National Police Accountability Project

Current Trends in Police Misconduct Litigation

Thursday, October 16, 2008

Detroit Marriott at the Renaissance Center

Detroit, MI

October 16, 2008

Dear CLE Participant:

Thank you for joining us today. The National Police Accountability Project (NPAP) has offered CLE seminars since the project's inception in 1999. As many times before, we have assembled some of the most experienced faculty for the purpose of educating lawyers, legal workers and law students in the complex area of Section 1983 litigation. By providing a forum to learn and an opportunity to network, we hope to embolden you in your efforts on behalf of the victims and to get a step closer to our goal to protect individuals and communities from law enforcement misconduct and brutality.

The National Police Accountability Project, a project of the National Lawyers Guild, is a non-profit organization dedicated to ending police abuse of authority through coordinated legal action, public education, and support for grassroots and victims organizations combating law enforcement misconduct.

The NPAP has members nationwide and is steadily growing. The project offers a variety of services to its members. Our member only listserv has become a tremendous resource to share legal analysis, litigation strategy and information regarding expert witnesses and other topics. The Section 1983 Subscription Series, quarterly updates on critical Section 1983 case law developments, can be accessed by members and non-members for an additional annual fee; open to everyone we publish Amicus Briefs. To find out more about our organization please visit our web page at www.nlg-npap.org.

Police misconduct continues to be a serious legal, social and political problem. The abuse of Tasers, police misconduct against immigrants, abhorrent conditions in jails and prisons across the country, and the continuing use of deadly force against unarmed individuals are only a few of the issues civil rights lawyers are confronted with regularly. We hope that this seminar will sharpen your legal skills and provide you with the necessary network to master these challenges.

As always, many people have worked to make this event possible. Our thanks go to speakers John Burton, Javier Maldonado, David Robinson, Richard Soble and Roger Smith, and our panelists Michael Avery, Howard Friedman, Julie Hurwitz, Deborah LaBelle, Julia Sherwin, Mariann Meier Wang and Amos Williams; to our CLE chair and moderator Michael Haddad, and to our parent organization, the National Lawyers Guild. Last but not least, what would a CLE seminar be without a coffee break? Our thanks go to Analytics, Incorporated who generously sponsor our coffee breaks www.classadmin.com/index.html.

The National Police Accountability Project

Brigitt Keller
Executive Director

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About the Faculty

MICHAEL AVERY is a Professor at Suffolk University Law School in Boston. He completed a three year term as the President of the National Lawyers Guild in October, 2006. A graduate of Yale College and Yale Law School, he was a trial lawyer for 28 years before joining the Suffolk faculty in 1998. He specialized in constitutional law and civil rights cases, particularly civil actions based on law enforcement conduct. Among the hundreds of such cases he filed, Prof. Avery was lead counsel for the plaintiffs in the Cerro Maravilla case, based on the police murder of Puerto Rican independence activists in 1978. He currently represents plaintiffs in cases stemming from the FBI scandal in Boston, which involved the imprisonment for three decades of innocent men as a result of FBI suppression of exculpatory evidence. He is also representing lawyers from the Center for Constitutional Rights in a suit against President Bush to enjoin warrantless electronic surveillance. He has argued civil rights cases in the United States Supreme Court and several circuit courts. Prof. Avery is a co-author of *Police Misconduct: Law and Litigation*, the leading treatise in the field of law enforcement misconduct litigation, and has published several articles on police misconduct. He also co-authored *Handbook of Massachusetts Evidence*, the leading treatise in that field. He has authored several articles on civil rights law and evidence. He frequently lectures to both civil rights and police audiences on constitutional law and civil rights.

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JOHN BURTON John Burton obtained his undergraduate degree from UCLA in 1976, and graduated from Hastings College of the Law in 1978, following an externship with California Supreme Court Justice Stanley Mosk. Mr. Burton is a member of the NPAP Board of Directors. Mr. Burton was a member of Police Watch: The Police Misconduct Lawyers Referral Service, from 1986 until its dissolution in 2004, and is a past president of its board of directors. He was a professor of Torts at the University of West Los Angeles from 1981 through 1989. Mr. Burton has focused his practice on representing victims of police misconduct since 1984. Mr. Burton has provided leadership to teams comprised of several police misconduct attorneys in three major complex cases. Mr. Burton was lead counsel for plaintiffs' attorneys in civil litigation arising from the August 1988 Dalton Avenue raids by the Los Angeles Police Department ($3.5 million recovered), and was vice-lead counsel to Hugh Manes in the class action lawsuit against the Los Angeles County Sheriff's Department arising from widespread misconduct at the Lynwood Substation ($7.5 million recovered in addition to compelled institutional changes). Most recently, Mr. Burton served as co-lead counsel with Barry Litt in the class action cases challenging the systematic over-detention and unnecessary strip searches of people held in Los Angeles County jails ($27 million recovered and system changed). Along with co-counsel Peter Williamson of Williamson & Krauss of Woodland Hills, California, Mr. Burton represented plaintiffs in *Heston v. City of Salinas and TASER International, Inc.*

On June 9, 2008, the jury returned a $6.2 million verdict against TASER International, the first such verdict since the company introduced 26-watt electronic control devices (ECDs) in 2000.

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HOWARD FRIEDMAN is the principal in the Law Offices of Howard Friedman P.C., a civil litigation firm in Boston, Massachusetts. Howard's practice emphasizes representing plaintiffs in civil rights cases. He has represented the plaintiffs in five class actions alleging unconstitutional strip searches at county jails and he has handled about a dozen individual cases alleging unlawful strip searches in prisons, jails and schools. He is the President of the National Police Accountability Project of the National Lawyers Guild. He served as chair of the Civil Rights Section of the Association of Trial Lawyers of America (ATLA) (now the American Association for Justice). He is a graduate of Northeastern University School of Law and Goddard College.

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JULIE HURWITZ is in private practice in Detroit, Michigan, a partner in the firm of Goodman & Hurwitz, P.C., where she and her partner Bill Goodman specialize in civil rights and government misconduct/§1983 litigation. She is also adjunct professor of law at the University of Detroit/Mercy School of Law, where she teaches Civil Rights Litigation. From 1990-1993 and again from 1997-2006, she was the Executive Director of the NLG/Maurice & Jane Sugar Law Center for Economic and Social Justice [Sugar Law Center] in Detroit. She has successfully tried several civil rights case to verdict, including police misconduct, prisoner rights, failure to protect and sexual harassment cases, most recently obtaining a $2.5 million jury verdict, with fellow NPAP practitioner Thomas M.Loeb, on behalf of two women who had been maliciously prosecuted and wrongfully convicted of an armed robbery of which they were the victims. She is past president of the Detroit Chapter of the National Lawyers Guild and a graduate of the University of Michigan Law School.

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DEBORAH LABELLE's in Ann Arbor, Michigan focuses on the human rights of people in detention. She has been lead counsel in over a dozen class actions that have successfully challenged policies affecting and treatment of incarcerated men, women and juveniles and their families, arguing several cases before the US Supreme Court and in international forums. Ms. LaBelle was the first American to be designated as Human Rights Monitor by Human Rights Watch for her work on behalf of women prisoners and use of international standards on behalf of those in detention in the United States. She received the Champion of Justice award from the State Bar of Michigan in 2004, was the ACLU's Civil Libertarian of the Year in 2006, and designated as 2008 Trial Lawyer of the Year by the Public Justice Foundation. Her recent publications include contributions to *Human Rights Case Studies: the world of detention,* Human Rights at Home, eds. Cox, Rosenblum, Albisa, Davis, Soohoo. (Praeger Press 2008); *Women at the Margins, Women, the Law, and the Justice System: Neglect,*

Violence and Resistance (Haworth Press, 2003) and *Balancing Gender Equity for Female Prisoners* (Feminist Studies, Summer 2004). Ms. LaBelle is a Senior Soros Justice Fellow and in addition to her private practice is project director for the ACLU's Juvenile Life Without Parole Initiative and author of, *Second Chances: Juveniles serving life without parole in Michigan's prisons.*

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JAVIER MALDONADO is an attorney in private practice whose work focuses on civil litigation, primarily in immigration and employment discrimination, civil rights, wage and hour and other complex litigation in both federal and state courts. Mr. Maldonado is the former Executive Director of the Lawyers' Committee for Civil Rights under Law of Texas ("Texas Lawyers' Committee"), a nonprofit legal organization dedicated to protecting and defending the rights of immigrants and refugees. He previously served as a Trial Attorney with the Equal Employment Opportunity Commission and as a Staff Attorney and Skadden Fellow with the Mexican American Legal Defense and Educational Fund (MALDEF). Mr. Maldonado is a graduate of Columbia College and Columbia University School of Law. Following law school, Mr. Maldonado clerked for U.S. District Judge George P. Kazen in the Southern District of Texas. In 2006, Mr. Maldonado was awarded the LexisNexis Matthew Bender Daniel Levy Memorial Award for Outstanding Achievement in Immigration Law. Mr. Maldonado was born in Matamoros, Tamaulipas, Mexico and lives today in San Antonio, Texas with his wife and three children.

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DAVID A. ROBINSON is a graduate of Wayne State University and Detroit College of Law and has practiced law for over 22 years. Before starting his legal practice, he served the Detroit Police Department for thirteen years, both as an officer of the law and an officer of the court, and frequently defended officers involved in civil litigation. As a part of his responsibilities, he taught the legal section to recruits in the Detroit Metropolitan Police Academy. During these years, he also served the Wayne State University Criminal Justice Department as an instructor in Criminal Law and Evidence. At the end of his tenure he served as legal advisor to the Department. In his legal practice, Mr. Robinson has litigated numerous cases against municipalities involving civil rights violations resulting from police misconduct. As a result of his personal history, experience, and area of practice, he has a unique insight to both municipal liability and governmental immunity, and has been instrumental in the improvement of community relations for various institutions by identifying areas of concern and addressing them through the creation and implementation of sound policies in order to ensure and maintain a relationship of mutual respect, trust and confidence between the community and its leaders. David Robinson serves on the executive boards of both the NPAP and the Legal Redress Committee for the NAACP. Previously, he has been on the boards of the Michigan Association for Justice and the National Lawyers Guild. He is a frequent CLE lecturer and has addressed the members of the coalitions against police brutality for Detroit and Pontiac.

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JULIA SHERWIN is an AV rated attorney and a partner in Haddad & Sherwin, in Oakland, California. She primarily represents Plaintiffs in civil right matters, including First Amendment, wrongful death, police misconduct, sexual harassment, and racial discrimination. Ms. Sherwin has successfully tried and settled numerous cases in federal and state courts, for example:

- $4.35 million present value [$10.9 million structured] medical malpractice settlement for failure to diagnose a serious cardiac condition in a 9-year-old boy;
- California's first mandatory training program in public schools to combat discrimination and harassment against gay and lesbian students and teachers, followed by an emotional distress damages verdict of $500,000 and ultimately a $1.1 million settlement for a teacher who was disciplined for protecting gay and lesbian student;
- sweeping police crowd control policy changes and substantial damages settlements for six peace demonstrators who were injured by the Oakland police at the Port of Oakland on April 7, 2003;
- the first jury verdict in the country for a public entity's deliberately indifferent failure to train its employees about language-based discrimination;
- lead counsel on a case of first impression nationally to recognize the First Amendment rights of Administrative Law Judges to make decisions free of outside pressure (*Perry v. McGinnis,* 209 F.3d 597 (6th Cir. 2000).

Ms. Sherwin is listed as a Northern California *Super Lawyer* in Civil Rights/First Amendment for 2006 and 2008. She is immediate past president of the Alameda Contra Costa Lawyers.

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ROGER A. SMITH A shareholder and managing attorney of the Troy office with the law firm of Garan Lucow Miller, P.C., Roger A. Smith has been an attorney covering a broad spectrum of governmental and municipal law, product liability, construction as well as personal injury law since 1977. Mr. Smith is the coauthor of the publication, the Michigan Tort Reform (1995) and was the recipient of 2003 Respected Advocate Award bestowed by The Michigan Trial Lawyers Association. He is a two-time nominee (2002 and 2003) for the State Bar of Michigan John W. Cummiskey Award recognizing the pro bono contributions of a Michigan attorney. He has been selected by his peers as a 2008 "Best Lawyer in America" for his work in personal injury law and as a "Super Lawyer" (2006, 2007 and 2008) for his achievements in government, cities and municipalities law. Mr. Smith is a member of the State Bar of Michigan, American Bar Association (past), the Defense Research Institute, Michigan Defense Trial Counsel, and the Association of Defense Trial Counsel, among others. He serves as President of the Advisory Council of the Salvation Army William Booth Legal Aid Clinic and was an inaugural Master of the Bench of the Oakland County Inn of Court. He is a Case Evaluator in both Wayne County and Oakland County Circuit Court. He also served as a Court Appointed Facilitator in Oakland County. Mr. Smith received his law degree from Wayne State University (1977).

