to no safety threat.”

While the officer also argued that he believed the motorist may have been mentally ill, the court believed that, if true, the officer should then “have made greater effort to take control of the situation through less intrusive means.” The purpose of detaining a mentally ill person, the court reasoned, is to help him, not to punish him, so that the justifiably use of force is different “both in degree and kind” from that justified for use against those who commit crimes or pose a threat to the officer or others. Accordingly, a finding of mental illness would also not justify the use of the ECD in the court’s view.

The sole noncompliance alleged on the part of the motorist, exiting his vehicle against the officer’s instruction, hardly constituted resistance at all, according to the court, and did not justify the use of the ECD, particularly in light of the officer’s failure to provide a warning that the motorist would be subjected to the ECD if he did not comply with an order to remain in his car.

“We thus conclude that the intermediate level of force employed by Officer McPherson against Bryan was excessive in light of the governmental interests at stake. Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle. Officer McPherson was standing approximately twenty feet away observing Bryan’s stationary, bizarre tantrum with his X26 [ECD] drawn and charged. Consequently, the objective facts reveal a tense, but static, situation with Officer McPherson ready to respond to any developments while awaiting back-up. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply ‘no immediate need to subdue [Bryan]’ before Officer McPherson’s fellow officers arrived or less-invasive means were attempted.”

The court also found that the motorist's right not to be subjected to the level of intermediate force represented by the ECD under these circumstances was clearly established, depriving the officer of a qualified immunity defense, despite the fact that there was "no direct legal precedent dealing with this precise factual scenario." This, the court stated, was because "where an officer's conduct so clearly offends an individual's constitutional rights, we do not need to find closely analogous case law to show that a right is clearly established."

The appeals court concluded that:

"No reasonable officer confronting a situation where the need for force is at its lowest—where the target is a nonviolent, stationary misdemeanant twenty feet away—would have concluded that deploying intermediate force without warning was justified. We thus hold that Officer McPherson's use of significant force in these circumstances does not constitute a 'reasonable mistake' of either fact or law."

This is an important federal court decision, but it also clearly is one that may not be as big a departure as it might initially seem. While asserting a new category of the "intermediate" use of force for ECDs and similar devices, the court framed all of its particular application of the law to the facts in the context of the now familiar objective reasonableness framework of *Graham v. Connor*.

The use of a particular level of force must be justified by the need for the force, looking at such factors as the seriousness of the offense, the level of resistance of the suspect, and any threat the suspect poses to the safety of the officer or members of the community.

Application of these principles, as set forth by the court in *Bryan*, is very much fact specific.

The case serves as a valuable reminder that each use of force must be justified by a need for it, and that officers must consider the risk of inflicting pain and injuries from falls in deciding whether the use of the ECD is appropriate under the circumstances confronted, and, when possible, an officer should consider whether "less intrusive tactics" can be utilized to control an individual and carry out a seizure, with particular application to special circumstances discussed in the opinion, such as encounters with mentally ill persons.

The court also acknowledged the difficulties that officers often face in making split-second decisions concerning the need to use force. Good training on the use of force, both the practical and legal aspects of it, is key to preparing officers to be able to make the best and safest decisions possible within the limitations of the time available, based on familiarity with a variety of possible scenarios and the prior caselaw.

Michael Brave, a prominent police trainer and national litigation counsel for TASER International, summarized the lessons of the *Bryan* case as:

1. Taser devices are not risk free and officers need to take into consideration the risk of secondary injuries from incapacitation and falls in determining when and how to deploy a Taser device.
2. Taser devices, while non-lethal, are an “intermediate or medium, though not insignificant” use of force and every trigger pull must be justified as a separate use of force.
3. In any use of force analysis, an officer must consider “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”
4. When circumstances allow, giving a Taser warning and an opportunity to comply is very important prior to discharging a Taser device.
5. An officer must consider other less intrusive tactics that would have been available to effect the arrest and be able to articulate them in an arrest report.
6. An officer must ensure that commands are clear, are being heard and the suspect has the opportunity and ability to respond.
7. Understanding the difference between active and passive resistance and the different levels of use of force that can be applied in those different circumstances is very important for all officers no matter the use of force involved.
8. Officers need to understand what constitutional rights are “clearly established in light of the specific context of the case” in order to avail themselves of the protection of qualified immunity in excessive use of force claims.
9. This case highlights the importance that smart use training can play in teaching officers the proper use of a Taser device in accordance with judicial guidelines.

