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# *Police Misconduct and Civil Rights Law Report*

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## **POLICE PRONE RESTRAINT METHODS AND TASER-RELATED DEATHS**

by Lynne Wilson\*

### **Introduction**

Rahim Hadani had no idea that he was calling the police when he dialed 911. He wanted an ambulance. He had tried for over an hour to calm down his good friend, Roman Andreichikov. Nothing worked. Andreichikov, a 25 year old personal trainer and body builder, mumbled incoherently, picked at his skin and became increasingly agitated, flailing his arms and legs about. Andreichikov, coming off a five day drug binge, threatened repeatedly to jump from the balcony of his forty-fourth floor Vancouver, British Columbia (Canada) apartment. Darah Hansen, "Use of Taser Questioned by Dead Man's Family," Richmond (BC) News (Online Edition), May 27, 2004.

Hadani knew that he needed help. The crack cocaine addiction that Andreichikov had kicked for two years was once again devouring his easy-going personality. As he waited for paramedics to arrive, Hadani was able to get Andreichikov to sit on a couch where he held onto its arm and rocked back and forth. Dee Hon, "Dead in Custody: Tyee Special Report," June 21, 2004, The Tyee (an inde-

pendent internet media source) at [www.thetyee.ca/News](http://www.thetyee.ca/News) (summarizing Hadani's description of Andreichikov's death on May 1, 2004).

What greeted Hadani at the apartment door that night lacked even the illusion of help. A Vancouver Police officer entered abruptly with his M26 Taser in hand. Four burly Vancouver Police officers trailed single file behind him. Officers questioned Andreichikov about his name and date of birth, then told him to get off the couch and lie face-down on the floor. A large man, Andreichikov did as he was told, calmly. Dee Hon, "Dead in Custody: Tyee Special Report," June 21, 2004, The Tyee (an independent internet media source) at [www.thetyee.ca/News](http://www.thetyee.ca/News) (summarizing Hadani's description of Andreichikov's death on May 1, 2004).

Possibly because he was having difficulty breathing, Andreichikov suddenly flipped over onto his back. The officer with the Taser shot two probes into Andreichikov's leg and fired 50,000 volts of electricity into his body, overwhelming his nervous system and causing him to stiffen with involuntary muscle contractions. While he was still convulsing, the officers placed him back into a prone position for handcuffing. Three of the officers piled onto Andreichikov's body. One pushed his head against the floor. Two bent his legs at the knees while using their combined body weight to drive his ankles into his back. Dee Hon, "Dead in Custody: Tyee Special Report," June 21, 2004, The Tyee (an independent internet media source) at [www.thetyee.ca/News](http://www.thetyee.ca/News) (summarizing Hadani's description of Andreichikov's death on May 1, 2004).

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\* The author is a Seattle attorney who frequently writes for *Police Misconduct and Civil Rights Law Report*. She wishes to thank Los Angeles attorney Carol Watson for her generous help in writing this article. A shorter version appeared in *Covert Action Quarterly* No. 78 (Winter 2005).

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"I can't breathe." Hadani recalls hearing those last words from his friend as he watched with horror the three officers pressing their combined weight into his back. "If you're mumbling, you're still breathing," one of the officers replied. Thirty seconds later, Andreichikov died. Dee Hon, "Dead in Custody: Tyee Special Report," June 21, 2004, The Tyee (an independent internet media source) at [www.thetyee.ca/News](http://www.thetyee.ca/News) (summarizing Hadani's description of Andreichikov's death on May 1, 2004). The next day, local Vancouver newspapers barely mentioned Andreichikov's death except to say that an investigation was being conducted. Dee Hon, "Tasers: What Police and Media Aren't Saying," The Tyee, August 6, 2004. The British Columbia Coroner's Service has yet to publicly release a cause of death other than to say he suffered a "cardiac arrest." Hon, The Tyee, *supra* (June 21, 2004) (noting that it often takes up to a year to complete an inquest and investigation); Hansen, *supra*.

The tragic circumstances surrounding Roman Andreichikov's death speak volumes about the current complex controversy over police use of Tasers, law enforcement's newest, and increasingly popular less-lethal weapon. Taser International, Inc., maker of the most widely used stun gun weapon of the same trademarked name, boasts on its website [that over 6,000 law enforcement agencies around the world now use such "electronic control" weapons. Many U.S. police departments, including Houston, Phoenix, San Jose and Miami-Dade, have purchased the devices for every patrol officer and many more are sure to follow. At some point in the near future, it is conceivable that one Taser will be available for potential use during every police-citizen encounter, at least in the U.S. The current controversy over the possible harmful effects of Tasers has had virtually no impact on the ballooning sales. Subrata N. Chakravarty, "Taser Letter Says Some Customers May Delay Orders," Bloomberg News (January 11, 2005) (Taser International, Inc. sales doubled in 2003 to \$24.5 million and were expected to nearly triple in 2004 to \$68.7 million).

But the controversy is an important one for police misconduct attorneys who deal with excessive force cases, even in those cases that do not involve a wrongful death claim. Whether or not a Taser can be classified as "deadly force" in a particular set of circumstances is an important thing to know before deciding how to proceed. *See, e.g., Smith v. City of Hemet*, No. 02-56446 (9<sup>th</sup> Cir. January 10, 2005) (remanding to district court to decide whether use of police dog in the particular circumstances presented constituted deadly force). This article is an effort to shed some light on one aspect of the Taser controversy that has been neglected, the unnecessarily lethal role of the prone restraint methods that are used by police in almost every reported aggressive police takedown and subsequent death.

### The Post-Tasered Death Toll

It should come as no surprise that with increasing police use of the weapon, the numbers of post-Tasered in-custody deaths continues to mount. *See* Robert Anglen, "Autopsy Links

Taser to Death in Mesa," The Arizona Republic (Online Edition) (January 14, 2005) (90 deaths in the U.S. and Canada following "a police-Taser strike" since September 1999); Robert Anglen, "71 Cases of Death Following Stun-Gun Use," Arizona Republic, September 15, 2004 (summarizing known circumstances of such deaths reported between September 1999 and September 2004); Alex Berenson, "As Police Use of Tasers Rises, Questions Over Safety Increase," New York Times (front page), July 18, 2004 (noting that six deaths occurred in June 2004 alone).

Based on its own study of 74 such deaths, Amnesty International ["Amnesty"] has recently called for all U.S. law enforcement agencies to suspend their use of "electro-shock" weapons, pending "an urgent, rigorous, independent and impartial inquiry into their use and effects." *See* "USA: Excessive and Lethal Force? Amnesty International's Concerns About Deaths and Ill-Treatment Involving Police Use of Tasers" (November 30, 2004) ["Amnesty Report," available at [p. 2](#). Amnesty's concern stems from questions surrounding at least five of the deaths it analyzed where coroners "found the [Taser] directly contributed to the death, along with other factors such as drug abuse and heart disease." Amnesty Report at [p. 3](#). *See also* Anglen, *supra* (January 14, 2005) ("medical examiners in nine cases have cited the gun as a cause or contributing factor in someone's death"). If law enforcement agencies refuse to suspend their use of Tasers, Amnesty asks that their use be restricted to "situations where the alternative ... would be deadly force." Amnesty Report at [p. 3](#). The American Civil Liberties Union has also called for limiting police use of Tasers to those situations where an officer is justified in using deadly force. Letter from ACLU of Northern California to San Francisco Police Commission (September 21, 2004); Letter from ACLU of Colorado to Denver Police Chief (February 26, 2004).