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RICHARD A. SOBLE of Soble Rowe Krichbaum, LLP, Ann Arbor, MI, practices in the area of complex civil litigation. He serves by judicial appointment on the Washtenaw County Mediation Committee and is frequently requested by both attorneys and judges to serve as an arbitrator or mediator/facilitator. Having handled over 500 such cases, Mr. Soble shares his experience in alternative dispute resolution as a board member for the ICLE Mediation Advisory group. He has published and been invited to lecture on trial practice, negotiation skills, and alternative dispute resolution by the Michigan Trial Lawyers, ICLE, the National Lawyers Guild and the University of Michigan and Wayne State University law schools. Mr. Soble is also a Fellow of the State Bar of Michigan, serving on the Legal Services Grant Committee and is past executive vice-president of the National Lawyers Guild.

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MARIANN MEIER WANG is a partner with Emery Celli Brinckerhoff & Abady LLP ("ECBA"). She has litigated a variety of civil rights matters, both individual cases and class actions, and has focused particularly on fighting discrimination and police abuse, and protecting detainees' and prisoners' rights as well as reproductive rights. At ECBA, she has litigated police abuse cases, prisoners' rights cases, First Amendment retaliation claims, employment discrimination and fair housing cases, labor and wage claims, and commercial cases including trademark infringement and contract cases. Two of the class actions she has litigated concerned strip search practices -- McBean v. City of New York, an ongoing case with hundreds of thousands of class members unlawfully strip searched by New York City's Department of Corrections pursuant to a policy that the City had declared in court had stopped years before, and Tyson v. City of New York, a class of 60,000 individuals strip searched by the New York Police Department. Prior to joining ECBA, she litigated federal and state constitutional challenges to restrictions on reproductive rights with the ACLU and was a litigation associate with Paul, Weiss, Rifkind, Wharton & Garrison. She has also litigated international human rights cases for a law group in the UK called Interights, where she directed the free speech and equality programs. She is a former law clerk to the Hon. Sterling Johnson, Jr. in E.D.N.Y., and a graduate of Columbia University's School of Law and Harvard College.

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AMOS E. WILLIAMS has been a practicing attorney in Detroit, Michigan since 1986. He started his legal career as a solo practitioner after graduating from Detroit College of Law. He was later joined by his wife, Carole F. Youngblood, in Williams & Youngblood, P.C. In 1994 Carole Youngblood was elected Wayne County Circuit Judge. Amos has practiced extensively in the field of police misconduct and civil rights and he has litigated countless cases in both the state and federal

courts. He has been a frequent instructor of trial advocacy and litigation skills for the Institute of Continuing Legal Education. Prior to becoming a lawyer, in 1985 he retired as a lieutenant from the Detroit Police Department where he served for 17 years. During his career as a police officer, he completed his undergraduate degree at Wayne State University and earned a B.S. in criminal justice. He also graduated from the F.B.I. National Academy in 1980. As a paratrooper in the Army's 101st Airborne Division he served in Viet Nam as a forward observer in 1967 and 1968. He was awarded, among others, the combat infantrymen's badge, 3 purple hearts, a bronze star, a bronze star for valor. In 2006, he won the Democratic Party's nomination for Michigan Attorney General and although he failed to unseat the incumbent in the general election he amassed more than 1,600,000 votes. Since the election he has returned to private practice and he remains active in progressive causes.

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Moderator: MICHAEL J. HADDAD is an AV rated attorney and a partner in Haddad & Sherwin, in Oakland, California. The majority of his practice is related to representing plaintiffs in police misconduct and other civil rights litigation, including wrongful police shootings, wrongful death, excessive force, and municipal liability. Mr. Haddad has successfully tried and handled numerous police misconduct and civil rights cases in federal and state courts, including a $1.2 million verdict in the Eastern District of California for the wrongful death shooting of a mentally ill man, a $3.5 million settlement for the family of a police officer killed by "friendly fire," and several injunctive relief settlements to improve police department policies and procedures. Mr. Haddad also currently serves as Vice-President of the National Police Accountability Project (NPAP), and is a panel attorney for Bay Area Police Watch (BAPW). Previously, Mr. Haddad was a partner in the firm of Goodman, Eden, Millender & Bedrosian, in Detroit, Michigan. He graduated from the University of Michigan Law School in 1991.

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I. Immigration Issues in Police Misconduct Litigation

Materials:

To sue or not to sue?
Keeping client in the US if s/he sues
Discovery issues
Damages

Presenter:

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National Police Accountability Project
October 16, 2008

Immigration Issues in Police Misconduct Litigation

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To Sue or Not to Sue?

- As an initial matter, there is no question that noncitizens, or aliens, who lack lawful immigration status in the US have a constitutional right to sue for civil rights violations in US courts. *See e.g.*, *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987); *Bolanos v. Riley*, 509 F.2d 1023 (2nd Cir. 1975).

- Undocumented clients face the potential of being reported to the Dep't of Homeland Security (DHS).

- Retaliatory reporting may be separately actionable if it can be proven that it was done for illegal purposes. *E.g. Sure-Tan, Inc. v. NLRB*, 104 S.Ct. 2803 (1984)(employer illegally retaliated against workers by reporting them to INS because of union activities).

- But, retaliatory reporting will not stop DHS from initiating removal/deportation proceedings. *See Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997)(INS could use evidence of noncitizen's immigration status to initiate removal proceedings even if obtained through employer's reporting in violation of NLRA); *Montero v. INS*, 124 F.3d 381 (2nd Cir. 1997).

- Indeed, federal law expressly limits federal/state/local laws from restricting public entities from sharing information regarding the immigration status of noncitizens. 8 U.S.C. 1373(c) and 1644.

- Immigrant clients with criminal offenses face unique problems.

- For example, any person with an “aggravated felony” is subject to **mandatory detention** by DHS pending removal proceedings. Aggravated felonies can be many things including a theft offense with a one year sentence of probation, aggravated assault with a one year sentence of probation, indecency with a minor, or offenses involving delivery of drugs. Immigration law severely restricts the relief from removal that is available to aggravated felons.

- Even relatively “minor” offenses can subject a potential immigrant plaintiff to serious consequences such as mandatory detention and/or no relief from removal, for example misdemeanor possession of marijuana.

- Consult with an immigration attorney because the consequences of certain criminal offenses can have particularly serious problems for client.

- Proceeding under fictitious name may be an option but the standard for proceeding as *Doe* is high.
  - Use of fictitious names runs afoul of public's common law right of access to judicial proceedings. *Nixon v. Warner Comms. Inc.*, 98 S.Ct. 1306 (1978).
  - FRCP 10(a) requires that every complaint "include the names of the parties."
  - But, fictitious names will be allowed in the unusual case or where exceptional circumstances exist such that nondisclosure is necessary to protect the plaintiff from "injury, harassment, ridicule, or personal embarrassment." *Does I thru XXIII v. Advance Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).

- To proceed anonymously:
  - You must seek leave of court.
  - Review your circuit law for particular standard justifying the use of pseudonyms:
    - *Does I thru XXIII v. Advance Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).
    - *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869 (7th Cir. 1997).
    - *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993).
    - *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981).
  - Note there are differences among the circuits in the standards for proceeding under a fictitious name.

Keeping Client In The US If S/he Sues

- No provision in federal law that expressly allows for noncitizens to remain in the US pending civil rights proceedings.

- Is client eligible to obtain LPR status or relief from removal?

- If client was victim of a particular crime (such as rape, domestic violence, felonious assault, etc.), client can seek a U visa and obtain permission to remain in US with right to work. 8 U.S.C. § 1101(a)(15).

- Request ***deferred action*** from DHS. Such relief is not in the statute. It is an act of discretion where case is given lower priority and so noncitizen is not placed in proceedings. Considerations are: (1) likelihood of removing alien; (2) presence of sympathetic factors; (3) possibility for negative publicity; and, (4) whether noncitizen is a member of a class of deportable noncitizens whose removal has been given high priority (e.g., sex offenders).

- Contact client's consulate and see whether it can help. But be careful about approaching consulate if client expresses fear about returning to his country or about his country's government.

- If client departs U.S. after he is deposed, it will be very difficult to proceed simply with deposition testimony.
- In *Garcia-Martinez v. City and County of Denver*, 392 F.3d 1187 (10th Cir. 2004), Tenth Circuit affirmed district court's dismissal of civil rights action where plaintiff left the US because he feared getting arrested for illegally reentering the US. At trial, the district court refused to admit the plaintiff's deposition testimony because his reasons for not appearing did not constitute "unavailability" as that term is used in FRCP 32(a)(3) and FRE 804(b)(1).

Discovery Issues

- Plaintiffs' attorneys should oppose discovery on client's immigration status.

- This will include limiting discovery about the plaintiff's: (1) birthplace; (2) primary education; (3) primary language; and (4) birthplaces of parents.

- Generally, a plaintiff's immigration status is not relevant to the question of liability but rather goes to the issue of damages and only as it concerns certain statutes such as the NLRA. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004)(Title VII case); *Flores v. Amigon*, 233 F.Supp.2d 462 (E.D.N.Y. 2002) (FLSA case); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D.Mich. 2005)(FLSA and AWPA).

- Defendants employ *Hoffman Plastics Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002) to discover the plaintiff's status. That case limited the NLRB and courts from awarding backpay for NLRA violations to undocumented workers for years of work not performed.

- But outside the labor context, the limitations on the recovery of damages may not be applicable and thus discovery of a plaintiff's status may not be relevant and discoverable. *See Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2nd 2006)(in state negligence action, plaintiff's undocumented status was not a bar to recovery for lost US wages even if he was illegally in the US); *but see Veliz v. Rental Service Corp. USA, Inc.*, 313 F.Supp.2d 1317 (M.D.Fla. 2003)(in wrongful death action, survivors had no right to recovery of lost support insofar as it encompassed lost US wages).

- Attorneys must also fight discovery of use of false SSNs as such information can lead to serious federal criminal consequences.

- In the FLSA context, courts have been willing to bar discovery of an immigrant plaintiff's social security numbers. *Flores v. Amigon*, 233 F.Supp.2d 462 (E.D.N.Y. 2002) (FLSA case); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D.Mich. 2005)(FLSA and AWPA).

Damages

- Under federal law, documented immigrants are eligible for compensatory and punitive damages with some caveats.

- Backwages: undocumented immigrants are eligible to recover wages for work they performed.

- Future lost wages (or lost earning capacity): this is a problematic issue because of *Hoffman Plastic Compounds, Inc.* Plaintiffs must argue that absent evidence that plaintiff faced likely removal/deportation or had plans to return voluntarily, US wages is proper measure for lost earning capacity. Otherwise, lost earnings may be limited to wages in home country.

- But note, courts have held that a defendant's claim that a plaintiff's lost earnings capacity is limited by IRCA and/or *Hoffman Plastic Compounds*, *Inc.* is an affirmative defense that must be raised in the pleadings. If the defendant fails to raise the defense, it is waived. *See Contreras v. KV Trucking*, *Inc.*, 2007 WL 2777518 (E.D.Tex. Sept. 21, 2007).

- Although there is no caselaw, there is nothing in federal law that bars a plaintiff from recovering mental pain and anguish damages as well as punitive damages.