As for the fourth point above, the giving of warnings before using the ECD, the court says that warnings should be given “when feasible.” It is, of course, entirely possible that there will be circumstances where the need to make a split-second response to a threat will render the giving of such a warning either not possible or not suitable under the circumstances

In [Mattos v. Agarano](#), #08-15567, 2010 U.S. App. Lexis 694 (9th Cir.), in which the court’s chief judge was on the per curiam panel, the court cited *Bryan* and applied its principles in determining that the use of a Taser ECD against a husband in a domestic violence case did not violate his rights, given the close quarters in which the officers and the plaintiffs encountered each other and the intoxicated state the husband was in, which indicated that the officers faced a very real threat of immediate harm.

The appeals court's ruling in *Bryan*, it should also be recognized, is not the final result of the lawsuit. It is merely a decision that the defendant officer was not entitled to summary judgment on the basis of a defense of qualified immunity. Such a defense, when successful, eliminates the need for a trial. In deciding whether the officer could prevail on this basis, the appeals court was required to resolve all arguable inferences in favor of the plaintiff and against the officer. Since this defense was unsuccessful, a jury will now be confronted with the task, after viewing the evidence, of deciding whether the officer acted in an objectively reasonable manner, under the circumstances he faced at the time.

* Nomenclature: Various writers refer to the instrument as a CED or CEW (Conducted Energy Device or Weapon), or an ECD or ECW (Electronic Control Device or Weapon), or an EMD weapon (Electro-Muscular Disruption), or an electroshock weapon or stun-gun. Like Xerox ® and Kleenex ®, T.A.S.E.R. ® (Thomas A. Swift Electric Rifle) is now the popular name for all hand-held, electric-discharging muscle immobilizers, even though a single manufacturer dominates the world market [Nasdaq: TASR]. For simplicity, AELE refers to all conducted energy weapons as "Tasers".

Resources

The following are some useful resources related to the subject of this article.

- [TASER International Training Bulletin 15.0](#). (Oct. 2009).
- [Website](#) of TASER International, Inc.
- [Electronic Control Devices Legal Resources website](#).
- [Institute for Prevention of In-Custody Deaths website](#) (in particular the articles page).

Prior Relevant Monthly Law Journal Articles

- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part I: 4th Amendment claims for excessive force](#), 2007 (3) AELE Mo. L.J. 101.
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part II: Use against juveniles, and inadequate training claims](#), 2007 (4) AELE Mo. L.J. 101.

- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices--Part III: Use Against Detainees and Disabled or Disturbed Persons](#), 2007 (5) AELE Mo. L.J. 101.
- [Electronic Control Devices: Liability and Training Aspects](#), by Edmund Zigmund, 2007 (5) AELE Mo. L.J. 501.

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- Michael Brave and Mildred K. O'Linn, "Bryan v. McPherson - A New Standard for the Use of Electronic Control Devices?" [The Police Chief](#) Vol. 77 No. 3, March 2010.
- Strote, Jared; Walsh, Mimi; Angelidis, Matthew; Basta, Amaya; Hutson, H Range, [Conducted Electrical Weapon Use by Law Enforcement: An Evaluation of Safety and Injury](#), The Journal of Trauma, 22 December 2009,
- John M. MacDonald, Robert J. Kaminski, and Michael R. Smith, "[The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events](#)" Am J Public Health, published 21 October 2009, 10.2105/AJPH.2009.159616.
- [Report](#) of the Nova Scotia Panel of Mental Health and Medical Experts Review of Excited Delirium (June 30, 2009). Discusses the phenomena referred to as excited delirium in the context of the use of conducted energy devices (CEDs) on persons displaying agitated, aggressive, irrational conduct.
- "[Compliance Report. Wisconsin's Electronic Control Device training compared with USDOJ recommendations made to Orange County, Florida](#)," Wisconsin Department of Justice Training and Standards Bureau. (May, 2009).
- "[Comparison Report. Wisconsin Electronic Control Device training and Amnesty International recommendations](#)," Wisconsin Department of Justice Training and Standards Bureau. (May, 2009).
- "A Multi-Method Evaluation of Police Use of Force Outcomes," University of South Carolina TASER ECD Three-Year Study. [Summary](#). [Full NIJ Report](#).
- Report of the American Medical Association (AMA) Council on Science and Public Health on "[Use of Tasers by Law Enforcement Agencies](#)." (June 15, 2009).

- William P. Bozeman, William E. Hauda, Joseph J. Heck, Derrel D. Graham, Brian P. Martin, James E. Winslow, [Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects](#), Annals of Emergency Medicine April 2009 (Vol. 53, Issue 4, Pages 480-489)
- [Taser® Electronic Control Devices: Physiology, Pathology, and Law](#) (Hardcover), by Mark W. Kroll (Editor), Jeffrey D. Ho (Editor), List Price: \$119.00. (Springer, March 15, 2009).

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