Do Tasers really "cause" death, in either the legal sense or in the medical sense? Roman Andreichikov may have been suffering from the after-effects of a five day crack binge and he may have been Tased. But it was the combined weight of three police officers pressing down on his back and chest as he lay handcuffed and bound on his stomach that surely played the "but for" causal role in killing him. A careful look at the circumstances of almost any one of the post-Taser deaths listed in Amnesty's (or any other) account reveal a similar use of forceful physical takedown and prone restraint methods by the police. *See, e.g.,* Amnesty Report at [p. 77](#) (Louis Morris died in Orange County, Florida on October 21, 2003 from cocaine excited delirium and cardiac arrest after being hobble-restrained [prone] with handcuffs and ankle restraints) and [p. 71](#) (Vincent Del'Ostia died in Broward County, Florida in January 2002 from "cocaine toxicity" while prone with one officer's foot on his mid-back and hand and ankle cuffed behind back).

Coroners and medical examiners will sometimes briefly describe the restraint process but will almost uniformly attribute as a cause of death in these cases "cocaine toxicity" or "sudden, unexpected death associated with cocaine excited

delirium" or "cocaine excited delirium" or simply "cocaine overdose." See numerous examples in Amnesty Report Appendix 1 [Taser Deaths in USA and Canada 2001-2004] (i.e., Walter Burks, Louis Morris). This is so even though the National Association of Medical Examiners ["NAME"] states that "[i]n cases of sudden death related to police actions, the involvement of cocaine as a cause of death should be made with caution." NAME's "Position Paper on the Certification of Cocaine-Related Deaths," *The American Journal of Forensic Medicine and Pathology* Vol. 25, No. 1 (March 2004), pp. 11-13. Furthermore, according to NAME guidelines, deaths that are due to "positional restraint induced by law enforcement personnel or to choke holds or other measures to subdue" should be classified as "homicides." The "homicide" classification is necessary in part because the death results from "one or more intentional, volitional, potentially harmful acts directed at the decedent" but it is also necessary to reduce the "public perception that a 'cover-up' is being perpetrated by the death investigation agency." NAME "Guide for Manner of Death Classification" (February 2002) at p. 11 [found at [www.thename.org](http://www.thename.org)]

Not a single Taser-related death has been classified as a "homicide" as is suggested by NAME's guidelines. Even the autopsy report for James Borden, the most controversial of all of the "Taser-caused" demises [See details below], lists the manner of death as an "accident." Terre Haute, Indiana Regional Hospital Autopsy Report (December 15, 2003).

The most recently reported "Taser-caused" death illustrates how much the universally used and potentially lethal police prone restraint methods are downplayed and/or "covered up" in coroners' findings. Twenty-nine year old Milton Salazar of Flagstaff, Arizona died on July 23, 2004 two days after being Tased twice during "a struggle with Mesa police officers." Anglen, "Autopsy Links Taser to Death in Mesa," *supra* (January 14, 2005). According to the press report, the Maricopa County Medical Examiner listed the cause of death as "excited delirium due to cocaine intoxication" with the "stress from the physical struggle" and "Taser injuries" listed as contributing factors. But the two officers who were arresting Mr. Salazar also had him prone on the floor while handcuffing him and it is obvious from the description that one of them was pressing down on him in some manner to keep him from kicking. After getting the handcuffs on, one of the officers "rolled him over and he immediately turned white." Anglen, "Autopsy Links Taser to Death in Mesa," *supra* (January 14, 2005).

### The Myth of Excited Delirium as a Cause of Death

Many people die in police custody in a similar fashion without the police having used Tasers. The most recent well-known example is the in-custody death of 41 year old Nathaniel Jones, whose "struggle" with six baton-wielding Cincinnati police officers was videotaped and widely broadcast. Stewart, "Excited Delirium," CBSNews.Com (December 10, 2003). The coroner in the Jones case attributed Jones'

death to "excited delirium," a psychotic state that is most often associated with cocaine or methamphetamine use. What was not shown on the videotape was that Mr. Jones (like Roman Andreichikov and most of the others on the post-Tasered lists) may have died from "respiratory failure while" a number of the Cincinnati officers "lay or sat on him." Associated Press, "Family of Man Beaten to Death Sues City" (September 11, 2004).

"Excited (or agitated) delirium" is a medical term that loosely refers to a condition of extreme mental and motor excitement with confused and unconnected thoughts. It can be caused by prolonged drug use but is also associated with some forms of mental illness, head injuries, low blood sugar, alcohol and fever. Wetli, C.V. and Fishbain, D.A., "Cocaine-Induced Psychosis and Sudden Death in Recreational Cocaine Users," *Journal of Forensic Sciences* Vol.30, No. 3, July 1985, pp.873-880. See also Ross, "Factors Associated with Excited Delirium Deaths in Police Custody," *Modern Pathology* Vol. 11, No. 11, pp. 1127-1137. It is marked by severe agitation, physical aggression, hallucinations, impaired thinking and paranoia.

Supposedly, people suffering from "excited delirium" come to the attention of police by their extreme behavior (jumping on top of cars, running around in the street naked, hurling themselves through windows, etc.) and then proceed to exhibit "super-strength" as police try to take them into custody. The adrenaline produced during the "struggle" allegedly mixes with whatever is already going on chemically in the brain and

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the result is “you’re in essence, cooking your brain.” Stewart, “Excited Delirium,” *supra* (quoting Dr. Deborah Mash, a brain researcher who has examined “dozens of brains from so-called excited delirium victims, and found that nearly all of them were drug abusers”).

The problem with this “cooking your own brain” theory is that it fails to take into account what else was going on with the person besides being excitedly delirious (or Tased or hit with a baton) just before death. The police officers were not simply “struggling” with the person; they were restraining them in a way that ends up cutting off the person’s ability to breathe. Even the study conducted by Dr. Charles Wetli (the main proponent of “excited delirium” as a cause of death) involved seven in-custody deaths, six of which occurred while the person was either hog-tied or in some other way subjected to a police prone-restraint method. Wetli and Fishbain, *supra*. A number of other major medical studies confirm that it is police use of forceful takedowns rather than drugs that is the key element in “excited delirium” deaths. Many of the in-custody deaths studied involved police use of electronic control weapons. Stratton, Rogers, Brickett & Gruzinski, “Factors Associated with Sudden Death of Individuals Requiring Restraint for Excited Delirium,” *American Journal of Emergency Medicine*, Vol. 19, No. 3 (2001), pp. 187-191 (study of 18 excited delirium deaths associated with a struggle and forced restraint; 5 of the 18 were Taser-related); O’Halloran and Lewman, “Restraint Asphyxiation in Excited Delirium,” *American Journal of Forensic Medicine and Pathology*, Vol. 14, No. 4 (1993), pp. 289-295 (study of 11 in-custody deaths including two who were shocked with stun guns prior to death).

