

Ninth Circuit No. 08-35526

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALAIKA BROOKS

Plaintiff - Appellee,

v.

CITY OF SEATTLE et al.,

Defendants - Appellants.

*Brief of Amici Curiae National Police Accountability Project
and Human Rights Defense Center In Support of Plaintiff-Appellee*

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are National Police Accountability Project (NPAP) and Human Rights Defense Center (HRDC). *Amici curiae* are either not corporate parties or are corporate parties that do not have any parent corporations, and no public company owns 10% or more of their stock.

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INTERESTS OF *AMICI CURIAE*

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and corrections officers by coordinating and assisting civil rights lawyers. The project presently has more than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as *amicus curiae* in cases, such as this one, which present issues of particular importance for the clients of its lawyers, who are sometimes subjected to the effects of TASER products.

The Human Rights Defense Center (HRDC) is a Washington state non-profit, charitable corporation based in Vermont that publishes a nationally distributed monthly journal called Prison Legal News (PLN). Since 1990, PLN has reported on news, recent court decisions, and other developments relating to the civil and human rights of prisoners in the United States and abroad. PLN has the most comprehensive coverage of detention facility litigation of any publication. In addition to reporting on the human and civil rights of prisoners, PLN also reports on the rights of crime victims, prison and jail employees, and prison and jail visitors. PLN has approximately 6,800 subscribers in all fifty states and abroad and eight times as many readers.

Approximately sixty-five percent of PLN subscribers are state and federal prisoners. The remainder are attorneys, judges, advocates, journalists, academics and concerned citizens. PLN's website, www.prisonlegalnews.org, receives approximately 100,000 visitors per month.

In addition to publishing PLN and non-fiction reference books, HRDC has regularly filed litigation under the First Amendment in federal courts nationwide, challenging prison officials who censor PLN, seeking public records from government agencies and also providing representation in select prisoner cases. HRDC is concerned with the treatment of prisoners, and is interested in the standards to govern the use of TASER International products and similar devices in the corrections setting.

SUMMARY OF ARGUMENT

Electrical control devices (ECDs) – primarily products manufactured by TASER International, Inc. – are handheld weapons that deliver rapidly pulsing electrical current into human beings.¹ ECDs cause intense pain and incapacitating muscle contractions, either through two darts attached to wires, or directly from contact with exposed electrodes, which TASER International refers to as a “drive-stun.” ECD use has become ubiquitous in law enforcement and corrections.

This Court recently made three decisions relating to ECD use. In *Bryan v. McPherson*, 590 F.3d 767 (9th Cir. 2009) (affirming denial of qualified immunity), *opn. withdrawn and replaced*, 608 F.3d 614 (9th Cir. 2010) (finding constitutional violation but reversing denial of qualified immunity) (petition pending for rehearing with suggestion of rehearing en banc), the panel held the ECD in dart (or probe) mode to “constitute an intermediate, significant level of force that must be justified by ‘a strong government interest [that] *compels* the employment of such force.’” 608 F.3d at 622 (quoting *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003)). Aside from the amended ruling that the governing law was not clearly established in July 2005, when the device was used, *Amici* agree with the panel’s

¹An ECD is frequently referred to as a “taser.” “TASER” is a registered trademark owned by TASER International, Inc. “Stun gun” is an unfortunate expression because it fails to describe accurately the effect of an ECD. Besides “ECD,” there are other expressions and acronyms for the weapons, including conducted electrical device (CED), conducted electrical weapon (CEW), electrical control weapon (ECW) and neuro-muscular incapacitator (NMI).

analysis, and particularly its emphasis on the *potential* risks of injuries posed by ECDs.

Between the *Bryan* opinions, two other Ninth Circuit panels rendered published decisions which to some extent conflict with *Bryan*, *Mattos v. Agarano*, Ninth Cir. No. 08-15567, and *Brooks v. City of Seattle*, 08-35526. These two decisions are now consolidated and under en banc review. In *Brooks*, an officer drive-stunned a pregnant woman three times while she was sitting in her car, the keys having been removed from the ignition, distinguishing *Bryan* in part by the lack of darts. In *Mattos*, an officer shocked a woman in her home during an investigation of alleged domestic violence. The panel opinion did not say whether the ECD was used in dart mode or as a drive stun, but *Amici* understand that, like *Bryan*, it was a dart mode application.

