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## **Ninth Circuit finds that the use of a TASER<sup>®</sup> constituted excessive force Two cases involved noncompliant subjects**

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The Ninth Circuit has issued a decision finding that excessive force was used in two incidents where officers utilized Tasers against noncompliant subjects. [Mattos v. Agarano](#), #08-15567, 2011 U.S. App. Lexis 20957 , 2011 WL 4908374, was submitted and decided together with [Brooks v. City of Seattle](#), #08-35526. The opinion was issued on October 17, 2011. The issue in both cases was whether the defendant officers were entitled to qualified immunity from the plaintiffs’ claims of Fourth Amendment violations for unreasonable and excessive use of force.

The doctrine of qualified immunity shields a peace officer (or other government official) from civil liability for conduct that “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” [Harlow v. Fitzgerald](#), #80-945, 457 U.S. 800, 818 (1982).

This balances the “need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability

when they perform their duties reasonably.” [Pearson v. Callahan](#), #07-751, 555 U.S. 223, 231 (2009).

The qualified immunity determination is a two-step test: first, viewing the facts in the light most favorable to the plaintiff, the court must decide whether the officer violated the plaintiff’s constitutional right; if so, the court must decide whether the right was clearly established in the context of the specific case at the time of the event. [Saucier v. Katz](#), #99-1997, 533 U.S. 194, 201 (2001).

Whether a use of force is reasonable or whether it is excessive is determined by the facts of the situation, and involves balancing governmental interests against the nature of quality of the intrusion on the individual’s Fourth Amendment rights. [Graham v. Connor](#), #87-6571, 490 U.S. 386 (1989), guides this determination.

Factors involved in determining the governmental interests at stake include: “(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.” [Chew v. Gates](#), #91-55718, 27 F.3d 1432, 1440 (9th Cir. 1994), *citing* [Graham](#), 490 U.S. at 396.

Whether a right was clearly established at the time of the event depends on whether it was “‘sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” [Ashcroft v. al-Kidd](#), #10-98, 131 S.Ct. 2074, 2083 (2011), quoting [Anderson v. Creighton](#), #85-1520, 483 U.S. 635, 640 (1987).

This does not require that there be case law exactly on point, but “existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* This takes into account that officers are required to exercise their discretion while performing their official duties and are often called upon to make split-second decisions in uncertain or intense situations.

Applying this test in the *Mattos/Brooks* cases, the Ninth Circuit determined that while the facts as alleged by the plaintiffs amounted to excessive force, the defendant officers were entitled to qualified immunity in both cases because the law regarding use of force with respect to Tasers was not clearly established at the time of the incidents.

## **Malaika Brooks incident**

On November 23, 2004, in Seattle, Washington, Brooks was driving her 11 year-old son to school. Brooks was seven months pregnant at the time. Brooks entered the 20-mile-per-hour school zone driving 32 miles per hour and was pulled over by police officer Juan Ornelas. Brooks' son exited the car to go to school as Brooks gave her license to Ornelas. When Ornelas cited Brooks for speeding, Brooks insisted she had not been speeding and refused to sign the citation.

Officer Donald Jones then asked her to sign the citation and explained that it was not an admission of guilt but a confirmation that she had received the citation. Brooks told Jones he was lying and continued to refuse. Jones advised her that if she did not sign the citation she would go to jail. Sergeant Steven Daman arrived and also asked Brooks to sign the citation. Brooks again refused. Slip op. at 19007-08.

Ornelas told Brooks to get out of the car because she was going to jail. Brooks refused to get out of the car. The car was still running at this point. Jones then pulled out a Taser, showed it to Brooks, and asked if she knew what it was. Brooks indicated she did not know what it was, then informed the officers that she was pregnant. After learning this, the officers discussed where to tase Brooks.

Ornelas then opened the car door and twisted Brooks' arm up behind her back; Brooks stiffened her body and clutched the steering wheel to prevent the officers from pulling her out of the car. Jones cycled his Taser, showing Brooks what it did. Around this time, Ornelas was able to remove the car keys from the ignition and drop them onto the floor of the car. Slip op. at 19008-09.

Jones then applied the Taser to Brooks' clothed thigh in drive-stun mode. Brooks began to cry and started honking her car horn. Thirty-six seconds later, Jones applied the Taser to Brooks' bare left arm, and six seconds later he applied it to her neck. Brooks fell over in the car, and the officers were able to drag her out and handcuff her. Slip op. at 19009.

Brooks did not experience any lasting injuries from the tasing but sustained several permanent burn scars. Her daughter was born healthy approximately two months later. Brooks sued the City of Seattle, the police chief, and the involved officers for excessive force in violation of the Fourth Amendment, the City and the chief for negligence, and the officers for assault and battery.