What actually happens is that other, more complex, physical factors come into play during the contact with police. Concluded one forensic pathologist: “The mechanism of death appears to be sudden, fatal cardiac dysrhythmia or respiratory arrest induced by a combination of at least three possible factors relating to increased oxygen demands and decreased oxygen delivery.” O’Halloran and Lewman, *supra* at p. 294. First is the stress placed on the heart by the combination of the struggle and the delirious state. Second is the consequential need for increased oxygen. Third is that the “hogtie” or prone restraint position impairs breathing “in situations of high oxygen demand by inhibiting chest wall and diaphragmatic movement.” O’Halloran and Lewman, *supra* at p. 294. Although many police departments have eliminated use of the “hogtie” restraint for controlling violent persons, the use of forceful prone restraint methods have not been so eliminated.

Even if cocaine is a component of “excited delirium,” the levels of cocaine found at autopsy are actually lower than levels found in those who die from intoxication without struggling with police. Pollanen, Chiasson, Ciarns & Young, “Unexpected Death Related to Restraint for Excited Delirium: A Retrospective Study of Deaths in Police Custody and in the Community,” *Canadian Medical Association Journal*, Vol. 158

(1998), pp. 1603-1607 (blood levels of cocaine in users with “excited delirium” was lower than levels found in people who died from cocaine intoxication). As one study noted:

Drugs such as cocaine and amphetamines can, of course, cause death without positional asphyxiation from restraint as a factor, but the frequency of sudden death in people restrained prone while in a state of excited delirium, compared with the rarity of sudden death in such people when not restrained, implicates restraint as a causative factor in such deaths.

O’Halloran and Lewman, *supra* at 294.

Other forensic pathologists have concluded, however, that there is a “significant difference between agitated cocaine abusers who die and the nonagitated, non-psychotic, sudden, cocaine-related deaths.” Stephens and Wetli, etc., “Criteria for the Interpretation of Cocaine Levels in Human Biological Samples and Their Relations to the Cause of Death,” *The American Journal of Forensic Medicine and Pathology*, Vol. 25, No. 1 (March 2004), pp. 1-10. According to this “excited-delirium-as-cause-of-death” school of pathology, a sudden death during the struggle with police may be due to some as-yet unproven genetic predilection to the harmful effects of cocaine (or other drugs). *The American Journal of Forensic Medicine and Pathology*, Vol. 25, No. 1 (March 2004), pp. 1-10 (discussing the next for heightened scene and medical investigations of cocaine-related deaths “involving unusual behavior on the part of the deceased with police involvement”). It is this theory that has apparently influenced many coroners in the post-Taser death cases to list as the primary cause of death “cocaine-induced excited or agitated delirium” rather than “restraint asphyxia.” Stephens and Wetli, etc., “NAME Position Paper on the Certification of Cocaine-Related Deaths,” *The American Journal of Forensic Medicine and Pathology*, Vol. 25, No. 4 (March 2004), pp. 11-13 (“reported drug levels may not directly relate to the toxic or lethal effects of the drug upon the patient”).

### **Basic Mechanics of Positional or Restraint Asphyxia**

When the chest is forcefully compressed down while the person is held in a prone position, the person has no ability to lift the chest up to inhale any oxygen at all, let alone the extra oxygen needed because of the additional stressors. It is this physical process that can cause a fatal cardiac arrhythmia or heart attack, with or without Tasers or drugs. *Tofano v. Reidel*, 61 F.Supp. 2d 289 (D.N.J. 1999) (medical examiner concluded where detainee was held face down in a prone position with officers exerting pressure on the back that the plaintiff’s death was due to a deprivation of oxygen). It is not known exactly how many people die in police custody each year from “restraint asphyxia” but what estimates exist must be conservative because of the prevalence of the “excited delirium” designation as a cause of death whenever certain behaviors and drugs are present. See Connor, M.G., “In-Custody Death: Excited Delirium, Restraint Asphyxia, Positional Asphyxia and In-Custody Death Syndromes” (2002) (estimating the

number of in-custody deaths from restraint at between 50-125 in the U.S.) [found at [www.strugglingteens.com](http://www.strugglingteens.com)].

"Restraint asphyxia" was first proposed as a cause of death category in 1993 to distinguish it from the broader category of "positional asphyxia." It is meant to describe a situation where the person cannot, even with great exertion, escape from the asphyxiating position. O'Halloran and Lewman, "Restraint Asphyxiation in Excited Delirium," *supra* (1993). Modern medical examiners now consider "restraint asphyxia" a specific diagnosis. This diagnosis is reserved for those cases where people exhibiting "excited delirium" behavior die in police custody. Common elements include: (1) prone restraint with pressure on the upper torso; (2) handcuffing, leg restraint, or hogtying; (3) acute psychosis and agitation (whether or not induced by stimulant drugs); (4) physical exertion and struggle; and (5) obesity. O'Halloran and Frank, "Asphyxial Death During Prone Restraint Revisited: A Report of 21 Cases," *American Journal of Forensic Medical Pathology*, Vol. 21, No. 1 (March 2000), pp. 39-52.

A few of the post-Taser deaths listed in the Amnesty Report contain such a diagnosis as a cause of death even where drugs were involved. Amnesty Report Appendix 1 at p. 77 (Kerry O'Brien, with cause of death listed as "positional asphyxia due to hogtying and prone restraint"), p. 77 (Lewis King, with cause of death listed as "cardiac arrest during prone restraint"), p. 73 (Gordon Jones, with cause of death listed as "positional asphyxia secondary to application of restraints in setting of acute cocaine intoxication"), p. 75 (Timothy Sleet, with cause of death listed as "asphyxial death secondary to prone restraint syndrome"), p. 78 (Lewis King, with cause of death listed as "cardiac arrest during prone restraint"). See also Phuong Cat Le, "Three Have Died in Washington After Jolting," *Seattle Post-Intelligencer* (December 1, 2004) at p. A1 (Willie Smith died two days after being Tasered with medical examiner ruling that his death was "a combination of acute cocaine intoxication and physical restraint").

But a number of the post-Taser deaths that are summarized clearly illustrate how easily officials "blame the victim" for causing his own death through drug use when the reality of what happened to him is directly tied to the harsh police tactics used. See Amnesty Report Appendix 1 at p. 80 (Peter Lamonday where official cause of death is listed as "cocaine-induced excited delirium" but the description notes that seven police officers used their combined weight to "take him to the ground") and Le, *supra* (detailing death of Curtis Rosentangle in Silverdale, Washington where the official cause of death was "excited delirium" owing to "acute cocaine intoxication" though witnesses described a struggle with Rosentangle on his stomach and at least one deputy with a knee to the back of his neck).

Amnesty addresses concerns about police restraint methods in a section of its report entitled "Impact of Other Restraints." Amnesty Report at pp. 56-60. However, the discussion of the forceful takedown prone restraint methods discussed here is limited to a single paragraph. Even there, Amnesty admits that at least 24 (one third) of the death

investigations revealed "restraint positions which can dangerously restrict breathing and have been associated with deaths from 'positional asphyxia.'" Amnesty Report at p. 56 (also discussing use of hogties, chokeholds and pepper spray in over a dozen cases). The one-third statistic is clearly a low figure since most coroners or medical examiners do not perform the type of thorough investigation needed to uncover the details of the prone restraint method used. O'Halloran, "Reenactment of Circumstances in Deaths Related to Restraint," *The American Journal of Forensic Medicine and Pathology*, Vol. 25, No. 3 (September 2004), pp. 190-193 (advocating the need for witness and restrainer interviews as well as videotaped reenactments of the restraint process that was used).

