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# LEGAL DEFENSE TRUST TRAINING BULLETIN

*MICHAEL P. STONE, GENERAL COUNSEL*

6215 River Crest Drive, Suite A, Riverside, CA 92507

Phone (951) 653-0130 Fax (951) 656-0854

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## OFFICERS' USE OF TASER ON SUSPECT IS REASONABLE

**Marquez v. City of Phoenix, filed September 11, 2012**

**United States Court of Appeals, Ninth Circuit**

**by**

**Muna Busailah**

**and Robert Rabe**

In this case, the court had to decide if an officer, who repeatedly deployed a "taser" against a combative suspect, used constitutionally excessive force.

Responding to a call, officers entered the home and proceeded to a bedroom. Upon entering the room, the officers found blood smeared on the walls and furniture. There was a screaming woman naked in a corner and the suspect was on the bed holding a young girl in a chokehold.

When the suspect did not release the girl, one of the officers fired his taser at him. The taser did not appear to be having an effect, but the officers were able to rescue the young girl. When the suspect then started kicking the

officer in the thighs and groin, the officer decided to apply the taser in "drive-stun mode" - where the weapon's exposed electrodes are in direct contact with the skin. "Drive-stun mode" does not incapacitate the target, but instead encourages the individual to comply by causing pain. Each of the two officers used the taser against the suspect several times and they were finally able to wrestle him into submission. The suspect went into cardiac arrest and died.

The family of the deceased brought the lawsuit, suing the officers for excessive force in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983 and state-law wrongful death. The district court concluded

that the officers' repeated use of the taser was reasonable given that "the officers were confronted with an individual suspected of serious crimes, who was a potential threat, and who, by all accounts, was resisting arrest." The family appealed. Not disputing that the officer was justified in using the taser in order to rescue the child, they contended that any justification for the use of force dissipated once she was at a safe distance from the suspect.

The Court of Appeal remarked that "police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." While the existence of less forceful options is relevant, "police officers are not required to use the least intrusive degree of force possible." The court had to balance the suspect's Fourth Amendment interests against the governmental interests at stake. Key to this inquiry are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting or attempting to evade arrest by flight." Under the facts of this case, the court concluded that "although the officers used significant force in this case, it was justified by the considerable government interests at

stake." In dismissing the state law claim, the court also ruled that the use of a taser does not involve "deadly physical force" because there is no evidence (or case holding) a taser is capable of creating a *substantial* risk of death or serious physical injury.

COMMENT: In reaching its decision, the Ninth Circuit Court of Appeal, twice compared and contrasted the interest in using force against this suspect with that where police are summoned to a scene to protect a mentally ill offender from himself, where the government has less interest in using force - perhaps even foreshadowing what its decision might be in the now infamous Fullerton case, where the suspect also died. Officers must always consider what danger the suspect poses against themselves and others when deciding what level of force to use.

Stay Safe!

Muna Busailah and Robert Rabe