The officers moved for summary judgment on the grounds of qualified immunity. The district court denied the motion as to the excessive force claim, ruling that Brooks had alleged facts supporting a Fourth Amendment claim and that the officers were not entitled to qualified immunity. The officers appealed. Slip op. at 19009-10.

Addressing the excessive force question first, the Ninth Circuit held that a reasonable fact-finder could conclude that the officers' use of force was constitutionally unreasonable and excessive. The Court found that Brooks had not committed a serious violation and that she did not pose a threat to the officers.

While acknowledging that Brooks was actively resisting arrest and physically frustrating the officers' efforts to remove her from the car, and that Brooks bore "some" responsibility for the escalation of the situation, the Court concluded that Brooks' resistance did not involve violence towards the officer and she was not attempting to flee, so the situation was not urgent.

In further support of this conclusion, the Court cited the fact that the officers were deliberate and thoughtful in their actions, and that no evidence was presented that their presence was needed elsewhere.

Other facts important to the Court's determination of excessive force, were that the officers knew Brooks was pregnant and that the officers tased her three times in less than one minute, purportedly giving her no time to recover and rethink her decision not to get out of the car. Slip op. at 19020-23.

This decision begs the question: What were the officers supposed to do? Let her go even though they had cause to arrest her? Wait there for hours hoping she would finally comply and exit the car? Forcibly pull her from the car by the arm, which could have caused more severe and permanent injury than a Taser?

Chief Judge Kozinski, concurring in the judgment but dissenting from the determination as to excessive force, stated that Brooks was lawfully under arrest but noncompliant, leaving officers with no alternative. Slip op. at 19040. An arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.*, quoting [\*Graham v. Connor\*](#), 490 U.S. at 396. Chief Judge Kozinski strongly disagreed with the majority's dismissive statement that Brooks bore "some" of the responsibility for

what happened:

“Brooks is completely, wholly, 100 percent at fault. Had she behaved responsibly, she’d have driven away in a few minutes with no complications. Instead, Brooks risked harm to herself, her unborn daughter and three police officers because she got her dander up over a traffic ticket. The officers, for their part, were endlessly patient, despite being called liars and otherwise abused by Brooks. They deserve our praise, not the opprobrium of being declared constitutional violators. The City of Seattle should award them commendations for grace under fire.” Slip op. at 19042.

Judge Silverman, also concurring in the judgment but dissenting from the determination as to excessive force, added, “There are only so many ways that a person can be extracted from a vehicle against her will, and none of them is pretty... In this case, tasing was a humane way to force Brooks out of her car, causing her only fleeting pain and virtually no other harm whatsoever.” Slip op. at 19046-47.

Still, the Ninth Circuit ultimately determined that the officers were entitled to qualified immunity because the law in this area was not clearly established at the time of the incident. In November 2004, there were three federal circuit cases dealing with the use of Tasers: [\*Russo v. City of Cincinnati\*](#), #90-3432, 953 F.2d 1036 (6th Cir. 1992); [\*Hinton v. City of Elwood\*](#), #91-3327, 997 F.2d 774 (10th Cir. 1993); and [\*Draper v. Reynolds\*](#), #03-14745, 369 F.3d 1270 (11th Cir. 2004).

None of these cases found a Fourth Amendment violation arising from an officer’s use of a Taser. Therefore, even though the Court did conclude that the tasing of Brooks constituted excessive force and violated the Fourth Amendment, the Court could not conclude that a reasonable officer would have *known* it constituted excessive force because there were no prior cases that would have given him or her that knowledge. Slip op. at 19024-28.

### **Jayzel Mattos incident**

On August 23, 2006, in Maui, Hawaii, Jayzel and her husband Troy had a domestic dispute, and Jayzel asked their 14 year-old daughter to call the police. Officers Darren Agarano, Halayudha MacKnight, and Stuart Kunioka arrived and found Troy, who was approximately six feet three inches tall and 200 pounds, sitting at the top of the porch

steps, smelling of alcohol, with open beer bottles lying nearby.

Officer Ryan Aikala also responded shortly thereafter. Troy told Kunioka the he and Jayzel had an argument but nothing physical had occurred. Troy then became agitated and rude as Kunioka continued to question him. Kunioka asked to speak with Jayzel, and when Troy went inside to get Jayzel, Agarano stepped into the residence behind him.

When Troy returned with Jayzel, he became angry at seeing Agarano inside the house, and yelled at him to get out. Jayzel had followed behind Troy, but ended up standing in front of him while on her way to the front door to speak with the officers. Slip op. at 19010-11.

Jayzel agreed to go outside to speak with the officers, but before she could comply with the request, Aikala entered the residence and announced that Troy was under arrest. Jayzel was standing in front of Troy and did not immediately move out of the way when Aikala approached.