One recent controversial study attempts to prove that the factor of additional weight on the back in the prone maximal restraint position does not seriously affect respiratory function. Chan, etc., "Weight Force During Prone Restraint and Respiratory Function," *American Journal of Forensic Medical Pathology*, Vol. 25, No. 3 (September 2004), pp. 185-189. But that study involved only healthy subjects, within average weight ranges (rather than obese or with protruding stomachs), and most importantly, the weight being applied to their backs was no greater than 50 pounds.

The circumstances confronting an agitated or noncompliant (and often overweight and unhealthy) person being restrained by usually more than one police officer are vastly different. As summarized by Carol Watson, a Los Angeles police misconduct attorney who has successfully litigated many wrongful death cases involving restraint:

It is beyond dispute that if a person's respiratory apparatus is compressed with sufficient pressure for a sufficient time, the person will die of suffocation. Think ... about a person in a prone position with hundreds of pounds of weight being used to compress the respiratory apparatus against pavement. Anyone who knows anything about police tactics knows that every person who is taken into custody after refusing to submit to police authority will inevitably be placed in a prone position and restrained that way until the person stops struggling or can be put in mechanical restraints. It is very simple: if the ribs and lungs are prevented from expanding, inhalation will not occur. Loss of consciousness and death will follow in a very short time. If police sit or kneel or apply upper body strength on the back of a person with enough pressure for enough time, the person will die.

Carol Watson, Memo on "Restraint Asphyxia and Tasers" (October 2004) [on file with author], *citing* O'Halloran and Frank, "Asphyxial Death During Prone Restraint Revisited," *supra* (2000) and Werner U. Spitz, M.D., ed., on *Asphyxia, Medicolegal Investigation of Death*, (3<sup>rd</sup> Ed. 1993) at pp. 484-485.

The average length of time between the first application of forceful prone restraint and the restrainer's realization that the person has ceased breathing is under six minutes. See,

e.g., Pollanen, Chiasson and Cairns, "Unexpected Death Related to Restraint for Excited Delirium: A Retrospective Study of Deaths in Police Custody and In the Community," Canadian Medical Association Journal, Vol. 158, No. 12 (1998), pp. 1603-1607; Stratton, Rogers, and Green, "Sudden Death in Individuals in Hobble Restraints During Paramedic Transport," Annals of Emergency Medicine, Vol. 25 (May 1995), pp. 710-712. Once a restraint asphyxia victim is in full cardiopulmonary arrest (his heart has stopped), resuscitation is almost impossible. Stratton, Rogers, Bricket, and Gruzinski, "Factors Associated with Sudden Death of Individuals Requiring Restraint for Excited Delirium," American Journal of Emergency Medicine, Vol. 19 (May 2001), pp. 187-191.

### Basic Mechanics of the Taser

Taser weapons use compressed nitrogen to shoot two copper wires as far as 21 feet. The wires have probes at the end which complete a circuit that jolts the target with 50,000 volts of electricity. The electric pulses last up to five seconds and cause the muscles to contract uncontrollably. The "target" is rendered immobile in less than half a second but the effects of the shock last for several minutes, long enough to gain control of a person for example and handcuff them. Tasers are also referred to as "electro-muscular disruption systems" as the electric energy overrides the central nervous system causing contractions of the body's muscle tissue. They affect both the motor and the sensory nervous system and cause incapacitation of the "target." The newest model Taser (X26) contains a computer chip that stores each time and date the weapon is used as well as the duration in seconds of the electric discharge. It is also 60% smaller and lighter than the older model (M26). The older model that is used in most U.S. police departments records the time and date but not the duration of the discharge. B.C. Office of the Police Complaint Commissioner, Taser Technology Review and Interim Recommendations (September 2004) at pp. 5-6.

Tasers can also be used in the "drive stun" mode. In this mode, the weapon is placed directly against the person's skin and only affects the sensory nervous system. It is thus not used as a tool of incapacitation but rather of pain compliance. In either mode, the pain can be excruciating as well as immobilizing. The pain does stop, however, once the switch is turned off. B.C. Office of the Police Complaint Commissioner, Taser Technology Review and Interim Recommendations (September 2004) at pp. 5-6.

The M26 Taser uses a "pulse" or current of 18-26 watts to incapacitate a person. The newer model X26 uses 7-11 watts of current and has a "more consistent flow of energy in its pulse because of the addition of a digital pulse controller." B.C. Office of the Police Complaint Commissioner, Taser Technology Review and Interim Recommendations (September 2004) at pp. 5-6. The Taser is aimed at a person at the center mass of the body, with the top probe discharging in the line with the laser sight and the bottom probe at a downward angle of eight degrees. If one of the probe misses, the electric current does not pass through and the Taser will not function

to incapacitate. B.C. Office of the Police Complaint Commissioner, Taser Technology Review and Interim Recommendations (September 2004) at pp. 5-6.

### Known Physical Effects of Taser Use During "Struggle" With Police

It has been hypothesized that when the already delirious person is involved in a prolonged violent struggle with police, the use of a Taser may briefly increase "metabolic acidosis" in the body by increasing the muscular activity during the five seconds that the Taser use lasts. "Metabolic acidosis" is a condition that occurs when the acid level in the blood is too high. It may have the effect of decreasing respiration. Raymond Fish and Leslie Geddes, "Effects of Stun Guns and Tasers," Lancet, Vol. 358 (September 1, 2001), pp. 687-688. Such an effect would not in and of itself cause a cardiac event leading to death so long as the person "was able to breathe in a way that would compensate for a metabolic acidosis. *Such would not be the case if the individuals remained agitated or were prevented from breathing freely* [emphasis supplied]." Raymond Fish and Leslie Geddes, "Effects of Stun Guns and Tasers," Lancet, Vol. 358 (September 1, 2001), at p. 688.

One medical study that looked at the effect of Taser use during 16 police confrontations in Los Angeles resulting in death. It concluded that Taser use "in and of itself does not cause death." Ronald Kornblum and Sara Reddy, "Effects of the Taser in Fatalities Involving Police Confrontation," Journal of Forensic Sciences (March 1991), pp. 434-447. However, in one of the cases, the Taser was considered a "contributing factor" to the man's death. The man had a history of serious pre-existing heart disease including cardiac arrhythmia and was high on PCP at the time of his struggle with the police. The medical conclusion was that because of the seriousness of his heart condition, he could have suffered a fatal cardiac arrhythmia from "the PCP, the excitement, the electrical stimulation, *or a combination of any or all of these factors* [emphasis supplied]." Ronald Kornblum and Sara Reddy, "Effects of the Taser in Fatalities Involving Police Confrontation," Journal of Forensic Sciences (March 1991), at p. 447.