II. Litigating Taser Cases

Materials:

Opening Statement
Plaintiff's Opposition to Defendant's Motions in Limine on Experts
Plaintiff's Memorandum in Opposition to Defendant's JMOL
Closing Instructions
Plaintiff's Memorandum in Opposition to Defendant's Motion for a New Trial

Presenter:

John Burton, Law Offices of John Burton, Pasadena, CA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

BETTY LOU HESTON,	)	C-05-03658-JW
	)	
PLAINTIFF,	)	MAY 14, 2008
	)	
V.	)	VOLUME 1
	)	
CITY OF SALINAS, ET AL.,	)	PAGES 138 - 399
	)	
DEFENDANTS.	)	
_____	)	

THE PROCEEDINGS WERE HELD BEFORE

THE HONORABLE UNITED STATES DISTRICT

JUDGE JAMES WARE

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FOR THE PLAINTIFF:

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SAN JOSE, CALIFORNIA MAY 14, 2008

P R O C E E D I N G S

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE HELD OUT OF THE PRESENCE OF THE JURY:)

THE COURT: GOOD MORNING, PLEASE BE SEATED. ARE WE READY TO COMMENCE?

MR. BURTON: THE PLAINTIFF IS READY, YOUR HONOR.

MR. HURLEY: READY FOR THE DEFENDANT CITY OF SALINAS, YOUR HONOR.

MS. O'LINN: READY, YOUR HONOR.

THE COURT: ALL RIGHT. SUMMON THE JURY.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN THE PRESENCE OF THE JURY:)

THE COURT: VERY WELL. LADIES AND GENTLEMEN OF THE JURY, I SEE YOU'RE BEING GIVEN COPIES OF THESE INSTRUCTIONS. AND I SHOULD COMMENT BEFORE I BEGINNING TO READ THEM, THAT IT IS MY PRACTICE TO GIVE YOU THE LEGAL INSTRUCTIONS IN WRITING SO THAT YOU CAN FOLLOW ALONG WITH THEM. AND SO BOTH WITH RESPECT TO THESE OPENING INSTRUCTIONS AND LATER ON WITH THE CLOSING INSTRUCTIONS ON THE LAW, YOU WILL HAVE THOSE IN

WRITING.

I WANT TO TAKE A FEW MINUTES TO TELL YOU SOMETHING ABOUT YOUR DUTIES AS JURORS AND TO GIVE YOU SOME INSTRUCTIONS. DURING VARIOUS POINTS IN THE TRIAL WHEN I FIND IT APPROPRIATE, I WILL GIVE YOU ADDITIONAL INSTRUCTIONS.

ALL OF THE INSTRUCTIONS WHICH I GIVE TO YOU ARE IMPORTANT. YOU MUST FOLLOW ALL OF THEM.

AS YOU LEARNED DURING THE JURY SELECTION PROCESS, THIS IS A CIVIL CASE INVOLVING THE DEATH OF ROBERT C. HESTON. BETTY LOU HESTON, ROBERT H. HESTON, AND MISTY KASTNER, THE EXECUTOR OF ROBERT C. HESTON'S ESTATE, THE PLAINTIFFS IN THIS CASE, HAVE FILED A LAWSUIT AGAINST THE CITY OF SALINAS POLICE DEPARTMENT AND INDIVIDUAL OFFICERS MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON, AND JUAN RUIZ, THE DEFENDANTS.

THE PLAINTIFFS CLAIM THAT THE OFFICER DEFENDANTS SUBJECTED ROBERT C. HESTON TO EXCESSIVE FORCE WITH A TASER M26 ELECTRONIC CONTROL DEVICE CALLED AN ECD IN VIOLATION OF ROBERT C. HESTON'S FOURTH AMENDMENT RIGHTS AND DEPRIVED PLAINTIFFS BETTY LOU HESTON AND ROBERT H. HESTON OF THEIR DUE PROCESS RIGHTS TO FAMILIAL RELATIONS IN VIOLATION OF THE 14TH AMENDMENT.

PLAINTIFFS HAVE ALSO BROUGHT SUIT AGAINST TASER INTERNATIONAL, INC. PLAINTIFFS CLAIM THAT DEFENDANT TASER, NUMBER ONE, NEGLIGENTLY MANUFACTURED THE TASER M26 ECD'S; TWO, FAILED TO PROVIDE ADEQUATE WARNINGS THAT REPEATED APPLICATIONS OF ITS ELECTRICAL CURRENT AND DEPLOYMENT AND USE OF A TASER CAN CAUSE CARDIAC ARREST, ESPECIALLY ON PERSONS WHO ARE IN AN AGITATED OR EXCITED PHYSICAL STATE; AND THREE, IS STRICTLY LIABLE FOR FAILURE TO PROVIDE ADEQUATE WARNINGS.

NOW, IN EVERY LEGAL DISPUTE, THERE ARE TWO KINDS OF QUESTIONS. THE FIRST KIND OF QUESTIONS ARE QUESTIONS OF FACT. FOR EXAMPLE, IN MANY LAWSUITS THERE ARE A DISPUTE BETWEEN THE PARTIES OVER WHETHER OR NOT A PARTICULAR EVENT ACTUALLY TOOK PLACE.

UNDER OUR SYSTEM A JURY WOULD BE IMPANELED TO LISTEN TO THE EVIDENCE AND BASED ON THAT EVIDENCE THE JURY WOULD DECIDE WHETHER OR NOT THE DISPUTED EVENT TOOK PLACE OR NOT.

AS JURORS IN THIS CASE, YOUR FIRST DUTY IS TO LISTEN TO THE EVIDENCE AND MAKE A DECISION ABOUT WHAT HAPPENED. THERE MIGHT BE INSTANCES WHEN WHAT THE PLAINTIFFS CLAIM TOOK PLACE WILL BE

DIFFERENT THAN WHAT THE DEFENDANTS CLAIM TOOK PLACE. THERE MIGHT BE INSTANCES WHEN WHAT THE PLAINTIFFS CLAIM TOOK PLACE, WILL BE THE SAME AS WHAT THE DEFENDANTS CLAIM TOOK PLACE. YOU MUST LISTEN TO THE EVIDENCE AND BASED ON THAT EVIDENCE MAKE YOUR DECISION ABOUT WHAT TOOK PLACE. IN OTHER WORDS, YOU MUST DECIDE THE FACTS OF THE CASE. YOU AND YOU ALONE ARE THE JUDGES OF THE FACTS.

THE SECOND KIND OF QUESTIONS INVOLVED IN LEGAL DISPUTES ARE CALLED QUESTIONS OF LAW. AN EXAMPLE OF A QUESTION OF LAW IS: "WHAT IS THE STANDARD WHICH MUST BE USED TO DECIDE IF A POLICE OFFICER'S ACTIONS WERE EXCESSIVE?"

IN OUR LEGAL SYSTEM THE JUDGE IS RESPONSIBLE FOR DECIDING QUESTIONS OF LAW. AND IN DUE COURSE, AND WHAT WE CALL "JURY INSTRUCTIONS," I WILL TELL YOU THE LAW WHICH APPLIES TO THIS CASE.

THE FINAL STEP IN THE PROCESS IS CALLED THE VERDICT. BASED ON YOUR DECISION ON THE FACTS AND APPLYING THE LAW WHICH I WILL GIVE TO YOU, YOU WILL BE ASKED TO DECIDE IN FAVOR OF THE PLAINTIFFS OR THE DEFENDANTS. THEREFORE, YOU WILL HEAR THE EVIDENCE, DECIDE WHAT THE FACTS ARE, AND THEN APPLY THOSE FACTS TO THE LAW WHICH I WILL GIVE TO YOU. AND THAT IS HOW YOU WILL REACH YOUR VERDICT. IN

DOING SO, YOU MUST FOLLOW THAT LAW WHETHER YOU AGREE WITH IT OR NOT.

THE EVIDENCE WILL CONSIST OF THE TESTIMONY OF WITNESSES, DOCUMENTS AND OTHER THINGS RECEIVED INTO EVIDENCE AS EXHIBITS AND ANY FACTS ON WHICH THE LAWYERS AGREE OR ON WHICH I INSTRUCT YOU TO ACCEPT.

IN A LAWSUIT SUCH AS THIS, THE LAW PROVIDES THAT A PARTY IS ENTITLED TO A VERDICT IN ITS FAVOR ONLY IF THAT PARTY PRESENTS A SUFFICIENT AMOUNT OF EVIDENCE. WE CALL THIS THE BURDEN OF PROOF.

IN THIS CASE YOU WILL HEAR ABOUT PREPONDERANCE OF THE EVIDENCE. WHEN A PARTY HAS THE BURDEN OF PROVING A CLAIM BY A PREPONDERANCE OF THE EVIDENCE, THAT MEANS THAT THE PARTY HAS TO PRODUCE EVIDENCE WHICH, CONSIDERED IN LIGHT OF ALL OF THE FACTS, LEADS YOU TO BELIEVE THAT WHAT THAT PARTY CLAIMS IS MORE LIKELY TRUE THAN NOT.

NOW, DURING THE TRIAL YOU WILL HEAR EVIDENCE FROM BOTH SIDES. IF YOU WERE TO PUT THE EVIDENCE ON OPPOSITE SIDES OF THE SCALES, THE PARTY WITH THE BURDEN TO PROVE A MATTER BY A PREPONDERANCE OF THE EVIDENCE WOULD HAVE TO MAKE THE SCALES TIP SLIGHTLY ON THAT PARTY'S SIDE. IF

THAT PARTY FAILS TO MEET THIS BURDEN, THE VERDICT MUST BE FOR THE OPPOSING PARTY.

NOW, SOME OF YOU MIGHT HAVE HEARD THE TERM OF "PROOF BEYOND A REASONABLE DOUBT." THAT'S A STRICTER STANDARD, THAT IS, IT ONLY APPLIES TO A CRIMINAL CASE AND IT REQUIRES MORE PROOF THAN A PREPONDERANCE OF THE EVIDENCE. THE REASONABLE DOUBT STANDARD DOES NOT APPLY TO A CIVIL CASE AND YOU SHOULD, THEREFORE, PUT IT OUT OF YOUR MINDS.

NOW, THE FOLLOWING THINGS ARE NOT EVIDENCE AND YOU MUST NOT CONSIDER THEM AS EVIDENCE IN DECIDING THE FACTS OF THIS CASE:

1. STATEMENTS AND ARGUMENTS OF THE ATTORNEYS.

2. QUESTIONS AND OBJECTIONS OF THE ATTORNEYS.

3. TESTIMONY THAT I INSTRUCT YOU TO DISREGARD.

4. ANYTHING THAT YOU MIGHT HAVE SEEN OR HEARD WHEN THE COURT IS NOT IN SESSION, EVEN IF WHAT YOU SEE OR HEAR IS DONE OR SAID BY ONE OF THE PARTIES OR ARE BY ONE OF THE WITNESSES.

EVIDENCE MAY BE DIRECT OR CIRCUMSTANTIAL. DIRECT EVIDENCE IS TESTIMONY BY A WITNESS ABOUT WHAT THAT WITNESS PERSONALLY SAW, HEARD, OR DID.

CIRCUMSTANTIAL EVIDENCE IS INDIRECT EVIDENCE; THAT IS, IT IS PROOF OF ONE OR MORE FACTS FROM WHICH ONE CAN FIND ANOTHER FACT.

YOU ARE TO CONSIDER BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE. THE LAW PERMITS YOU TO GIVE EQUAL WEIGHT TO BOTH, BUT IT IS FOR YOU TO DECIDE HOW MUCH WEIGHT TO GIVE TO ANY EVIDENCE.

THERE ARE RULES OF EVIDENCE WHICH CONTROL WHAT CAN BE RECEIVED INTO EVIDENCE. WHEN A LAWYER ASKS A QUESTION OR OFFERS AN EXHIBIT INTO EVIDENCE, AND THE LAWYER ON THE OTHER SIDE THINKS IT IS NOT PERMITTED BY THE RULES OF EVIDENCE, THAT LAWYER MAY OBJECT.

IF I OVERRULE THE OBJECTION, THE QUESTION MAY BE ANSWERED OR THE EXHIBIT MAY BE RECEIVED.

IF I SUSTAIN THE OBJECTION, THE QUESTION CANNOT BE ANSWERED AND THE EXHIBIT CANNOT BE RECEIVED.

AND WHENEVER I SUSTAIN AN OBJECTION TO A QUESTION, YOU MUST IGNORE THE QUESTION AND MUST NOT GUESS WHAT THE ANSWER WOULD HAVE BEEN.

SOMETIMES I MIGHT ORDER THAT EVIDENCE BE STRICKEN FROM THE RECORD AND THAT YOU DISREGARD IT. THAT MEANS THAT WHEN YOU ARE DECIDING THE CASE, YOU MUST NOT CONSIDER THE EVIDENCE WHICH I TOLD YOU TO

DISREGARD.