According to Jayzel, as Aikala moved in to arrest Troy, he pushed up against Jayzel's chest, and she "extended [her] arm to stop [her] breasts from being smashed against Aikala's body." Aikala asked Jayzel, "Are you touching an officer?"

At this time, Jayzel was speaking to Agarano, asking why Troy was being arrested and asking everyone to calm down and go outside so as not to wake her children. Then, apparently without warning, Aikala shot his Taser at Jayzel in dart-mode. Jayzel and Troy were both arrested - Jayzel for harassment and obstructing government operations, Troy for harassment and resisting arrest. Slip op. at 19011.

The Mattoses sued the officers for violations of the Fourth, Fifth, and Fourteenth Amendments based on the warrantless entry into their home, the arrests, and the use of the Taser on Jayzel. The officers moved for summary judgment, and the district court granted summary judgment for the officers on all claims except the Fourth Amendment excessive force claim for the tasing.

The district court concluded it could not determine qualified immunity because there were material questions of fact as to whether the tasing was constitutionally reasonable. Slip op. at 19012. The officers appealed.

Just as in the *Brooks* matter, the Ninth Circuit held that a reasonable fact-finder could conclude that the use of force was constitutionally unreasonable and excessive. The Court has previously determined, in [Bryan v. MacPherson](#), #08-55622, 630 F.3d 805 (9th Cir. 2010), that a Taser employed in dart-mode “constitute[s] an intermediate, significant level of force.” Slip op. at 19018, 19028, quoting *Bryan*, 630 F.3d at 826.

The Court had not determined what level of force is used when a Taser is employed in drive-stun mode, as it was in the *Brooks* incident, and declined to make that determination in the *Brooks* case due to an insufficient record as to the level of force. Slip op. at 19018-19.

The Court determined that, viewing the facts in the light most favorable to the Mattoses, Jayzel’s actions did not rise to the level of obstruction, as she claimed she was putting up her arm to stop Aikala from pressing up against her breasts, so “the severity of the crime, if any, was minimal.” Slip op. at 19029. Also important to the Court’s determination of excessive force was the fact that Jayzel was apparently unarmed, did not threaten the officers, and was trying to get everyone to calm down. Slip op. at 19029-30.

With respect to whether Jayzel was resisting the officers’ arrest of Troy, the Court concluded that her resistance, if any, was minimal, as she was caught between Aikala and Troy and was trying to defend herself from physical contact. “That being said... Jayzel did not immediately move out of the way to facilitate the arrest. For the purposes of this *Graham* factor, however, we draw a distinction between a failure to facilitate an arrest and active resistance to arrest.” Slip op. at 19030.

While acknowledging that domestic disputes are volatile and pose a potential threat to officer safety, the Court ultimately determined that it was unreasonable for Aikala to tase the “potential non-threatening victim of the domestic dispute whom the officers ostensibly came to protect,” particularly since Aikala gave Jayzel no warning before tasing her. Slip op. at 19030-32.

Nevertheless, for the same reason as in the *Brooks* case, the Court concluded that the law with respect to this violation was not clearly established at the time of the incident, so the officers were entitled to qualified immunity. Slip op. at 19034.

## Consequences for law enforcement

1. The law regarding Taser use has only begun to develop in recent years. As it continues to develop it will impact and shape the use of this device that has now been adopted by most law enforcement agencies as a non-lethal force alternative.
2. While this case was a technical victory for the officers, in that they were awarded qualified immunity, the Court's determination of excessive force in both incidents has set a precedent that affects what will be considered permissible use of a Taser in situations where officers encounter a noncompliant subject.
3. Of particular concern is the decision in the *Malaika Brooks* matter, where it was undisputed that Brooks was actively resisting arrest and physically preventing herself from being extracted from her car, yet the use of non-lethal force causing no lasting injury was determined to be excessive.
4. This decision appears to have drastically reduced officers' options for dealing with a physically noncompliant arrestee.

Judge Kozinski's dissent summarizes the consequences of this ruling for law enforcement:

"The majority and concurrence get the law wrong, with dire consequences for police officers and those against whom they're required to use force. My colleagues cast doubt on an effective alternative to more dangerous police techniques, and the resulting uncertainty will lead to more, worse injuries. This mistake will be paid for in the blood and lives of police and members of the public.

"Today's decision, though nominally a victory for the officers, is a step backward in terms of police and public safety." Slip op. at 19046.

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## Reference

1. Use of TASER ruled unconstitutional by Ninth Circuit, Jones & Mayer *Client Alert* (Vol. 26, No. 26, Oct. 19, 2011). *The firm concentrates in public entity representation.*
2. [TASER use was unconstitutional](#), by Jack Ryan Esq., Legal & Liability Risk Management Institute (Oct. 19, 2011).
3. TASER<sup>®</sup> is a Trademark of [TASER International Inc.](#)

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