It is not clear precisely what effect a Taser can have on a healthy person's heart, however. The Lancet article mentioned above states that stimulation to the heart is extremely unlikely from darts striking the skin:

Because of the difference in excitability between nerves and cardiac muscle, and because the heart is distant from the skin, myocardial stimulation is extremely unlikely in normal use of these devices (i.e., with darts striking the skin).

Lancet, *supra* at 687.

In response to the 1991 Kornblum study (above), a former deputy medical examiner from Los Angeles emphasized the distinction between the effect of Tasers on healthy hearts and the effect on those not so fortunate :

It seems only logical that a device capable of depolarizing skeletal muscle can also depolarize heart muscle

and cause fibrillation under certain circumstances ... while the use of tasers may be generally safe in healthy adults, pre-existing heart disease, psychosis, and the use of drugs including cocaine, PCP, amphetamine and alcohol may substantially increase the risk of fatality.

Terrance B. Allen, "Discussion of 'Effects of the Taser in Fatalities Involving Police Confrontation'," *Journal of Forensic Sciences* (July 1992) at pp. 956-958.

### **The Key "Taser-Caused" Deaths Cited in the Amnesty Report**

In only a few post-Taser death cases was the Taser specifically assigned a "contributing factor" role in the death by a local coroner or medical examiner. In each case, however, the prone restraint methods used by law enforcement combined with serious health problems played a far more significant role.

The most controversial of these involved James Borden, who died while in the custody of Indiana jailers on November 6, 2003. A portion of Mr. Borden's struggle was caught on videotape and was subsequently shown on CBS News. Steven Higgs, "Imagine There's No Justice," *The November Coalition* (an online magazine "working to end drug war injustice"), March 28, 2004. The autopsy report lists the cause of death as a heart attack secondary to an enlarged heart, "pharmacologic intoxication," and electrical shock. Summarized in Amnesty Report at p. 1. *See also*, Terre Haute Regional Hospital Department of Pathology Autopsy Report (November 7, 2003). Mr. Borden suffered from bipolar disorder, diabetes and congestive heart failure. He had 25 times the therapeutic dose of ephedrine (amphetamine) in his system. The videotape of a handcuffed Mr. Borden shows him being Tased. "Taser Under Fire Over Deaths," April 6, 2004. One of the jailers was charged with two felony counts of battery. Mr. Borden, while uncooperative, had never expressed a threat to himself or anyone else, behavior that the Correctional Center's directive required to justify Taser use. Cory Schouten, "Jailer to Face Two Charges in Taser Death," *Indiana Daily Student* (May 13, 2004) at

What is not shown on the edited videotape, what is left out of the autopsy report (not to mention the summary on page one of the Amnesty Report) and from other news reports of Mr. Borden's demise is one crucial detail. According to the recent civil rights lawsuit filed in federal court on behalf of Mr. Borden's estate, Mr. Borden was thrown to the ground after the first Taser. Four sheriff deputies then piled on top of him, forcing his face into the ground. He was Tasered again and at that point he stopped breathing and turned blue. Resuscitation efforts were not successful. Amended Complaint, *Estate of James Borden et al v. Monroe County Sheriff et al*, U.S. Dist. Ct. S.D. Indiana Cause No. 1:04-CV-0318 RLY-WTL (filed August 27, 2004). According to the Special Prosecutor who brought charges against one of the jailers, by the time of the last Taser Mr. Borden was "at least unable to breathe" and already in the process of dying. Steve Higgs, "Breaking

This Silence, At Last," *The Bloomington Alternative* (May 13, 2004).

The second most controversial post-Taser death also involved a physical restraint procedure during which heavy pressure was placed on the back and chest area while holding the person's face down. Willie Lomax, age 26, died on February 21, 2004 at a public housing complex after a struggle with private security guards and Las Vegas police officers. Anglen, *Arizona Republic*, *supra* (September 15, 2004). Mr. Lomax was behaving erratically when security guards asked him if he needed medical help. The guards tried to take control of him because they believed he might harm himself or others but Mr. Lomax reportedly became combative. A Las Vegas police officer arrived and warned him he would use the Taser. "Coroner's Inquest: Jurors Rule Taser a Factor in Death, Officer's Actions Determined to be Excusable," *Las Vegas Review-Journal* (June 26, 2004). After the first shock, Mr. Lomax again became combative and after the second shock, the security officers were able to handcuff him. Mr. Lomax continued to struggle and kick, and the Las Vegas officer used the Taser five more times in an effort to gain control of Mr. Lomax. At some point during the struggle, one of the security officers held Mr. Lomax down by pushing his knee into Mr. Lomax's back. He stopped breathing while being transported to a hospital, was resuscitated and died the next day. "Coroner's Inquest: Jurors Rule Taser a Factor in Death, Officer's Actions Determined to be Excusable," *Las Vegas Review-Journal* (June 26, 2004).

An inquest jury found that the "combination of the force of the knee in his back, the Taser, his drug use" and the restraint process "all played an equal role in" Mr. Lomax's demise. "Coroner's Inquest: Jurors Rule Taser a Factor in Death, Officer's Actions Determined to be Excusable," *Las Vegas Review-Journal* (June 26, 2004). A medical examiner's report stated that the cause of death was "cardiac arrest during restraint procedures" with the Taser, PCP intoxication and pneumonia listed as contributing factors. "Coroner's Inquest: Jurors Rule Taser a Factor in Death, Officer's Actions Determined to be Excusable," *Las Vegas Review-Journal* (June 26, 2004). However, the medical examiner testified at the inquest that he could not be certain that death would not have occurred without the Taser. Amnesty Report Appendix 1 at p. 78.

Another "contributing factor" case involved Gordon Jones who died in Orange County, Florida in July 2002 after being Tasered thirteen times. The initial autopsy report listed the cause of death as "positional asphyxia secondary to application of restraints in a setting of acute cocaine intoxication." Amnesty Report Appendix 1 at p. 73. Mr. Jones died while strapped face down in a stretcher. Coroner William Anderson stated that the multiple Taser strikes made it hard for him to breathe. He states that "the guns can interrupt normal heart activity, especially in people prone to cardiac arrhythmia or who are hypoxic and struggling to breathe." Anglen, "Medical Examiners Connect Stun Gun to Five Deaths," *Arizona Republic* (July 18, 2004). Nine months after Anderson filed

his report, Orange County officials requested a second opinion from Dr. Cyril Wecht, "a nationally recognized pathologist and lawyer." Anglen, "Medical Examiners Connect Stun Gun to Five Deaths," Arizona Republic (July 18, 2004). Not unsurprisingly, Dr. Wecht concluded that Jones died "primarily from a cocaine overdose." Anglen, "Medical Examiners Connect Stun Gun to Five Deaths," Arizona Republic (July 18, 2004). What is not known is what was done to Mr. Jones between the time he was Tasered and when he was placed prone on the stretcher. Amnesty Report at p. 49 (noting that Jones walked with deputies to an ambulance).