I WILL NOW SAY A FEW WORDS ABOUT YOUR CONDUCT AS JURORS.

FIRST, DO NOT TALK TO EACH OTHER OR WITH ANYONE ELSE ABOUT THIS CASE OR ABOUT ANYONE WHO HAS ANYTHING TO DO WITH IT UNTIL THE END OF THE CASE WHEN YOU GO TO THE JURY ROOM TO DECIDE ON YOUR VERDICT.

"ANYONE ELSE" INCLUDES MEMBERS OF YOUR FAMILY AND YOUR FRIENDS. YOU MAY TELL THEM THAT YOU ARE A JUROR, BUT DON'T TELL THEM ANYTHING ABOUT THE CASE UNTIL AFTER YOU HAVE BEEN DISCHARGED BY ME;

SECOND, DO NOT LET ANYONE TALK TO YOU ABOUT THE CASE OR ABOUT ANYONE WHO HAS ANYTHING TO DO WITH IT. IF ANYONE SHOULD TRY TO TALK TO YOU, PLEASE REPORT IT TO ME IMMEDIATELY;

THIRD, DO NOT READ ANY NEWS ARTICLES ABOUT THE CASE OR LISTEN TO ANY RADIO OR TELEVISION RECORD REPORTS ABOUT THE CASE;

FOURTH, DO NOT DO ANY RESEARCH SUCH AS CONSULTING ANY DICTIONARIES OR OTHER REFERENCE MATERIALS, AND DO NOT MAKE ANY INVESTIGATION ABOUT THE CASE ON YOUR OWN;

FIFTH, IF YOU NEED TO COMMUNICATE WITH

ME, SIMPLY GIVE A SIGNED NOTE TO MS. GARCIA OUR COURTROOM DEPUTY CLERK OR TO ONE OF OUR COURT REPORTERS, WE'RE BLESSED TO HAVE TWO ACTUALLY INVOLVED IN THIS CASE OR TO ME;

AND SIX, DO NOT MAKE UP YOUR MIND ABOUT WHAT THE VERDICT SHOULD BE UNTIL AFTER YOU HAVE GONE TO THE JURY ROOM TO DECIDE THE CASE AND YOU AND YOUR FELLOW JURORS HAVE DISCUSSED THE EVIDENCE. KEEP AN OPEN MIND UNTIL THEN.

NOW, I SEE YOU HAVE STENO PADS SO IF YOU WISH YOU MAY TAKE NOTES TO HELP YOU REMEMBER WHAT WITNESSES SAY.

IF YOU DO TAKE NOTES, PLEASE KEEP THEM TO YOURSELF UNTIL YOU AND YOUR FELLOW JURORS GO TO THE JURY ROOM TO DECIDE THE CASE.

DO NOT LET NOTE-TAKING DISTRACT YOU SO THAT YOU DO NOT HEAR OTHER ANSWERS BY OTHER WITNESSES.

WHEN YOU LEAVE AT NIGHT, YOUR NOTES SHOULD BE LEFT IN THE JURY ROOM.

IF YOU DO NOT TAKE NOTES, YOU SHOULD RELY ON YOUR OWN MEMORY OF WHAT WAS SAID AND NOT BE OVERLY INFLUENCED BY THE NOTES OF OTHER JURORS.

NOW, IF YOU NEED TO SPEAK WITH ME, AS I SAY, ABOUT ANYTHING, SIMPLY USE YOUR NOTE PADS TO

GIVE A NOTE TO THE CLERK OF COURT, TO THE COURT REPORTER, OR TO ME.

YOU MAY ALSO USE YOUR NOTE PAD TO LET US KNOW IF YOU'RE HAVING DIFFICULTY HEARING OR UNDERSTANDING A PARTICULAR PART OF THE CASE.

THE POLICY OF THE COURT IS TO NOT PERMIT JURORS TO ASK QUESTIONS OF WITNESSES, HOWEVER, IF THERE IS SOME ASPECT OF THE CASE WHICH YOU FIND CONFUSING, PLEASE WRITE A NOTE TO ME AND I WILL BRING IT TO THE ATTENTION OF THE ATTORNEYS.

NOW, I HAVE ESTABLISHED A SCHEDULE FOR HOW MUCH TIME EACH PARTY WILL BE ALLOTTED FOR THE TRIAL OF THE CASE. EACH SIDE MAY USE THEIR ALLOTTED TIME AS THAT SIDE SEES FIT, AS LONG AS THE ALLOTTED TIME IS NOT EXCEEDED.

I WILL CONTROL THOSE MATTERS. I MENTION IT TO YOU BECAUSE I WANT TO GIVE YOU MY ASSURANCE THAT I WILL MAKE CERTAIN THAT WE ARE EFFICIENTLY USING THE TIME WHEN YOU ARE PRESENT.

SOMETIMES SHORT DELAYS ARE UNAVOIDABLE. I WILL KEEP YOU ADVISED OF OUR SCHEDULE.

THE TIMING STARTS WITH THE OPENING STATEMENT. I WILL ALLOW EACH SIDE TO MAKE AN OPENING STATEMENT. AN OPENING STATEMENT IS NOT EVIDENCE. IT IS SIMPLY AN OUTLINE TO HELP YOU

UNDERSTAND WHAT THAT PARTY EXPECTS THE EVIDENCE WILL SHOW.

I SHOULD ALSO COMMENT THAT IN MY COURTROOM MINORITY RULES. WE HAVE SCHEDULED BREAKS, BUT IF ANY ONE OF YOU SHOULD NEED A BREAK BEFORE OUR SCHEDULED BREAK, ALL YOU HAVE TO DO IS TO RAISE MY HAND AND GET MY ATTENTION, AND I MAKE THE SAME ADMONITION TO THE LAWYERS INVOLVED IN THE CASE SO THAT WE'RE ALL COMFORTABLE AND WE CAN TAKE A FIVE-MINUTE BREAK. I TRY TO SCHEDULE A BREAK MIDWAY BETWEEN OUR SESSIONS BUT SOMETIMES THAT'S NOT TO YOUR CONVENIENCE. JUST LET ME KNOW IF YOU NEED A BREAK.

VERY WELL. AT THIS POINT THE COURT WILL CALL ON COUNSEL FOR PLAINTIFF FOR OPENING STATEMENT.

MR. BURTON: THANK YOU, YOUR HONOR.

(WHEREUPON, COUNSEL FOR THE PLAINTIFF GAVE HIS OPENING STATEMENT.)

MR. BURTON: GOOD MORNING, FOLKS. AGAIN, THANK YOU FOR BEING HERE AND PUTTING UP WITH THE JURY SELECTION.

DURING 2003 THE CITY OF SALINAS POLICE DEPARTMENT EQUIPPED ITS OFFICERS WITH A RELATIVELY NEW DEVICE, A TASER M26. IT'S REFERRED TO AS AN

ECD OR ELECTRICAL CONTROL DEVICE.

THESE DEVICES WERE PURCHASED FROM THE DEFENDANT TASER INTERNATIONAL.

THESE ARE MARKETED -- THEY WERE DESIGNED AND THEY'RE SOLD AS A NONLETHAL ALTERNATIVE TO USE TO CONTROL PEOPLE WHO ARE OUT OF CONTROL, WHO ARE IRRATIONAL, FOR WHATEVER REASON, WHO ARE NOT RESPONSIVE TO VERBAL COMMANDS BUT WHO DON'T NEED TO BE STOPPED WITH A FIREARM.

THIS CASE IS ABOUT THE MANUFACTURER'S RESPONSIBILITY, THAT'S TASER'S RESPONSIBILITY TO TEST THE DEVICE BEFORE IT'S PUT ON THE MARKET TO MAKE SURE THAT IT'S SAFE FOR HOW IT MIGHT BE USED AND ALSO TO WARN ABOUT DANGERS THAT MIGHT ARISE FROM ITS USE. AND THESE DANGERS ARISE FROM THE EXCESSIVE USE OF THE DEVICE; THAT IS, TOO MUCH ELECTRICITY BEING USED.

THIS CASE IS ALSO ABOUT THE RESPONSIBILITY OF A POLICE DEPARTMENT, IN THIS CASE THE CITY OF SALINAS POLICE DEPARTMENT, TO MAKE SURE ITS OFFICERS ARE PROPERLY TRAINED IN USING DEVICES LIKE THE TASER AND ALSO THAT THEIR USE OF THE DEVICE IS PROPERLY MONITORED SO THAT MISUSE CAN BE IDENTIFIED AND CORRECTED BEFORE IT CAUSES HARM.

THIS CASE IS ALSO ABOUT THE DUTY OF

SUPERVISORS WHO ARE ON THE SCENE, WHO ARE IN CONTROL OF OFFICERS TO MAKE SURE THAT THEIR SUBORDINATES ACT APPROPRIATELY. AND IT'S ABOUT THE LINE OFFICERS THEMSELVES AND FOLLOWING THE GUIDELINES THAT THEY HAVE BEEN TRAINED TO FOLLOW AND THE RULES OF LAW THAT GOVERN THEIR CONDUCT.

THE EVIDENCE IN THIS CASE WILL SHOW THAT ALL OF THESE DEFENDANTS FAILED TO MAKE AND MEET THESE RESPONSIBILITIES, AND THEREFORE, WE'RE GOING TO BE ASKING YOU AT THE END OF THE TRIAL TO FIND THEM RESPONSIBLE FOR THE DEATH OF ROBERT C. HESTON.

ON FEBRUARY 19TH, 2005, ROBERT H. HESTON, THE GENTLEMAN TO MY LEFT, AND HIS WIFE, BETTY HESTON, CALLED 911 FOR HELP WITH THEIR SON.

HE WAS OBVIOUSLY AGITATED AND DELUSIONAL. AND AS YOU'LL HEAR, THIS IS NOT THE FIRST TIME THAT HE HAD BEEN IN THIS KIND OF A CONDITION. IN FACT, HE HAD HAD A SERIES OF PROBLEMS BECAUSE OF HIS OWN HISTORY OF ADDICTION TO METHAMPHETAMINE. HE HAD HAD PERIODS OF SOBRIETY FOLLOWED BY PERIODS OF RELAPSE. HE WOULD HAVE INCIDENTS WHERE HE WOULD BECOME IRRATIONAL AND DELUSIONAL IN THE PAST.

ON THIS DAY THEY SAW HIM ACTING STRANGELY AND THEY KNEW THE SIGNS AND THEY CALLED THE POLICE FOR HELP.

ROBERT C. HESTON WAS EXACTLY THE KIND OF PERSON THAT THIS TASER WAS DESIGNED TO HELP, TO TAKE INTO CUSTODY SAFELY SO THAT HE COULD GET THE TREATMENT THAT HE NEEDED FOR HIS CONDITION, WHICH AT THIS POINT WAS A MEDICAL PROBLEM AS WELL AS TO SECURE SAFELY THIS OUT-OF-CONTROL INDIVIDUAL AND PRESERVE PUBLIC ORDER.

THESE SALINAS POLICE OFFICER DEFENDANTS, AND THAT'S SERGEANT DOMINICI, WHO WAS THE SERGEANT IN CHARGE OF THE OPERATION AT THE HOUSE, AND THERE WAS A SECOND SERGEANT RUIZ WHO CAME DURING THE INCIDENT, AND THEN TWO OTHER OFFICERS WHO FIRED THEIR TASERS, OFFICERS LIVINGSTON AND GODWIN. THEY WERE SENT TO HELP THE HESTONS WITH THIS PROBLEM.

INSTEAD OF ONLY FIRING ONE OF THEIR TASERS ONE TIME, WHICH WOULD HAVE KNOCKED MR. HESTON DOWN AND ALLOWED HIM TO BE HANDCUFFED SAFELY, THEY FIRED THREE TASERS. AND INSTEAD OF JUST DISCHARGING EACH ONE TIME, THESE THREE TASERS WERE DISCHARGED A TOTAL OF 25 TIMES, 25 TIMES INTO AN INDIVIDUAL WHO WAS LYING HELPLESSLY ON HIS PARENTS' LIVING ROOM FLOOR.

THEY STOPPED ONLY WHEN MR. HESTON TURNED PURPLE AND WENT LIMP.