The *Mattos* panel decried the lack of a full factual record about ECDs, stating “The problem here is that, even with the benefit of some briefing and argument on the subject, it is difficult for us to opine with confidence regarding either the quantum of force involved in a deployment of a Taser gun or the type of force inflicted.” This problem arises from the fact that *Mattos* and *Brooks*, like *Bryan*, for that matter, are interlocutory appeals from denials of summary judgment where the record is rife with factual disputes. In the view of *Amici*, this Court would be well served to examine jurisdiction over such appeals early on, and dismiss them where the district court’s order denying qualified immunity is based on issues of fact. *See Eng v. Cooley*, 552 F.3d 1061, 1067 (9th Cir. 2009). Appeals from final judgments provide better records for essential factual determinations such as the degree of risk posed by ECDs.

Amici file this brief, with a short addendum of TASER International training materials, to bring to the attention of the en banc panel the background of ECD development, and health and safety risks arising from ECD use either in dart mode or as a drive stun. Due to their intense pain and serious medical risks, including brain damage and death, *Amici* urge that this Court hold that any law enforcement or correctional use of an ECD be considered a high level of force which must be justified under *Graham v. Connor*, 490 U.S. 386 (1989), for arrests, or *Hudson v. McMillian*, 503 U.S. 1 (1992), in jails or prisons.

I. ECD HISTORY, TECHNOLOGY AND USAGE

A. The History of the ECDs Used in *Brooks* and *Mattos*

Jack Cover, an electrical engineer, developed ECDs in the early 1970s as a “less-lethal” force option for law enforcement, whimsically naming his invention after the 1911 novel *Tom Swift’s Electric Rifle; or, Daring Adventures in Elephant Land*, one in a series of stories written for young males. Cover inserted an “A” in TSER to make the acronym pronounceable.² Cover’s original ECD fired two darts attached to wires and propelled by gunpowder. When both darts hit their target the ECD discharged a series of brief electric pulses – as short as 10 microseconds (ten millionths of a second) – at the rate of about 10 to 15 times a second.

Cover patented his invention in 1974, and the first sales occurred in 1976. The

²Contrary to TASER’s claim, see “Company Trivia,” located at <http://www.taser.com/company/Pages/trivia.aspx>, TASER is *not* an acronym for “Thomas A. Swift’s Electric Rifle,” as the character had no middle initial.

first generation ECDs used electrical output of approximately .4 joules per pulse – around seven watts per second. Despite the risks inherent in this new technology, there was no peer-reviewed scientific testing or medical evaluation performed before manufacturers began selling ECDs directly to law enforcement and correctional agencies for use on human beings. Governmental entities such as California’s Peace Officers Standards and Training (POST) did not promulgate standards for training or use. As a result, police and corrections agencies relied on training provided by manufacturers, a situation which remains essentially true today.

ECD use did not immediately become widespread, in large part because officers found that a motivated person could fight through the effects of the relatively low power output.³ There were, however, reports of deaths associated with ECD use.⁴

In 1993 Cover sold the “TASER” trademark, along with various licenses and

³*Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir.1992), provides a particularly tragic example of the original ECD’s lack of stopping power, leading to the shooting of an agitated and suicidal individual holding a knife in each hand.

⁴Kornblum, Ronald N., M.D., and Reddy, Sara K., M.D., *Effects of Taser in Fatalities Involving Police Confrontation*, Journal of Forensic Sciences, Vol. 36, No. 2, pp. 434-48 (March 1991) (reporting sixteen cases). In *McCranie v. State*, 172 Ga. App. 188, 322 S.E.2d 360, 361 n. 1 (1984), the court explained: “Apparently, at the time of the incident at issue, taser guns were not considered by prison officials to constitute deadly force. They have, however, since been classified as such at the [Georgia State] prison.” A few years later in *People v. Sullivan*, 116 A.D.2d 101, 500 N.Y.S.2d 644, 647 (1986), *order rev’d on other grounds*, 68 N.Y.2d 495, 510 N.Y.S.2d 518, 503 N.E.2d 74 (1986), the court, discussing ECDs as among the alternatives for controlling irrational persons, noted that “although the device was introduced in 1971 [*sic*], there has been great concern about the impact on people with heart problems and its use has been outlawed in this State.”

patents, to brothers Patrick “Rick” and Thomas Smith, the founders of TASER International, Inc. They changed the propellant to nitrogen, thus removing the product from regulation by the Bureau of Alcohol, Tobacco and Firearms,⁵ and then, to make the device more effective, and therefore popular with its law enforcement and corrections customer base, increased the power four-fold, to 1.76 joules per pulse, 26 watts a second.