One of the reported deaths from Las Vegas fits the same fact profile as the circumstances of Roman Andreichikov. A roommate called 911 to report that Keith Tucker was "acting unusual, tearing the house apart, punching the walls and ... talking to an unknown person not there." Associated Press, "Vegas Man Dies After Police Use Taser to Subdue Him" (August 3, 2004). Police found Tucker sitting on a bed talking incoherently but when they approached him, he started to kick and to punch the officers. Officers used a Taser and batons to "subdue" and forcibly handcuff him. During the process of handcuffing, he started to have difficulty breathing. He died later at a hospital. Anglen, *supra* (September 15, 2004) reported at Amnesty Report Appendix 1 at p. 83. A coroner assigned the cause of death as "cardiac arrest brought on by restraint with Taser and batons." Anglen, *supra* (September 15, 2004) reported at Amnesty Report Appendix 1 at p. 83.

Finally, William Teasley died in August 2004 after being Tasered twice while being booked into a jail in Anderson County, South Carolina for disorderly conduct. "Anderson Prosecutor Won't File Charges in Jail Taser Death," (September 29, 2004) at [www.fox21.com](http://www.fox21.com). According to Amnesty, a deputy coroner stated that the Taser "contributed to Teasley's death, combined with a medical history that included heart disease." Amnesty Report at p. 52. But Teasley also suffered from multiple serious health problems including an enlarged heart and spleen, hardened arteries and severe brain damage suffered in an earlier car accident. Associated Press, "Pathologist Says Taser Contributed to Jailed Man's Death" (August 20, 2004) (quoting a pathologist as saying: "In the dominoes of this man's existence, the Taser was the last straw"). Press reports indicate that there was a "struggle" with jail deputies after Teasley became violent after an arrest for disorderly conduct. The Taser was used during the effort to "subdue" him. Associated Press, "Pathologist Says Taser Contributed to Jailed Man's Death" (August 20, 2004).

In a number of other deaths, a coroner has assigned the Taser as a "sequential" or "temporal" (but not necessarily "contributing") role in the death. However, a closer analysis of the known facts shows that the Taser use (even where excessive) was only part of a more complicated restraint asphyxia process.

For example, Eddie Alvarado died in Los Angeles in June 2002 after being Tasered five times. Amnesty Report Appendix 1, p. 72. The autopsy report states that "the circumstances indicated a *temporal relationship* between the restraint,

*including Taser application*, and his cardiopulmonary arrest [emphasis supplied]." Amnesty Report Appendix 1 at p. 72. Alvarado was "hobble-restrained" (bound at the ankles and hands while lying prone) after the Taser use occurred. The actual cause of death was assigned as: "sequelae of methamphetamine and cocaine use, post restraint and taser use." Los Angeles County Department of Coroner Autopsy Report (January 23, 2003). Mr. Alvarado had been placed in a "hobble restraint" after collapsing prone on the floor. Amnesty Report at p. 48. *See also* death of Clever Craig in Mobile, Alabama in June 2002 at Amnesty Report Appendix 1 at p. 73 (cause of death indicates a *temporal* link between cardiac arrest and three Taser shocks), p. 81 (Taser listed as "part of the scenario" causing the death of Jacob Lair who was engaged in a physical struggle with law enforcement officers). Finally, Amnesty attributes the Taser as a "contributing factor" in a number of the deaths based solely on a document review of sixteen cases conducted by a Norwegian forensic pathologist, Dr. Sidsel Rogde. Amnesty Report at p. 44. Her conclusions do not assign any value to the prone restraint process or the use of drugs. Ultimately, her "independent" finding of "contributing factor" in seven such cases does not help shed light on the complex interaction of the factors involved. For example, at least one of the cases was not a police restraint case. Amnesty Report at n. 114. Jose Garcia was killed after being handcuffed and stunned during an armed robbery in his home. The 54 year old Mr. Garcia had suffered from almost total blocking of his coronary arteries. Will County, Illinois Coroners Report (September 28, 2002).

### Deciphering Other Taser-Related Deaths

In some cases listed by Amnesty as "Taser-related," a coroner has made a specific finding of "no evidence [that] the Taser directly caused or contributed to [the] death." Amnesty Report at p. 52 (summarizing circumstances surrounding death of Frederick Williams in Gwinnett County Jail, Georgia in June 2004). In many of the so-called "Taser-related" deaths, the person clearly died from other causes. Two are obvious suicides: One young man died from cardiac arrest "due to slashed wrists" and another barricaded himself inside his house, pulling a gas line out from the back of a stove filling the house with gas. Amnesty Report Appendix 1 at p. 74 (Joshua Hollander) and (David Riley). In addition, one died as the result of a head injury suffered during a fall after he was Tasered. Amnesty Report Appendix at p. 80 (Jerry Pickens). Another died from head injuries suffered during a fight that took place before police arrived. Amnesty Report Appendix 1 at p. 72 (Jason Nichols). In yet another, a young man died in a restraint chair and was injected with "Haldol whereupon he lost consciousness." Amnesty Report Appendix at p. 76 (Ray Austin). Another died after being placed face down in a holding cell with two "belly chains" and a set of leg irons holding him in the prone position. Amnesty Report Appendix at p. 79 (Alfredo Diaz).

Many were hogtied or placed in chokeholds, two extreme restraint methods that are known to cause death and are banned by many police departments except in situations that justify

deadly force. Amnesty Report Appendix 1 (Richard Baralla, Fermin Rincon, Johnny Lozoya, Joshua Hollander, Clayton Willey, Jerry Knight, Lawrence Davies). At least three of the deaths involved men who swallowed large quantities of crack cocaine or other drugs. Amnesty Report Appendix 1 at p. 71 (Marvin Hendrix), p. 76 (Clark Whitehouse), p. 85 (Samuel Wakefield); Anglen, *supra* (September 15, 2004). Finally, one of post-Tasered deaths was a fetus who died in utero days after the mother was Tasered. Amnesty Report Appendix 1 at p. 71 (coroner related the intrauterine death to "methamphetamine use").

## The Law of Force and Tasers

Short of an outright temporary ban, Amnesty calls for limiting Taser use to only those situations in which deadly force is justified, i.e., where a police officer "faces a life-threatening attack or injury, or threat of attack with a deadly weapon, or where the target presents an immediate threat of death or serious injury to him/herself or others." Amnesty Report at p. 68.

Placing the bar so high is essentially the same as an outright ban since many police officers will refuse to use a less lethal weapon when confronted with an armed suspect posing a "substantial risk of causing death or serious bodily harm to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *Billington v. Smith*, 292 F.3d 1177, 1185 (9<sup>th</sup> Cir. 2002) (deadly force justified where suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun). Furthermore, in most jurisdictions, they are not constitutionally required to do so. *Plakas v. Drinski*, 19 F.3d 1143 (7<sup>th</sup> Cir. 1994) (where deadly force is otherwise justified, there is no constitutional duty to use non-deadly force). The force used, whether deadly or not, need only be "reasonable" based on the totality of facts and circumstances known to the officer. *Graham v. Connor*, 490 U.S. 386, 395 (1989) (non-inclusive factors to consider are the nature of the crime involved, whether the person is resisting or fleeing and whether the person poses a danger to the officer or others); *Garcia v. United States*, 826 F.2d 806, 812 (9<sup>th</sup> Cir. 1987) (deadly force reasonable where plaintiff attacked border patrol agent with a rock and a stick).