THE REASON THAT HE BECAME LIMP AND

UNRESPONSIVE WAS THAT HE HAD SUFFERED A CARDIAC ARREST, HIS HEART HAD STOPPED BEATING.

PARAMEDICS WERE CALLED. THEY GOT THERE. THEY WORKED ON HIM, ATROPINE, CHEST COMPRESSIONS. THEY GOT HIS HEART RESTARTED AGAIN, BUT IT HAD BEEN STOPPED FOR OVER TEN MINUTES. AND DURING THAT TIME FRAME WAS DENIED THE OXYGEN, THE BLOOD NECESSARY TO KEEP THE TISSUE ALIVE, AND HE SUFFERED MASSIVE BRAIN DAMAGE.

HE WAS TAKEN TO THE HOSPITAL, LA NATIVIDAD MEDIAL CENTER. HE WAS HOOKED UP TO LIFE SUPPORT AND WAS KEPT ALIVE FOR 24 HOURS, BUT ON FEBRUARY 19TH HE WAS DISCONNECTED AND HE PASSED AWAY.

NOW, LET ME TELL YOU A LITTLE MORE DETAIL ABOUT THIS DEVICE, THE TASER. AND HOPEFULLY EVERYBODY CAN SEE IT ON THE SCREEN RIGHT THERE. GREAT.

AS YOU CAN SEE, IT LOOKS LIKE A PISTOL BUT IT IS NOT A FIREARM. THERE IS NO GUN POWDER INVOLVED.

INSTEAD OF HAVING A BULLET COME OUT OF THE BARREL, THERE'S A CARTRIDGE THAT CLIPS ONTO THE END OF THE BARREL AND THIS CARTRIDGE CAN BE CLIPPED ON AND OFF VERY EASILY.

THERE'S A WAY THAT IT CAN BE USED WITH THE CARTRIDGE OUT, BUT THAT'S NOT OF CONCERN IN THIS CASE. THESE TASERS WERE FIRED WITH THE CARTRIDGES MOUNTED.

AND AS YOU CAN SEE FROM THIS SLIDE, THE CARTRIDGE FIRES THESE TWO PROBES. THEY'RE ATTACHED TO 20-FOOT WIRES, AND AT THE END OF THE PROBE ARE THESE DARTS. THEY'RE SORT OF LIKE FISH HOOKS THAT ARE STRAIGHT LITTLE MINI HARPOONS THAT ARE BARBED.

AND THEY STICK INTO THE TARGET, EITHER INTO THE SKIN OR INTO THE CLOTHING. AND ONE THESE TWO DARTS CONNECT WITH THE TARGET OR ARE ABLE TO COMPLETE A CIRCUIT AND PERFECT CONNECTIONS ARE NOT REQUIRED FOR THAT, JUST ENOUGH ELECTRICITY TO TRAVEL, THEN THERE'S A FIVE-SECOND CYCLE OF ELECTRICITY INTO THE HUMAN BEING OR WHOEVER THE TARGET IT.

AND THIS IS A VERY PARTICULAR KIND OF ELECTRICITY YOU'LL HEAR A LOT ABOUT. IT'S IN LITTLE TINY PULSES AT A RATE OF 20 PER SECOND.

THESE PULSES DO NOT ELECTROCUTE A PERSON LIKE LET'S SAY AN ELECTRIC CHAIR AND STOP THEIR HEART.

WHAT THESE PULSES DO IS THAT THEY OVERRIDE THE ELECTRICAL SYSTEM THAT WE ALL HAVE IN

OUR BODIES WHERE THE BRAIN SENDS ELECTRICAL IMPULSES TO THE MUSCLE AND TELLS THEM TO CONTRACT.

THESE PULSES TELL THE MUSCLES IN THE BODY TO CONTRACT. AND SO THE PERSON, WHILE THE TASER CYCLE IS GOING THROUGH THEM, GOES THROUGH INVOLUNTARY MUSCLE CONTRACTIONS. THE EFFECT IS GENERALLY TO MAKE THE PERSON RIGID AND FALL DOWN, ESSENTIALLY PARALYZE MOMENTARILY AND UNABLE TO CONTROL HIS OWN MOVEMENTS.

THE TASER WORKS AS FOLLOWED: WHEN THE TRIGGER IS PULLED THESE DARTS GO OUT AND CONNECT AND THERE'S AN AUTOMATIC CYCLE OF FIVE SECONDS.

THERE'S THE DEVICE TO STOP IT SHORT OF THE FIVE SECONDS, BUT THAT WAS NOT USED IN THIS CASE.

ONCE THE DARTS ARE IMPLANTED, THE TRIGGER CAN BE PULLED A SECOND TIME OR A THIRD TIME OR A FOURTH TIME, EACH TIME DELIVERING A NEW FIVE-SECOND CYCLE.

THE TRIGGER CAN ALSO BE HELD DOWN AND IT WILL CONTINUE TO DELIVER ELECTRICITY UNTIL THE TRIGGER IS RELEASED BEYOND THE FIVE-SECOND BUILT-IN LIMIT.

THE TASER HAS A VERY SIGNIFICANT FEATURE TO HOLD OFFICERS ACCOUNTABLE FOR OVERUSE OR MISUSE

AND THIS FEATURE IS CALLED A DATAPORT. AND THE DATAPORT IS GOING TO HAVE A HUGE ROLE IN THE EVIDENCE THAT YOU'RE GOING TO HEAR IN THIS CASE.

THE DATAPORT HAS SOME SORT OF PLUG AND YOU CAN PLUG IT RIGHT INTO YOUR P.C. THERE'S A CHIP THAT RECORDS EACH TRIGGER PULL WITH THE TIME STAMP BUILT INTO THE DEVICE ITSELF SO THAT WHEN THE DATAPORT INFORMATION IS DOWNLOADED ONTO THE P.C., THE POLICE DEPARTMENT CAN GET A LINE-BY-LINE INDICATION EXACTLY WHEN IT WAS FIRED DURING AN INCIDENT.

AND THAT'S HOW WE KNOW THAT THESE THREE TASERS, SERGEANT RUIZ, OFFICER LIVINGSTON AND OFFICER GODWIN WERE FIRED 25 TIMES BECAUSE IT'S IN THE DATAPORT.

WHEN THE DEVICE IS HELD DOWN, AS YOU'LL SEE FROM THE TESTIMONY, THE DATAPORT RECORDS THESE SERIES OF TRIGGER PULLS EXACTLY FIVE SECONDS APART.

SO IF ONE WERE TO PULL THE TRIGGER EXACTLY FIVE SECONDS APART, THEY WOULD BE THE SAME PATTERN AS IF ONE HELD IT DOWN AND IT CYCLED FOR 10 OR 15 SECONDS OR MORE. AND YOU'LL SEE THAT IN THIS CASE.

TASERS CAN BE DEADLY WHEN THEY'RE CYCLED TOO MANY TIMES INTO A HUMAN BEING, ESPECIALLY

SOMEONE WHO, LIKE MR. HESTON, IS IN AN EXCITED OR AGITATED STATE.

THE OFFICERS KNEW THAT ROBERT HESTON WAS IN A DELIRIOUS AND AGITATED STATE AND THAT'S WHY THEY WERE CALLED.

AND THEIR OWN DEPARTMENT TRAINED THEM TO RECOGNIZE THIS AS A HEALTH PROBLEM AND TO CALL PARAMEDICS TO HELP THEM DEAL WITH IT. THEY VIOLATED THAT POLICY, THAT TRAINING, BY ENCOUNTERING MR. HESTON WITHOUT THE PARAMEDICS.

RATHER THAN HELP MR. HESTON GET SAFELY INTO CUSTODY SO THAT HE COULD BE TREATED AND PUNISHED IF APPROPRIATE, BECAUSE CERTAINLY INJECTION OF METHAMPHETAMINE IS A CRIME, INSTEAD OF DOING THAT THEY CYCLED THEIR TASERS 25 TIMES AND HE DIED.

PLAINTIFF'S EXPERT WITNESS ON THE EFFECT OF THE TASER IS DR. MARK MEYERS. HE'S A BOARD CERTIFIED CARDIOLOGIST FROM SOUTHERN CALIFORNIA, AND HE HAS A SPECIALTY IN WHAT IS CALLED ELECTROPHYSIOLOGY.

THERE ARE TWO KINDS OF CARDIOLOGISTS, THERE ARE CARDIOLOGISTS CONCERNED WITH THE STRUCTURE OF THE HEART AND KEEPING THE ARTERY CLEAN AND FLOWING AND THEY'RE THE ONES THAT DO

ANGIOPLASTIES AND CORONARY ARTERY BYPASS GRAFTS AND THOSE SORTS OF THINGS. YOU CAN THINK OF THEM AS PLUMBERS.

AND THEN THERE'S A WHOLE OTHER KIND OF CARDIOLOGIST THAT IS CONCERNED WITH ONLY THE ELECTRICAL SYSTEM THAT CONTROLS THE PUMPING OF THE HEART SO THAT THE BLOOD GOES THROUGH THE BODY AND PROFUSES THE TISSUES AND KEEPS US ALIVE. THEY'RE LIKE ELECTRICIANS. THOSE ARE CALLED ELECTROPHYSIOLOGISTS.

AND TASER HAS DESIGNATED AN ELECTROPHYSIOLOGIST WHO WILL ALSO BE TESTIFYING ON THESE ISSUES AND HIS NAME IS DOCTOR RICHARD LUCERI. AND YOU'LL SEE THAT DR. LUCERI AND DR. MEYERS' OPINIONS MATCH MORE THAN THEY DIVERGE IN THIS CASE.

AND THEY'RE THE IMPORTANT MEDICAL EXPERTS, BECAUSE THE QUESTION THAT YOU'RE GOING TO BE ASKED TO DECIDE IS WHAT CAUSED THIS CARDIAC ARREST, WHAT CAUSED ROBERT HESTON'S HEART TO STOP BEATING ON FEBRUARY 19TH.

DR. MEYERS WILL EXPLAIN TO YOU THAT WHEN MUSCLES CONTRACT, WHEN WE CONTRACT OUR MUSCLES THERE'S A WASTE PRODUCT PRODUCED. IT'S LIKE WHEN WE DRIVE OUR CARS THERE IS AUTOMOBILE EXHAUST, IT'S A WASTE PRODUCE OF MUSCLE CONTRACTIONS AND IT'S

CALLED LACTIC ACID OR LACTIC ACID BUILDUP.

AND WE HAVE ALL EXERCISED AND WE ALL FELT THE BURN OR THE SORENESS THE NEXT DAY. THAT'S LACTIC ACID.

AND WHEN THE TASERS CONTRACT THE MUSCLES, THAT ALSO PRODUCES LACTIC ACID.

WHEN LACTIC ACID IS PRODUCED, IT GOES IN THE BLOODSTREAM AND THAT'S HOW IT'S ELIMINATED FROM THE BODY. THE BLOOD THEN FLOWS THROUGH THE LUNGS AND BREATHING IS THE PROCESS THAT NEUTRALIZES THE LACTIC ACID.

IF SOMEONE EXERCISES TOO HARD, FASTER THAN THE BODY CAN COMPENSATE FOR IT AND THAT'S CALLED ANAEROBIC EXERCISE, THE BLOOD ACID IN THE SAME BUILDS UP.

WHEN THE BLOOD ACID BUILDS UP, THE MEASURE OF THE BLOOD ACID, WHICH IS CALLED PH, DROPS. BLOOD ACID GOES UP, PH DROPS.

NOW, VIGOROUS EXERCISE WILL LOWER A PERSON'S PH. IT ONLY BECOMES DANGEROUS IF IT DROPS TOO FAR, TOO FAST. BUT IF THE PH DROPS TOO FAR, TOO FAST, THAT ALONE STOPS THE HEART. THIS CONDITION OF ELEVATED BLOOD ACID, WHICH IS MEASURED AS LOWER PH, IS CALLED ACIDOSIS. AND YOU'LL BE HEARING A LOT ABOUT ACIDOSIS IN THIS CASE.

AND THE SOURCE OF THE ACIDOSIS IS THE LACTIC ACID PRODUCED BY THE MUSCLE CONTRACTIONS.