TASER International introduced the ADVANCED TASER Model M26 late in 1999. Shaped like a pistol, it holds eight AA batteries and delivers, depending on the battery charge, between 15 to 20 pulses per second – each of 40 microsecond duration – at a peak current ranging from 15 to 17 amps.⁶ Although the Model M26 sold well, officers complained about its size, weight, and similarity to a firearm.⁷

⁵Presently, TASER International’s ECDs are within the jurisdiction of the Consumer Product Safety Commission. To *Amici’s* knowledge, the CPSC has conducted no testing of the products, nor offered opinions regarding their safety.

⁶Braidwood Commission on Conducted Energy Weapon Use, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia*, at 54-56 (June 2009). The testimony and reports of the Braidwood Commission, established to investigate the role ECDs played in the October 2007 death of Robert Dziekanski in the Vancouver International Airport, caught on video, are an invaluable resource for ECD technical issues, available at <http://www.braidwoodinquiry.ca>.

⁷There have been at least six officers who claimed they shot someone after confusing their firearm with an ECD, including a Bay Area Rapid Transit (BART) officer seen on video shooting and killing a man in Oakland, California, on January 1, 2009. Although that officer used a Model X26, most cases involved the Model M26, the shape and weight of which much more closely resembles those of a pistol. *Mehserle justified in using Taser, expert says*, San Francisco Chronicle, A-1, June 29, 2010; see also *Torres v. City of Madera*, 524 F.3d 1053, 1055 (9th Cir. 2008) (Model M26);

(continued...)

In 2003, TASER International substantially re-engineered the electronics and released the more popular Model X26, smaller, sleeker and lighter because it is powered by only two AA batteries. To generate the same stopping power from the weaker energy source, the Model X26 has a longer (100 microsecond) although flatter (peak three to five amps) waveform. The X26 regulates its pulse rate better, consistently delivering around 19 per second. The individual pulses delivered by each model contain roughly the same amount of electrical energy – 100 micro-coulombs. The Model X26 can be equipped with an optional video camera.

Product sales to corrections and law enforcement have been substantial despite ongoing concerns about product safety. *See, e.g., Taser Shares Fall Sharply Despite Gain In Earnings*, New York Times, February 9, 2005. According to TASER International, by the beginning of 2009, at least 350,000 officers in over 12,750 agencies in 45 countries used its products, estimating approximately 680,000 human volunteer exposures, generally law enforcement and corrections officers during ECD training, and 547,000 field uses.⁸

⁷(...continued)
Henry v. Purnell, 501 F.3d 374 (4th Cir. 2007) (model not identified).

⁸Braidwood, *supra* note 6, at 50.

B. The Operation and Effects of TASER ECDs

1. Dart Mode

Both the Model M26 and Model X26 operate the same way. A plastic cartridge clips onto the front of the “barrel.” Switching off the safety activates a laser sight, the dot of light representing the target for the top dart. Pulling the trigger fires two darts, each bearing a barbed point nine millimeters long, connected to wires ranging in length from 15 to 35 feet, with 21 feet being the most common. The top dart travels straight while the bottom dart angles downward so that the darts should spread one foot for each seven feet traveled. The wider the spread, the more effective the electrical discharge will be in causing muscle incapacitation. ECDs are more effective in the back than the chest due to the presence of more muscles and nerves.

2. Drive Stun

The officer can remove the cartridge altogether – exposing two electrodes – disengage the safety, pull the trigger, and shove the electrified tips into a person’s flesh to cause excruciating pain, albeit without the spread between electrodes necessary for muscle disruption to take effect. TASER International calls this tactic a “drive-stun.” *Amici* are troubled by the drive stun, which seems to have no legitimate law-enforcement purpose, but has a very high likelihood for abuse, as illustrated by *Brooks*.

