

Current Case Law on Use of Tasers

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On May 29, 2012 decision of the U.S. Supreme Court not to review the Ninth Circuit's en banc opinion in *City of Seattle v. Brooks and Mattos v. Aragano*, 661 F.3d 433 (9th Cir. 2011). This means that the Ninth Circuit decisions in those cases remain binding authority in California.

Summary of *Brooks and Mattos*

Brooks involved an incident in November 2004 in which a pregnant woman was cited for speeding and refused to sign the ticket or step out of her vehicle. The officers applied a taser in drive stun mode against her three times within one minute. The Ninth Circuit held, in its en banc decision, that the force used against Ms. Brooks was excessive in light of the severity of the crime (a misdemeanor) and lack of threat posed to the officers by Ms. Brooks' non-violent resistance. However, the Court held that the officers were entitled to qualified immunity because the law prohibiting taser use under the circumstance was not clearly established in November 2004.

In the *Mattos* case, officers responded to a domestic dispute call in August 2006. At some point during the call, an officer began moving forward to arrest the husband, Troy Mattos. The wife, Jayzel Mattos, was standing between the officer and her husband and made contact with the officer's arm as he moved forward, at which point she was tased in prong mode without warning. In its en banc opinion, the Ninth Circuit held that the use of a taser on Ms. Mattos was excessive. The Court noted that Ms. Mattos did not pose a threat to officers and distinguished her failure to move out the officer's way from active resistance of an arrest. Additionally, the Court stated that the officer's failure to warn Ms. Mattos prior to deploying the taser weighed in favor of a constitutional violation. The Court also held that the officers were entitled to qualified immunity because the law was not clearly established in August 2006.

Significance of *Brooks and Mattos*

Although the individual officers in *Brooks* and *Mattos* were found to be entitled to qualified immunity for their actions, the Court's opinion that the use of the taser in both cases was excessive serves to put officers and police departments on notice of the types of circumstances under which the use of a taser may be improper. So, as of October 2011, (the date the *Brook sand Mattos* en banc decision was issued), an officer who applies a taser in drive stun mode on a passively resisting subject for a minor offense will not be entitled to qualified immunity because the court has determined that manner of taser use is not reasonable. Similarly, qualified immunity will not apply to an officer who deploys a taser in dart mode against a non-threatening subject who fails to move out of an officer's way and, in so doing, makes incidental contact with the officer. Again, the court has determined that this is not reasonable. Using the taser under these factual circumstances would likely be viewed by a federal court as an unreasonable and excessive use of force in violation of the Fourth Amendment.

Recent California Taser Case

The California Court of Appeal for the Second Appellate District recently issued an opinion in *Mendoza v. City of West Covina* (2012) 2012 Cal.App. LEXIS 639, affirming a \$1.5 million wrongful death verdict against a police department and an officer for excessive force violations under section 1983. The case involved an incident in 2007 in which a man in medical custody who was handcuffed to a chair, died of asphyxiation after he was tased and punched repeatedly, and held down by several officers. Holding that the defendant officer was not entitled to qualified immunity for his actions, the court distinguished the situations in *Brooks* and *Mattos* where officers used a taser on subjects who were offering "some apparent resistance," from the situation in *Mendoza* where the subject was tased and punched after becoming compliant. The decision in *Mendoza* indicates that California courts are looking to federal decisions for guidance on section 1983 issues involving tasers.

Note: Although not challenged on appeal, the jury found that the individual officer acted with "malice, oppression and/or fraud" and assessed punitive damages in the amount of \$4,500. However, the jury also found that the subject was 30% at fault. The court rationalized the jury's verdict as an indication that the jury believed that the subject had resisted to some extent prior to the initial tasing but had become compliant prior to the subsequent uses of the taser.

Takeaway Points

The following are practical suggestions about how to apply the Ninth Circuit's guidance:

1. Deploy tasers for defensive purposes - i.e. Self-defense or defense of others;
2. It is best **not** to use a taser simply to force compliance with an officer's commands;
3. Consider alternatives (e.g. verbal commands, OC spray, baton, etc) and make note of your consideration of alternatives in your report;
4. Give warnings prior to deploying a taser whenever possible to do so;
5. Use caution when deploying taser; consider both your location (i.e. if there is a significant fall down risk) and the number of times/duration of taser cycles.

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