PEOPLE DON'T NORMALLY EXERCISE THEMSELVES INTO CARDIAC ARREST FROM ACIDOSIS. IT ACTUALLY HAPPENS, OCCASIONALLY PEOPLE WILL DROP DEAD DURING A MARATHON OR A TRIATHLON OR SOMETHING, IT ACTUALLY DOES HAPPEN BUT IT'S VERY, VERY RARE AND THE REASON IS IS SIMPLY THAT THE BODY HAS MECHANISMS THAT TELL US, HEY, YOU'RE GETTING FATIGUED, YOU'RE WORKING TOO HARD, WE HYPERVENTILATE, WE SLOW DOWN, WE SIT, WE REST, WE ALLOW OUR BLOOD ACID TO RETURN TO NORMAL.

WHEN SOMEONE IS HOOKED UP TO A TASER AND THE TASER IS TELLING THE BLOOD, THE MUSCLES TO CONTRACT OVER AND OVER AGAIN, THE BRAIN IS NO LONGER IN CONTROL. THAT RECUPERATION IS OUT OF THE EQUATION AND THE BLOOD ACID CAN BE RAISED, THE SAME WAY SAYING THAT THE PH CAN BE LOWERED TO CRITICAL LEVELS AND UNDER CIRCUMSTANCES WHERE THE PERSON IS IN EXCRUCIATING PAIN FROM THE TASER AND UNDER A GREAT DEAL OF STRESS BECAUSE OF THE OVERALL SITUATION AND THAT IS THE RECIPE FOR CARDIAC ARREST.

NOW, BEFORE SELLING THIS NEW REP -- THIS TASER M26, TASER INTERNATIONAL TESTED IT ON PIGS.

BUT THEY ONLY TESTED IT TO SEE WHETHER OR NOT THE ELECTRICAL CURRENT WAS STRONG ENOUGH TO STOP THE HEART. WHAT IS CALLED ELECTROCUTION.

AND IT WASN'T. THE -- FROM TASER'S POINT OF VIEW THOSE -- THOSE PIG EXPERIMENTS WERE QUITE SUCCESSFUL. AND THEY PROMOTED THEIR DEVICE AS VERY SAFE BECAUSE THE CURRENT WAS SIMPLY NOT STRONG ENOUGH TO GO IN THROUGH ALL THE TISSUES, THE MUSCLE, INTO THE HEART AND THEN KNOCK THE HEART OUT OF IT'S NORMAL ELECTRICAL RHYTHM IN SOME DEADLY ALTERNATIVE RHYTHM.

BUT TASER, AS YOU'LL HEAR TODAY, DID NOT TEST THE EFFECT OF LONGER DURATION EXPOSURES, ESPECIALLY ON THE ACID LEVEL OF THESE PIGS.

TASER DID NOT WARN, WHEN IT BEGAN SELLING THIS DEVICE TO SALINAS AND OTHER POLICE DEPARTMENTS, WATCH OUT FOR REPEATED EXPOSURES BECAUSE PEOPLE MIGHT BECOME TOO ACIDOTIC AND DIE.

BEGINNING IN 2003, THE U.S. MILITARY BEGAN STUDYING THE TASER. IT VOICED CONCERN OVER WHETHER TOO MANY, TOO LONG EXPOSURES WOULD CREATE ACIDOSIS. A DOCTOR NAMED JAMES JAUCHIM -- AND YOU'LL HEAR A LOT ABOUT DR. JAUCHIM IN THIS CASE -- CONDUCTED AN EXPERIMENT. HE TOOK A NUMBER OF PIGS AND PUT THEM UNDER ANESTHESIA BECAUSE THE

CRUELTY-TO-ANIMAL PEOPLE DEMANDED THAT AND MEASURED THE EFFECT OF WHAT DIFFERENT TASER DOSAGES WERE ON THE PH LEVEL AND THE LACTIC ACID PRODUCTION OF THESE ANIMALS.

AND WHAT HE DETERMINED, AND WHAT YOU'LL SEE IN THE CASE GRAPHICALLY PRESENTED TO YOU, IS THAT THE MORE SOMEONE IS SHOCKED WITH A TASER, OR IN THIS CASE AN ANESTHETIZED PIG, THE MORE THE LACTIC ACID IS DISTRIBUTED IN THE BLOODSTREAM, THE HIGHER THE LACTIC ACID, THE LOWER THE PH.

ONE SHOCK, ALTHOUGH IT CREATES A STATISTICALLY SIGNIFICANT CHANGE IN LACTATE, DOES NOT CREATE ANYTHING NEAR A DANGER OR A CLINICALLY SIGNIFICANT CHANGE.

THREE, A MORE PROFOUND CHANGE, BUT STILL WITHIN THE REALM OF SAFETY.

BUT 18, 18 DOSES, WHICH IS ABOUT TWO-THIRDS OF WHAT MR. HESTON RECEIVED, PUT THESE PIGS RIGHT INTO THE DANGER ZONE WHERE CARDIAC ARREST FROM ACIDOSIS IS LIKELY.

WHEN WORD OF DR. JAUCHIM'S STUDY GOT TO TASER INTERNATIONAL AND TO ITS CEO PATRICK SMITH, WHO IS PRESENT IN COURT AND WE WILL BE PLAYING YOU AN EXCERPT FROM HIS DEPOSITION LATER TODAY. WHEN THEY FOUND OUT ABOUT DR. JAUCHIM'S STUDY, THIS WAS

SOMETIME IN 2004, THEY DECIDED THEY BETTER FINALLY WARN THEIR CUSTOMERS, THESE POLICE DEPARTMENTS, ABOUT THE DANGER OF EXTENDED DURATION OF TASER APPLICATIONS.

THEY ISSUED A WARNING, BUT IT WAS BURIED AS SLIDE 108 IN A 1 -- LET ME GET THE RIGHT NUMBER HERE -- AND 174 POWER POINT PRESENTATION MAILED OUT SOMETIME BETWEEN JANUARY 2004 AND JANUARY 2005.

THE SALINAS POLICE OFFICERS INVOLVED IN THIS INCIDENT NEVER SAW THIS WARNING. IT WAS NEVER RELAYED FROM TASER THROUGH THE SALINAS POLICE DEPARTMENT TO THEM. THEY ALL WILL TESTIFY THEY WERE UNAWARE OF ANY HEALTH RISK ASSOCIATED WITH THEIR 25 TASINGS OF MR. HESTON.

NOW, LET ME TELL YOU WHAT HAPPENED IN THIS INCIDENT IN A LITTLE MORE DETAIL, WHAT THE PLAINTIFFS SAY THE EVIDENCE WILL SHOW. AND THERE'S GOING TO BE SOME CONFLICTS IN THE EVIDENCE.

ON THIS DAY, FEBRUARY 19TH, THE PLAINTIFFS ARE WORRIED ABOUT THEIR SON. HE'S ONLY BEEN OUT OF PRISON LESS THAN A MONTH. HE'S BEEN DOING WELL. HE'S BEEN WORKING WITH HIS FATHER IN HIS CONCRETE BUSINESS. HE'S BEEN ATTENDING PROGRAMS AND ALL OF A SUDDEN HE'S ACTING VERY STRANGE AND IRRATIONAL. HE THINKS THERE'S SOMEBODY

IN THE ATTIC WITH A GUN THREATENING THE FAMILY. HE'S AGITATED.

THEY HAVE BEEN THROUGH THIS BEFORE, THEY KNOW WHAT THIS MEANS. HE HAS RELAPSED.

THEY CALL THE POLICE DEPARTMENT. SEND OVER SOMEONE TO HELP. OFFICERS ARE DISPATCHED. CURT KASTNER, THEIR SON-IN-LAW, THAT'S MISTY'S HUSBAND, COMES OVER TO HELP, AND A FRIEND NAMED CLIFF SATREE COMES OVER TO HELP.

THE OFFICERS COME, THEY TALK TO THE FATHER, THEY TALK TO THE SON. THE SON TELLS THE OFFICERS ABOUT SOMEONE IN THE ATTIC WITH A GUN THREATENING THE FAMILY.

THE OFFICERS BELIEVE THAT HE'S -- HE'S ON DRUGS. THEY CONCEDE HE'S DELUSIONAL AND IRRATIONAL, BUT THEY DECIDE TO TAKE NO ACTION AND THEY LEAVE. THEY'RE THERE FOR 10, 15 MINUTES AND THEY LEAVE.

NOT FIVE MINUTES AFTER THEY LEFT THE SON BECOMES EXTREMELY AGITATED AND EXCITED. HE BEGINS POUNDING ON THE CEILING. HE'S OPENING THE DOOR AND BEGINS THROWING THINGS OUT OF THE DOOR. HE KNOCKS HIS FATHER DOWN. 911 IS CALLED AGAIN, HIS FATHER CALLED 911. YOU'LL HEAR THE CALL. CURT KASTNER CALLS 911 AGAIN, "YOU HAVE TO COME BACK RIGHT

AWAY," AND HE CALLS AND HE'S OUT OF CONTROL AND CLIFFORD SATREE CALLED 911.

AND THE THING ABOUT CLIFFORD SATREE'S 911 CALL, WHICH YOU'LL HEAR PLAYED TODAY, IS THAT HE STAYS ON THE LINE AND DOES A PLAY-BY-PLAY OF EXACTLY WHAT HAPPENED NEXT AND SO YOU'LL BE ABLE TO HEAR IN REALTIME EXACTLY HOW THESE EVENTS UNFOLDED.

OFFICER DOMINICI, SERGEANT DOMINICI AND SERGEANT FAIRBANKS ARE THE FIRST TO RETURN.

THEY SEE MR. HESTON AT THE DOOR. THAT'S THE SON, THROWING THINGS OUT. IN FACT, HE THROWS SOMETHING, A PIECE OF WOOD, MOLDING, WHATEVER IT WAS, AND IT HITS SERGEANT DOMINICI IN THE CENTER OF HIS BULLET PROOF VEST AND IT BOUNCES OFF. SERGEANT DOMINICI IS NOT INJURED.

HE FIRES HIS TASER AT MR. HESTON.

SERGEANT DOMINICI HAS HAD LESS THAN TWO HOURS OF TASER TRAINING AND HAS NEVER FIRED THE PROBES BEFORE, EVEN AT A TARGET.

ONE OF THE PROBES MISSES AND GOES IN THE DOOR JAM. SO THERE'S NO COMPLETED CIRCUIT. THE TASER HAS NO EFFECT OTHER THAN TO FURTHER AGITATE ROBERT HESTON.

SERGEANT -- OFFICER FAIRBANKS FIRES ONLY A FEW SECONDS AFTER SERGEANT DOMINICI'S

UNSUCCESSFUL FIRING, BUT HIS IS UNSUCCESSFUL, TOO.

HE'S STANDING NEAR THE MAXIMUM RANGE OF THE TASER. REMEMBER, THE WIRES ARE ONLY 21 FEET, LESS THAN THE DISTANCE FROM ME TO YOU.

AS -- AS MR. HESTON FALLS BACKWARD FROM THE TASER, THE WIRES BREAK OR THE DARTS COME OUT, THE DEVICE LOSES ITS EFFECT. AND HE'S TASED AGAIN. AND YOU'LL HEAR CLIFFORD SATREE SAY HE'S PULLING A DART OUT. HE WAS ACTUALLY ABLE TO PULL A DART OUT BECAUSE HE WASN'T GETTING ANY CURRENT.

SERGEANT RUIZ RETURNS ALONG WITH OFFICER LIVINGSTON AND OFFICER PAREDEZ.

RUIZ TRIES TO ENGAGE ROBERT HESTON IN SOME CONVERSATION. "HEY, MAN, WHAT IS GOING ON?" CALM HIM DOWN. HE'S STILL TALKING ABOUT THE GUY IN THE ATTIC WITH THE GUN. STILL.

SERGEANT RUIZ FIRES HIS TASER. AT THE SAME TIME -- AND EVERY WITNESS WHO COMES IN WILL SAY IT'S VIRTUALLY SIMULTANEOUS -- OFFICER LIVINGSTON FIRES HIS TASER, EVEN THOUGH THE TRAINING FOR THE CITY OF SALINAS IS THAT ONLY ONE DEVICE SHOULD BE USED AT A TIME AND THE SECOND SHOULD BE USED ONLY IF THE FIRST IS UNSUCCESSFUL AS BACKUP.