The reality in most police departments today is that the Taser is placed at an "intermediate" level of force, below batons or impact weapons. Amnesty Report at p. 12 (survey of 30 U.S. police departments). One police use-of-force training expert advocates keeping Tasers at a low level of force in part because they "can be deployed at a distance rather than at close-quarter range." Ed Flosi, "Using Force Early," *The Police Marksman* (September/October 2004) at pp. 30-31 (also noting that the average award for excessive force claims between 1978 to 1996 was \$178,878). He urges the use of Tasers early to end physical resistance because of the low level of permanent or serious injury and to avoid needing to use a higher level of force. As one criminal defense attorney has commented, "if pepper spray and Tasers are deemed deadly force [by the courts], then odd as it may seem, the law may require the officer to use his bare hands on the suspect rather than apply pepper spray [or use a Taser]." Lisa J. Steele,

"Tasers, Pepper, and Deadly Force" (December 2004) [unpublished paper on file with author] (discussing state law variations in "deadly force" definitions applied to criminal defenses).

But another problem with Amnesty's "alternate to deadly force" recommendation is that in a growing number of jurisdictions police departments may be liable for not giving their officers a range of less-lethal options when taking into custody those who are mentally impaired or those who are in a diminished state because of drug intoxication. *Smith v. City of Hemet*, No. 02-56445 (9<sup>th</sup> Cir. January 10, 2005) (adding as a factor to the *Graham* test "the availability of alternative methods of capturing or subduing a suspect"); *Deorle v. Rutherford*, 272 F.3d 1272 (9<sup>th</sup> Cir. 2001) (officers may be required to consider a range of tactics in effecting the arrest of an emotionally disturbed person); *Cruz v. City of Laramie, Wyoming*, 239 F.3d 1183 (10<sup>th</sup> Cir. 2001) (similar holding where person being subdued in a hobble restraint has a "diminished capacity" because of drug use); *Russo v. City of Cincinnati*, 953 F.2d 1036 (6<sup>th</sup> Cir. 1992) (upholding Taser use to "avoid having to resort to lethal force" where lack of training in dealing with mentally ill may have caused shooting death of known paranoid schizophrenic).

The International Association of Chiefs of Police places the use of Tasers (or "electro-muscular control weapons") at the same level of force as pepper-spray. IACP National Law Enforcement Policy Center, *Electronic Control Weapons Model Policy*, August 2004. But it seems appropriate be more restrictive on Taser use than on pepper spray if only because of the complete physical incapacitation Tasers cause. Also, the current generation of Tasers [X26 and M26] was specifically designed for use on noncompliant and aggressive or violent people who seem particularly immune to the incapacitating effects of pepper spray. Taser International Brochure, "Safety Every Officer Deserves." Because these are more vulnerable populations, it is legally appropriate to place a higher bar to Taser use. But many departments have vague or loose policies. See *Draper v. Reynolds*, 369 F.3d 1270 (11<sup>th</sup> Cir. 2004) (upholding Milpitas, Georgia Taser policy permitting use where "subject fails to stop on a verbal command" and referencing Los Angeles Taser policy that permits use against "violent or *potentially* violent suspects"). More restrictive policies limit Taser use to those situations where officers are confronted with a person who is "actively resisting *as well as assaultive*" or likely to cause serious injury to self or others. Chicago Police Department General Order 92-03-11 regarding use of Tasers [emphasis supplied].

As a result of public outcry over excessive use of Tasers, a number of police departments have recently placed restrictions on Taser use. After the two Taser-related deaths of Willie Lomax and Keith Tucker, Las Vegas police banned the use of Tasers on handcuffed or restrained arrestees and also discouraged multiple Taserings in most circumstances. Phuong Cat Le and Hector Castro, "Teens and Pregnant Women Have Felt Jolt in King County," *Seattle Post-Intelligencer* (November 30, 2004) at p. A10. After a number of Taser uses on

children (including one six year old who was cutting himself with a piece of broken glass), Miami-Dade County revised its Taser use policy to require officers to consider factors "such as age, size and weight, as well as the suspect's likelihood of harming themselves or others, the person's ability to physically challenge the officer, and the overall seriousness of the situation." Associated Press, "Miami-Dade Police Given New Stun Gun Rules" (January 13, 2005).

### Prone Restraint Methods as Excessive Force

Because maintaining a person's ability to breathe is so crucial to preventing in-custody deaths, many experts recommend that police restrict all restraint methods to a minimum and that officers completely avoid any compression of the trunk or neck. Pedal, Zimmer, Mettern, Mittmeyer & Oehmichen, "Fatal Incidences During Arrest of Highly Agitated Persons," Arch Kriminology (German), Vol. 23 (Jan-Feb 1999), pp. 1-9; Ross, "Factors Associated with Excited Delirium Deaths in Police Custody," Modern Pathology, Vol.11, No. 11 (November 1998), pp. 1127-1137. Since 1995, the U.S. Department of Justice has warned police officers to use extreme caution when subduing those with high risk factors for restraint asphyxia such as obesity, high drug or alcohol use, or an enlarged heart:

The risk of positional asphyxia is compounded when an individual with predisposing factors becomes involved in a violent struggle with an officer or officers, particularly when physical restraint includes use of behind-the-back handcuffing combined with placing the subject in a stomach-down position.

National Law Enforcement Technology Center, "Positional Asphyxia - Sudden Death" (June 1995) (based on a report prepared by the International Association of Chiefs of Police) at p.2.

Thus, police departments have been on notice for at least ten years of the lethal effects of forceful prone restraint methods. It is not known how many departments maintain restrictive policies on prone restraint methods.

Courts are now holding individual officers liable for the failure to heed the warning against aggressive prone restraint methods. Recently, a federal appeals court upheld a jury verdict totaling \$900,000 for the in-custody death of a 32 year old autistic man, Calvin Champion. *Champion v. Outlook Nashville, Inc. et al*, 380 F.3d 893 (6<sup>th</sup> Cir. August 19, 2004). Mr. Champion became agitated while at a shopping mall and his caretaker called 911 for help. Responding officers were not initially informed of his inability to communicate and pepper-sprayed him when he refused to respond to commands. Three Nashville police officers took the struggling and kicking Champion to the ground and eventually handcuffed and "hobbled" him with ankle restraints. Five lay witnesses testified at trial that during the restraint process, the officers sat or otherwise put pressure on Mr. Champion's back while he was prone on the ground. They also testified that the officers continued to use pepper spray after he was subdued and had stopped resisting. The jury assessed \$300,000 against each of

the Nashville officers for Champion's pain and suffering before he died.

In upholding this verdict, the appeals court specifically pointed out that all of the officers had been trained about the potential danger of putting pressure on a person's back or diaphragm and that many court decisions had made it clear that certain types of restraint (such as neck or choke holds) cause asphyxia. But the court pointed out the egregiousness of the facts presented since the officers here had both placed their weight "upon Champion's body by lying across his back and simultaneously pepper spraying him." *Champion*, 380 F.3d at 903. Not only had these particular officers been trained about the dangers of "putting pressure on a prone, bound, and agitated detainee" but they had also been trained to not pepper spray a person who was handcuffed. Furthermore, Champion was an unarmed, emotionally disturbed person whose "diminished capacity" required more restraint than would otherwise be allowed. The court concluded that "[n]o reasonable officer would have continued to spray a chemical agent in the face of a handcuffed and hobbled mentally retarded arrestee .... No reasonable officer would continue to put pressure on that arrestee's back after the arrestee was subdued by handcuffs, an ankle restraint, and a police officer holding the arrestee's legs." *Champion* at 905.