Moreover, TASER International issues training materials encouraging officers to target drive stuns to the neck and groin. Drive-stuns typically leave tell-tale pairs of burn marks, and sometimes permanent scars. TASER International trains that “Probe

hits are usually more desirable than drive stuns” in part because of “fewer injuries.”

Addendum A.⁹

3. The ECD Electrical Current

Although darts frequently penetrate the skin, the current arcs at 50,000 volts, allowing it to jump through thick clothing when necessary. Much has been made about the “50,000 volt” shocks in early TASER International promotional literature and the popular media, but in fact there is far less voltage when the current flows through human tissue – approximately 7,000 volts for the Model M26 and 1,300 for the Model X26. Regardless, voltage – the “pressure” behind the flow of electrons – is not particularly relevant. Peak amperage, pulse duration, pulse rate and total charge per pulse are the important measurements for assessing physiological effects.

TASER International lists the amperage of its ECDs as being the range of two to three milliamps, using an irrelevant calculation for average current per second – over 99.8 percent of which consists of dead time between pulses – rather than the relevant measure of peak amperage per pulse.¹⁰ TASER International falsely claims that the device relies on current weaker than a Christmas light. In fact, the current per pulse is

⁹There is also a hybrid tactic. After a cartridge is fired, but still attached to the ECD, the electrodes are exposed. A person can be drive-stunned with the expended cartridge still in place. If there is also a dart attached somewhere on the person’s body, then the drive-stun will complete the circuit, and the path of the current will have the necessary spread for muscle disruption to occur.

¹⁰*Supra*, note 6, Braidwood Commission on Conducted Energy Weapon Use, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia*, at 54-56 (June 2009).

many times stronger.¹¹

Both the Model M26 and the Model X26 are set to cycle automatically for five seconds, accompanied by an audible clicking of the electrical pulses. The cycle can be ended sooner, however, by engaging the safety, or it can be prolonged by holding down the trigger longer than five seconds, continuing until the release of the trigger. Trigger pulls are recorded on a built-in computer chip TASER International calls the “dataport,” so the time, number and length of discharges can be determined with precision.

C. Medical and Safety Risks of ECDs.

ECDs pose a number of substantial risks of serious injuries. Besides the disfiguring scars which result from a drive stun, Addendum A (TASER training on the drive stun), a dart can hit a sensitive organ. Addendum B (TASER International training showing dart in eye). The electrical current can ignite flammable substances, including pepper spray. Addendum C (TASER International warning on igniting

¹¹According to the *Mattos* panel decision, “The defendants paint a benign portrait of the Taser, offering evidence that it has been used on over one million human subjects and has proven extremely safe, as well as evidence that the actual voltage applied to a subject’s body uses less electricity than a single bulb on a string of Christmas tree lights.” Many of the “over one million human subjects” were volunteers shocked through alligator clips or in “daisy chains” for minimal periods of time in controlled settings. As explained in this brief, safety issues are complex. The reference to “voltage” is wrong. The measure is amperage. Both the Model M26 and Model X26 have peak amperage many times greater than the one amp TASER International claims is needed to power a Christmas tree light, and more than enough peak current to interfere with cardiac function.

flammable substances). Particularly serious – as occurred in *Bryan* – are traumatic injuries due to fall, as the subject collapses with arms paralyzed, unable to protect himself or herself from impact. These injuries can be fatal. *See, e.g.,* Brooklyn Man Dies After Police Use a Taser Gun, *The New York Times*, Sept. 24, 2008 (fall from building). Finally, the intense muscle contractions caused by the device can result in serious orthopaedic fracture or dislocation. *See* C.M. Sloane, T.C. Chan, G.M. Vilke, *Thoracic Spine Compression Fracture after TASER Activation*, *J Emerg Med.* 2008;34(3):283-5 (back broken during voluntary exposure).