MR. HESTON STUMBLES BACKWARDS FROM THE

EFFECT OF THE TASER. SERGEANT RUIZ AND OFFICER LIVINGSTON FOLLOW HIM INSIDE OF THE HOUSE. THEY WANT TO KEEP HIM IN VIEW. THEY WANT TO KEEP THE WIRE SLACK SO THAT THEY DON'T BREAK OR COME OUT SO THAT THE TASERS WILL HAVE THEIR EFFECT.

THEY CYCLE THE DEVICES OVER AND OVER AGAIN. MR. HESTON GOES TO THE FLOOR. HE HITS HIS HEAD ON A COFFEE TABLE.

OFFICER PAREDEZ COMES IN RIGHT BEHIND THEM AND BEHIND OFFICER PAREDEZ IS OFFICER FAIRBANKS, WHO CLEARS THE WAY, THE GRANDFATHER CLOCK THAT MR. HESTON HAD KNOCKED DOWN AND THEY SEE MR. HESTON ALREADY ON THE FLOOR. THE ESTIMATE IS JUST A FEW SECONDS AFTER THE FIRING.

HE'S ON THE FLOOR PRONE, FACE DOWN, WITH HIS ARMS SORT OF CURLED UNDERNEATH HIM, A POSITION THAT IS CAUSED BY THE CYCLING OF THE TASERS. HE'S ON THE GROUND. THE OFFICERS CONTINUE TO CYCLE THEIR TASERS.

OFFICER LIVINGSTON IS HOLDING THE TRIGGER DOWN.

ANOTHER OFFICER COMES IN THE ROOM, OFFICER GODWIN. HE FIRES HIS TASER INTO MR. HESTON SO THAT NOW MR. HESTON IS HOOKED UP TO THREE TASERS. SERGEANT RUIZ'S DATAPORT SHOWS SIX

DIFFERENT FIVE SECOND TRIGGER PULLS.

OFFICER GODWIN'S SHOWS SIX DIFFERENT TRIGGER PULLS.

OFFICER LIVINGSTON'S SHOWS 13 FIVE-SECOND BURSTS. THAT'S A TOTAL OF TWO MINUTES AND FIVE SECONDS OF TASER SHOTS ALL SQUEEZED INTO A PERIOD OF ABOUT FIVE SECONDS, ALMOST ALL OF WHICH WAS AFTER HE WAS LYING ON THE FLOOR.

ON HIS RIGHT ARM IS OFFICER FAIRBANKS WAITING FOR THE TASER TO STOP SO HE COULD BE HANDCUFFED AND ON HIS LEFT ARM IS OFFICER PAREDEZ, WAITING FOR THE TASER TO STOP SO HE COULD BE HANDCUFFED.

AT HIS HEAD IS SERGEANT DOMINICI.

ANOTHER OFFICER COMES IN THE ROOM, THIS IS THE SEVENTH OFFICER NOW, TIM SIMPSON.

AT THIS POINT OFFICER GODWIN THINKS MAYBE HIS TASER IS NOT WORKING RIGHT AND TAKES THE CARTRIDGE OUT, PUTS IN A NEW ONE, SHOOTS MR. HESTON IN THE BACK, THIS IS THE SIXTH TIME, AND AS SOON AS THAT FIVE-SECOND CYCLE ENDS, THERE ARE NO MORE TASER CYCLING, MR. HESTON IS TURNING BLUE, HE'S LIMP. THEY PUT HIM IN HANDCUFFS.

OFFICER FAIRBANKS IMMEDIATELY CALLS FOR AN AMBULANCE. THEY ROLL HIM OVER. OFFICER PAREDEZ

CHECKS HIS CAROTID PULSE AND FINDS NOTHING. HE CHECKS HIS BREATHING, FINDS NOTHING.

THEY DON'T TAKE MR. HESTON OUT OF HIS HANDCUFFS.

OFFICER SIMPSON, WHO PUT HIM IN THE HANDCUFFS, IS TOLD TO GET HIS CAMERA AND START TAKING PICTURES. MR. HESTON IS LEFT IN HANDCUFFS. THE PARAMEDICS ARRIVE. THEY WORK ON HIM. BY THIS TIME HE IS TAKEN OUT OF HANDCUFFS AND THEY'RE ABLE TO START HIS HEART AGAIN, BUT IT'S TOO LATE.

TOMORROW YOU WILL HEAR FROM A DOCTOR NAMED TERRY HADDIX. SHE IS A STAFF PHYSICIAN, A FORENSIC PATHOLOGIST AT STANFORD. SHE DOES AUTOPSIES. AND SHE'S THE DOCTOR WHO DID THE AUTOPSY FOR MONTEREY COUNTY FOR ITS CORONER'S OFFICE TO DETERMINE WHY ROBERT HESTON DIED.

NOW, HIS ACTUAL CAUSE OF DEATH WHICH OCCURS 30 HOURS LATER, IS FAIRLY SIMPLE. IT'S THE MASSIVE ORGAN FAILURE THAT FLOWED FROM BEING BRAIN DEAD FOR 30 HOURS. THE REAL ISSUE HERE IS NOT THE CAUSE OF DEATH BUT THE CAUSE OF THE CARDIAC ARREST THAT OCCURRED ON FEBRUARY 19TH.

AND DR. HADDIX, WHO IS THE ONLY INDEPENDENT MEDICAL EXPERT YOU'RE GOING TO HEAR IN THIS CASE, NOT BROUGHT IN BY EITHER SIDE TO RENDER

OPINIONS, DID WHAT FORENSIC PATHOLOGISTS, MEDICAL EXAMINERS DO.

SHE AUTOPSIED THE BODY, LOOKED AT WHAT EVIDENCE THERE WAS THERE. SHE FOUND OUT AS MUCH AS SHE COULD ABOUT WHAT HAPPENED IN THE TIME RIGHT BEFORE HE DIED, AND SHE ALSO WENT TO GREAT LENGTH TO LEARN ABOUT THE TASER AND ITS EFFECTS. SHE ACTUALLY CORRESPONDED WITH TASER INTERNATIONAL AND LOOKED AT THE ARTICLES THAT SHE WAS REFERRED TO.

AND SHE CONCLUDED THAT THE REPEATED TASER DISCHARGES ON A PERSON WHO IS IN AN AGITATED STATE ON METHAMPHETAMINE CAUSED THIS DEATH.

SHE LOOKED AT THE TOXICOLOGY REPORTS, WHICH ARE THE LEVELS OF FOREIGN CHEMICALS IN THE BODY. HE HAD JUST A TRACE OF ALCOHOL, WHICH IS .01, SO .08 IS THE LEGAL LIMIT FOR DRIVING. SO ALMOST NOTHING. HE DID HAVE .64 MILLILITERS PER LITER, .64 METHAMPHETAMINE IN HIS SYSTEM AND THAT WHAT APPEARS TO BE RESPONSIBLE FOR THIS ERRATIC BIZARRE BEHAVIOR THAT BROUGHT THE POLICE THERE.

NOW, AS I MENTIONED TO YOU BEFORE, DR. MEYERS, THE PLAINTIFF'S CARDIOLOGY EXPERT, WILL EXPLAIN TO YOU WHY IT WAS THE REPEATED TASER APPLICATIONS THAT CAUSED THIS CARDIAC ARREST, THROUGH THE METABOLIC CHANGES, THROUGH THE CHANGES

IN THE BLOOD ACID THAT WERE CAUSED BY THE REPEATED MUSCLE CONTRACTIONS.

YOU WILL HEAR THAT DR. MEYERS BASES HIS CONCLUSIONS ON DR. JAUCHIM'S STUDY FOR THE U.S. MILITARY AND WHAT IT SHOWS ABOUT PH CHANGES CAUSED BY THE REPEATED TASER APPLICATIONS, WHICH IS JUST REALLY COMMON SENSE.

THROUGHOUT THE TRIAL YOU WILL HEAR SOME ALTERNATIVE HYPOTHESES AND ALTERNATIVE THEORIES, ALTERNATIVE SUGGESTIONS AS TO WHAT CAUSED THIS CARDIAC ARREST. DR. MEYERS WILL EXPLAIN TO YOU WHY NONE OF THEM APPLIED TO THIS CASE.

THE FIRST IS THAT THERE WAS SOME PREEXISTING HEART CONDITION THAT WAS DISCOVERED IN MR. HESTON DURING THE AUTOPSY. HE HAD A MILDLY ENLARGED HEART. DR. MEYERS AND DR. LUCERI, REMEMBER, TASER'S CARDIOLOGISTS, AGREED THAT THIS IS NOT AN UNUSUAL CONDITION FOR A 40-YEAR OLD AMERICAN, AND THAT IT IN NO WAY EXPLAINS THIS DEATH.

IN FACT, DR. LUCERI, AND THIS IS TASER'S EXPERT, SAID THAT ATTRIBUTING THIS DEATH, THIS CARDIAC ARREST TO THE ENLARGED HEART IS, AND I QUOTE, "NONSENSE."

THE SECOND IS THAT MR. HESTON DIED OF A

METHAMPHETAMINE OVERDOSE; HE JUST TOOK TOO MUCH METHAMPHETAMINE AND THAT STOPPED HIS HEART. THAT CAN HAPPEN; HOWEVER, AS BOTH DR. MEYERS AND DR. LUCERI, TASER'S EXPERT, WILL EXPLAIN TO YOU, WHEN THAT HAPPENS THERE'S A DIFFERENT MECHANISM, THERE'S A DIFFERENT KIND OF HEART ARRYTHMIA THAN WHAT WAS PRESENT IN THIS CASE.

AND I'LL WAIT UNTIL THE DOCTORS ARE UP THERE SO I DON'T MESS UP, BUT IT'S LIKE THE DIFFERENCE BETWEEN VENTRICULAR FIBRILLATION AND ASYSTOLE, WHICH COMES OUT AS COMPLETELY DIFFERENT KINDS OF LINES ON THOSE GRAPH PAPERS THEY HOOK UP TO PEOPLE'S HEARTS TO SEE HOW THEY'RE BEATING.

THE THIRD HYPOTHESIS IS THAT MR. HESTON DIED FROM SOMETHING THAT THE DEFENSE EXPERT IS LIKE TO CALL EXCITED DELIRIUM SYNDROME; THAT HE BASICALLY EXERCISED HIMSELF TO DEATH BECAUSE OF THE EFFECTS OF THE METHAMPHETAMINE.

NOW, THIS IS A VERY CONTROVERSIAL AND NEW THEORY ABOUT CAUSE OF DEATH. I DON'T WANT TO GO TOO FAR INTO IT NOW, BUT IT'S WHAT IS CALLED A DIAGNOSIS OF EXCLUSION.

IN OTHER WORDS, ONE CAN ATTRIBUTE DEATH TO EXCITED DELIRIUM SYNDROME, ACCORDING TO CERTAIN PROPONENTS OF THE THEORY, ONLY WHEN THERE ARE NO

ALTERNATIVE EXPLANATIONS.

FOR EXAMPLE, IF YOU HAVE SOMEBODY WHO IS IN AN EXCITED AND AGITATED STATE AND HAVE SOME METHAMPHETAMINE IN THEIR SYSTEM, AND THEY'RE DEAD, AND THEY HAVE A BULLET WOUND IN THEIR HEAD, YOU DON'T SAY THAT THAT'S EXCITED DELIRIUM SYNDROME.

SIMILARLY, IF SOMEBODY HAS BEEN TASED 25 TIMES AND IS SEVERELY ACIDOTIC AND GOES INTO CARDIAC ARREST, YOU DON'T SAY THAT THAT IS EXCITED DELIRIUM SYNDROME. IT'S ONLY WHEN THERE IS NO OTHER EXPLANATION.

MR. AND MRS. HESTON ARE SUING TASER INTERNATIONAL BECAUSE THEY DIDN'T DO THEIR RESEARCH BEFORE THEY MARKETED THEIR PRODUCT AND THEN EVEN AFTER THEY FOUND OUT, THEY DIDN'T DO WHAT THEY WERE SUPPOSED TO DO TO MAKE SURE THE WARNING GOT OUT.

THEY'RE SUING THE POLICE OFFICERS BECAUSE THEY SHOULD NOT HAVE TASED MR. HESTON AFTER HE WAS KNOCKED TO THE FLOOR.