The court's ruling in *Champion* highlights the crucial role of clear restrictive policies on the use of less-lethal weapons and aggressive takedown tactics. See also *Deorle v. Rutherford*, 272 F.3d 1272 (9<sup>th</sup> Cir. 2003) (holding that use of "bean-bag round" on mentally ill suspect was excessive under the circumstances); *Cottrell v. Caldwell*, 85 F.3d 1480 (11<sup>th</sup> Cir. 1996) (Such policies are especially important when police are confronted with someone suffering from a mental crisis whether or not that crisis is drug-induced. It is clear that the current legal trend is to hold officers to a higher standard when they are taking into custody someone who is in a state of "diminished capacity." This includes those in a state of "excited delirium" as well as those who are suicidal.)

Recently, after four Taser-related deaths in British Columbia (including that of Roman Andreichikov), the British Columbia Office of the Police Complaint Commissioner conducted a comprehensive review of the role of Tasers in law enforcement. B.C. Office of the Police Complaint Commissioner, "Taser Technology Review & Interim Recommendations," OPCC File No. 2474 (September 2004). The report is considered interim as it does not include the B.C. Chief Coroner's review of all in-custody restraint-related deaths in British Columbia, yet to be published.

The B.C. Police Complaint Commissioner reviewed all medical literature available concerning stun guns and Tasers, including a recent public forum conducted by the Orange County, Florida, Sheriff's Office, as well as all materials relating to Taser safety. See Orange County, Florida, Sheriff's Office, "Taser Task Force Medical Findings" (July 28, 2004) (Transcripts of testimony from a cardiac electrophysiologist, an emergency physician, a pharmacist and a medical examiner). In addition to recommendations concerning Tasers, the

Complaint Commissioner also recommended enhanced training for all police officers to cover recent changes in drug use patterns making it more likely that officers will encounter victims of "excited delirium" and that restraint protocols be modified to eliminate the maximal prone restraint position. BC Police Complaint Commissioner Report, *supra* at p. 56. It is no surprise that the Amnesty Report does not explicitly include such recommendations. Amnesty Report at p. 70 (recommending that mental health specialists be called in and that dangerous restraint "holds" such as hogtying and chokeholds be banned).

In addition to modifying restraint policies, enhanced training is crucial. Because one out of every ten calls to police now involve someone who is mentally ill (whether drug-induced or not), crisis intervention training should be required of every patrol officer who will be using the new generations of less-lethal weapons, including Tasers. Charles Gillespie, "Training Improves Safety in Dealing with Mentally Ill," *The Associated Press* (August 5, 2001). In addition, it is crucial for the enhancement of police-community relations that departments consider the reality that minorities suffer from far less access to mental health and substance abuse treatment and may on this basis alone be subjected to harsher police tactics. Erica Goode, "Mentally Ill Endure Racial Bias: Minorities Suffer More Illnesses But Get Inferior Care, Report Says," *New York Times* (August 27, 2001) (summarizing U.S. Surgeon General's Report). According to one use-of-force expert, a "forceful takedown" is never a primary option, regardless of a suspect's mental state: "Effective communication ... is always the first weapon of choice." Hon, *supra* (June 21, 2004) at n. 2.

Effective techniques for police handling of emotionally disturbed persons are relatively simple and can be learned in a few days, according to one police training expert. James J. Fyfe, "Policing the Emotionally Disturbed," 28 *J. Am. Acad. Psychiatry L.* 345, 347 (2000). They include such tactics as keeping a safe distance away, calling for backup, appointing one officer as the "talker," avoiding provocative displays (of Tasers, for example) or threats of force, and taking as much time as necessary (many hours or days) to *talk* the emotionally disturbed person into custody. *Id.* Courts have generally, however, rejected arguments that such training should be required. Michael Avery, "Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People," 34 *Columbia Human Rights Law Review* 261, 328-329 (2003).

## Conclusion

But better training in restraint procedures is mandatory. Police are trained to make sure that a handcuffed detainee can breathe and to watch for warning signs *after* the person is restrained. What about finding a way to avoid "forceful takedowns" altogether and training officers to do better when handling combative suspects who exhibit signs of "excited delirium"? More humane methods have been around for years.

One police training outfit in New York called "Modern Warrior" in 1994 developed a videotaped training program for officers called "Preventing In-Custody Deaths." See [www.modernwarrior.com](http://www.modernwarrior.com). After explaining the anatomy, the effect of drugs and complications arising from the cutting off of airflow to the lungs, a New York Police Department training officer demonstrates how to "take down" a combative person without compressing the person's chest. It looks so simple.

Perhaps if the Taser-blazing officers who took Roman Andreichikov down had seen that video, he would have lived to fight his own inner demons one more time.

## Recent Case Updates

### In the Supreme Court

In a *Per Curiam* decision, the Supreme Court summarily reversed the Ninth Circuit's Fourth Amendment qualified immunity decision in *Brosseau v. Haugen*, holding that the Ninth Circuit's finding that Officer Brosseau of Puyallup, Washington violated clearly established legal precedent governing the use of deadly force was clearly erroneous. In *Brosseau*, an associate of Kenneth Haugen, the plaintiff in the § 1983 lawsuit against Brosseau, went to the local police station to report that Haugen had stolen some tools from his shop. Officer Brosseau learned that in addition to these new allegations, Haugen also had an outstanding no-bail felony warrant on unrelated drug offenses.

The next morning, Haugen was outside of his mother's home spray painting his Jeep Cherokee, when his former associate, Glen Tamburello, learned of his whereabouts. Tamburello and another cohort then proceeded to Haugen's mother's home. When a fight broke out, neighbors called 911. Officer Brosseau responded to the 911 call and proceeded to the area. Her arrival created a distraction long enough for Haugen to run through his mother's yard and to hide in the neighborhood. Brosseau then told Tamburello and his friend to wait in Tamburello's truck, which was parked at the end of the driveway, while she called for back-up. Haugen's girlfriend and her daughter, who were also present at the scene, were ordered to remain in her car that was parked in the driveway facing Haugen's Jeep.

K-9 officers arrived and began to search the neighborhood. Eventually, a police officer radioed that a neighbor had spotted Haugen in her backyard. Brosseau responded to the area, and Haugen began running back toward his mother's house with Brosseau in pursuit. Haugen ran to his Jeep and jumped into the front seat. Brosseau later testified that she thought Haugen was attempting to retrieve a weapon.

Brosseau arrived at the Jeep with her gun drawn and ordered Haugen out of the vehicle. Haugen refused, and testified later that he was looking for his car keys. Brosseau then began banging on the driver side window, repeatedly ordering Haugen to get out of the car. At one point, Brosseau broke the driver side window with her weapon, and she then struck Haugen in the head with the barrel and handle of her gun.