Perhaps most importantly, ECDs pose serious cardiac risks, which can result in significant brain injury or death, especially when exposure is to the chest, or is prolonged, or the person targeted is suffering from extreme agitation or delirium. Addendum D (current TASER International warnings that its products can cause cardiac arrest).¹²

The health consequences of ECDs were documented in the most thorough etymological study to date. Independent researchers from the University of California, San Francisco, School of Medicine determined that in-custody deaths increased six-fold during the year following the first deployments of TASER International products in the surveyed California law-enforcement agencies. Byron K. Lee, MD, Eric Vittinghoff,

¹²The warnings followed a verdict against *TASER International in Heston v. TASER International, Inc.*, for failing to issue adequate warnings about cardiac arrest resulting from acidosis caused by multiple, repeated or prolonged cycles. An appeal from the verdict has been argued and is presently under submission. Ninth Cir. Case Nos. 09-15327 and 09-15440.

PhD, Dean Whiteman, BS, Minna Park, Linda L. Lau, BS, and Zian H. Tseng, MD, *Relation of Taser (Electrical Stun Gun) Deployment to Increase in In-Custody Sudden Deaths*, Am J. Cardiol. Volume 103, Issue 6, Pages 877-880, 15 March 2009.

Amnesty International identified 334 deaths associated with TASER International products in the United States from June 2001 through August 2008, almost all cardiac arrests. *“Less than Lethal”? The Use of Stun Weapons in US Law Enforcement*, Amnesty International (2008).

Despite boasts from the manufacturer, there is no peer-reviewed data that ECDs reduce injury rates to officers or to the people on whom they are used.

II. SHOULD THERE BE QUALIFIED IMMUNITY FOR ECD USE?

Amici contend that the medical and safety risks of ECD use have been sufficiently established, along with the relevant legal standards, to hold the officers for trial on claims of excessive force in *Bryan*, *Mattos* and *Brooks*.

As explained above, many of the health and safety risks of ECDs are either obvious or taught to police officers and correctional officials during training. “[T]hough such training materials are not dispositive, . . . ‘it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned.’”

Drummond, 343 F.3d at 1059 (quoting *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir. 1998) and citing *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994)

(“Thus, if a police department limits the use of chokeholds to protect suspects from

being fatally injured, . . . such regulations are germane to the reasonableness inquiry in an excessive force claim.”)); *see also*, *Smith v. Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (en banc) (expert testimony concerning officers’ violation of state law enforcement standards and department policy is reliable for assessing whether force used was unreasonable), *cert. denied* 545 U.S. 1128 (2005).

Amici understand that not infrequently the person subjected to an ECD suffers only the excruciating – but transient – pain of the device, and perhaps two minor puncture wounds or burn marks. They urge that the Court, without minimizing the degree of this intrusion, consider the more serious health and safety risks posed by the device when deciding whether to extend qualified immunity to public officials under a given set of facts. *See Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994) (“To assess the gravity of a particular intrusion on Fourth Amendment rights, the factfinder must evaluate the type and amount of force inflicted.”), *cert. denied sub nom. City of Los Angeles v. Chew*, 513 U.S. 1148 (1995).

Accordingly, *Amici* urge the Court to decide that the use of ECDs constitute a high-level use of force – a serious “‘intrusion’ on a person’s liberty” – whether in dart mode or drive stun – which must be carefully balanced against any “‘countervailing governmental interests at stake’ to determine whether the use of force was objectively reasonable under the circumstances.” *Smith v. City of Hemet*, 394 F.3d at 701 (quoting *Graham*, 490 U.S. at 396), *cert. denied* 545 U.S. 1128 (2005).

III. CONCLUSION

Based on the foregoing, *Amici* urge the Court to affirm the denial of qualified immunity in both *Brooks* and *Mattos*, and to remand the cases for trials on their merits so that the respective finders of fact can determine, based on a full record, whether the defendants' use of ECDs to shock the plaintiffs were objectively reasonable under the circumstances.

Respectfully submitted,

Dated: October 21, 2010

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CERTIFICATION OF ELECTRONIC SERVICE

BROOKS v. CITY OF SEATTLE

Ninth Circuit Case Number: 08-35526

I, Sandy Leonardis, certify that on October 21, 2010, I electronically filed the foregoing Brief of Amici Curiae National Police Accountability Project and Human Rights Defense Center In Support of Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: October 21, 2010

_____/s/
Sandy Leonardis