THE PLAINTIFFS WILL BRING IN AN EXPERT TO EXPLAIN THAT TO YOU. HIS NAME IS ERNEST BURWELL. HE TRAINED, BEFORE HIS RETIREMENT, LOS ANGELES COUNTY SHERIFF'S DEPUTIES IN THE USE OF THE TASER DURING SORT OF THE FIRST FOUR YEARS OF THE IMPLEMENTATION OF THIS STILL RELATIVELY NEW DEVICE.

AND MR. BURWELL WILL TELL YOU -- BUT, AGAIN, IT'S JUST COMMON SENSE -- THAT ONCE THE PERSON IS KNOCKED TO THE GROUND AND THE DEVICE HAS DONE ITS JOB OF ALLOWING A SAFE TAKE-DOWN FROM A DISTANCE, THE OTHER OFFICER IS PRESENT, AND THERE WERE OTHER OFFICERS PRESENT IN THIS CASE, SHOULD MOVE IN AND HANDCUFF THE PERSON, QUICKLY AND SAFELY; THAT CONTINUING TO SHOCK THE PERSON ONCE HE'S DOWN IS ACTUALLY COUNTERPRODUCTIVE BECAUSE -- BECAUSE IT MAKES THE MUSCLES RIGID AND MUCH MORE DIFFICULT TO PLACE BEHIND THE BACK INTO HANDCUFFING POSITION.

BEING SHOCKED WITH A TASER, YOU'LL HEAR, IS EXTREMELY PAINFUL. IT IS A USE OF FORCE. AND SO ANY INDIVIDUAL UNNECESSARY CYCLING OF A TASER, IF IT IS UNNECESSARY FOR A LAW ENFORCEMENT OBJECTIVE OR A PUBLIC SAFETY OBJECTIVE, IT IS EXCESSIVE FORCE.

NOW, DURING THE TRIAL THE DEFENDANTS WILL CLAIM THAT THEY DID NOT KNOW THAT THESE EXTRA CYCLES WILL KILL ANYBODY. MAYBE THAT'S TRUE. IT DOESN'T MATTER.

THE LAW HOLDS PEOPLE RESPONSIBLE FOR THE CONSEQUENCES OF EXCESSIVE FORCE, WHETHER THEY INTENDED IT TO BE DEADLY OR NOT.

MR. HURLEY: OBJECTION. LEGAL ARGUMENT.

THE COURT: YES, MEMBERS OF THE JURY, I ALLOW THIS TIME FOR THE PARTIES TO TALK ABOUT WHAT THE EVIDENCE WILL SHOW, AND I WILL INSTRUCT YOU ON THE LAW AND I'LL ASK YOU TO CONFINE YOUR COMMENTS TO WHAT YOU BELIEVE THE EVIDENCE WILL SHOW AND WAIT UNTIL LATER TO MAKE ARGUMENT ABOUT THE LAW.

MR. BURTON: THANK YOU, YOUR HONOR.

SERGEANT DOMINICI DID NOT USE HIS TASER AFTER MR. HESTON WAS ON THE LIVING ROOM FLOOR. HE'S NOT RESPONSIBLE IN THE SAME WAY; HOWEVER, HE WAS IN CHARGE OF THIS OPERATION AND YOU WILL HEAR FROM A SECOND EXPERT IN POLICE PRACTICES FROM PLAINTIFF, A RETIRED LIEUTENANT FROM THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT NAMED ROGER CLARK, WHO ONCE LEAD A VERY ELITE UNIT WHICH ARRESTED DANGEROUS CRIMINALS.

AND LIEUTENANT CLARK WILL EXPLAIN TO YOU HOW IMPORTANT IT IS FOR THE COMMANDER IN A TACTICAL SITUATION TO EXERCISE CONTROL TO MAKE SURE THAT EACH OF HIS SUBORDINATES UNDERSTAND WHAT HIS ROLE IS TO BE OR WHAT HER ROLE IS TO BE AND TO EXECUTE THAT PLAN AND TO STOP SUBORDINATES IF THEY BEGIN DOING THINGS THAT ARE COUNTERPRODUCTIVE, SUCH AS USING EXCESSIVE TASER SHOCKS.

FINALLY, PLAINTIFFS ARE ASKING THAT THE CITY OF SALINAS POLICE DEPARTMENT BE HELD RESPONSIBLE BECAUSE IT CHOSE NOT TO BUY THE SOFTWARE, $150, TO DOWNLOAD THE DATAPORT DATA.

PRIOR TO THIS INCIDENT THE CITY OF SALINAS POLICE DEPARTMENT, YOU'LL SEE FROM THE EVIDENCE, DID NOT CHECK THE TASERS OF OFFICERS AFTER AN INCIDENT TO FIND OUT HOW MANY TIMES THE DEVICE HAD BEEN FIRED TO SEE WHETHER OR NOT WHAT THE OFFICERS REPORTED ACTUALLY MATCHED WHAT HAPPENS.

IN THIS CASE THEY HAD TO GO GET THE SOFTWARE BECAUSE NOW THEY HAD A DEATH ON THEIR HANDS AND THEY FOUND THAT THE OFFICERS REPORTED FAR FEWER TRIGGER PULLS THAN THE DATAPORT RECOVERED.

HAD THEY GOTTEN THIS $150 SOFTWARE WITH THEIR ORIGINAL ORDER, SET THE CLOCKS ON THE DATAPORTS CORRECTLY AND MONITORED OFFICERS AFTER THEY USED IT, IT WOULD HAVE BEEN AWARE OF THE PROBLEM WITH THE EXCESSIVE TRIGGER PULLS AND BEEN ABLE TO CORRECT FOR IT.

THE EVIDENCE WILL ALSO SHOW THAT THE CITY OF SALINAS DID NOT REVIEW THE TASER TRAINING THAT WAS DISSEMINATED TO THEM WITH THE WARNING OF THE EXTENDED DURATIONS.

LET ME JUST CONCLUDE BY TELLING YOU ABOUT THE DECEDENT IN THIS CASE, ROBERT HESTON. HE GREW UP IN SALINAS. HE LIVED THERE HIS ENTIRE LIFE ALMOST. HE ACTUALLY WAS AN OUTSTANDING ATHLETE IN HIGH SCHOOL AND WON AN AWARD AS THE MOST OUTSTANDING FOOTBALL PLAYER IN THE CITY.

HE WENT TO FRESNO STATE TO PURSUE FOOTBALL BUT COLLEGE DIDN'T AGREE WITH HIM. HE LEFT SCHOOL AND WENT TO WORK AT HIS FATHER'S CEMENT BUSINESS.

BY THE TIME HE WAS IN HIS MID TWENTIES, HIS FAMILY BECAME AWARE THAT HE HAD THIS SEVERE SUBSTANCE ABUSE PROBLEM AND THERE WAS A FAMILY HISTORY OF SUBSTANCE ABUSE.

BY ALL ACCOUNTS THAT YOU'LL HEAR, THERE WERE TWO ROBERT HESTONS. WHEN HE WAS CLEAN AND SOBER, AS HE WAS FOR MANY SIGNIFICANT STRETCHES, HE WENT THROUGH REHABILITATION MANY TIMES, HE WAS THE WORLD'S NICEST GUY.

HIS FATHER WILL TELL YOU HOW THEY LOVED TO FISH TOGETHER, WORK SIDE-BY-SIDE IN THE CEMENT BUSINESS, GO TO CHURCH ON SUNDAYS AND THEN THE MEN'S BREAKFAST AFTERWARDS.

IT JUST -- FRIENDS LOVED HIM. HE WAS THE KIND OF GUY THAT WOULD GIVE YOU THE SHIRT OFF OF

HIS BACK.

AND THEN HE WOULD GET INVOLVED WITH THIS DRUG AND YOU'LL HEAR ABOUT -- ABOUT ALL OF THE STRUGGLES THAT THE FAMILY HAD WITH THAT.

THIS WAS NOT THE FIRST TIME THAT THIS HAPPENED. THERE WAS AN INCIDENT AT A HOTEL. THERE WAS AN INCIDENT WHERE HE WAS BITTEN BY A POLICE DOG. HE WAS ACTUALLY TASED ANOTHER TIME. THERE WAS ANOTHER INCIDENT WHERE HE WAS ACTUALLY THROWING STUFF OUT OF HIS PARENTS' HOUSE. THERE WAS EVEN AN INCIDENT WHERE HE GOT INTO A PHYSICAL ALTERCATION WITH HIS MOTHER WHERE SHE KICKED HIM IN THE GROIN AND WHERE HE RETALIATED AGAINST HER AND PUNCHED HER AND GAVE HER A BLACK EYE.

BUT YOU WILL ALSO HEAR THE POSITIVE TIMES HE HAD WITH HIS FAMILY, THE TIME WITH HIS NIECES AND THE PIE BAKING CONTEST WITH HIS FATHER, THE HOLIDAYS, THE FACT THAT THE FAMILY NEVER EVER GAVE UP ON HIM AND HE NEVER GAVE UP. HE WAS STILL STRUGGLING TO FIND THE PATH TO SOBRIETY.

HE WAS A VERY RELIGIOUS PERSON. HE WENT 12-STEP PROGRAMS AND SO ONE OF OUR LAST WITNESSES NEXT WEEK WILL BE A DOCTOR NAMED NATHAN LAVID. AND NATHAN LAVID IS A PSYCHIATRIST AND HE TREATED SPECIAL ADDICTIONS.

AND HE DID A PSYCHIATRIC AUTOPSY OF ROBERT HESTON WHERE HE TALKED TO THE FAMILY AND REVIEWED MEDICAL RECORDS, AND HE'LL EXPLAIN TO YOU WHY ROBERT HESTON WAS A GOOD CANDIDATE FOR ULTIMATE RECOVERY.

THERE ARE SOME PEOPLE WHO ARE HOPELESS. THERE ARE OTHER PEOPLE WHO TRY AND TRY AND TRY OVER AND OVER AGAIN TO DEFEAT THIS THING AND HE WAS IN THAT SECOND CATEGORY WITH THE MATURITY OF AGE, WITH THE SUPPORT OF HIS FAMILY, WITH THE RIGHT SORTS OF INTERVENTION FROM HIS CHURCH, FROM 12-STEP PROGRAMS, WITH MEDICAL AND -- AND INTERVENTION THAT IS -- THAT IS BECOMING MORE AND MORE COMMONPLACE, ROBERT HESTON MAY WELL HAVE REALIZED REDEMPTION AS MANY DO, BUT THAT'S NOT GOING TO HAPPEN BECAUSE HE PASSED AWAY. AND SO AT THE END OF THE CASE WE'LL BE ASKING YOU TO AWARD AN APPROPRIATE AMOUNT OF MONEY DAMAGES.

THANK YOU VERY MUCH. THANK YOU, YOUR HONOR.

THE COURT: UNLESS YOU LET ME KNOW OTHERWISE, I'LL GO AHEAD AND WE'LL HEAR ONE OF THE OTHER ARGUMENTS AND OPENING STATEMENTS AND THEN WE'LL TAKE A BREAK AT THAT POINT.

VERY WELL. I'LL CALL ON DEFENSE COUNSEL

MR. HURLEY.

MR. HURLEY: THANK YOU, YOUR HONOR.

(WHEREUPON, COUNSEL FOR THE DEFENDANT, CITY OF SALINAS AND INDIVIDUAL DEFENDANTS, GAVE HIS OPENING STATEMENT.)

MR. HURLEY: GOOD MORNING.

AS I TOLD YOU DURING JURY SELECTION, I REPRESENT THE CITY OF SALINAS POLICE DEPARTMENT. AND I KNOW I MENTIONED THEM BEFORE, BUT I WOULD LIKE TO BRIEFLY INTRODUCE THE DEFENDANTS AGAIN TO YOU.

FIRST OF ALL, CLOSEST TO THE WALL IS DEPUTY CHIEF CASSIE MCSORLEY. SHE'S NOT A DEFENDANT IN THIS CASE BUT SHE'S A REPRESENTATIVE OF THE POLICE DEPARTMENT.

NEXT IS COMMANDER JUAN RUIZ, WHO IS NOW A COMMANDER AND AT THE TIME OF THIS INCIDENT WAS A SERGEANT IN THE SALINAS POLICE DEPARTMENT AND HE HAS APPROXIMATELY 28 YEARS IN POLICE WORK.

NEXT IS OFFICER LEK LIVINGSTON, WHO IS A POLICE OFFICER WITH THE SALINAS POLICE.

NEXT IS SERGEANT MICHAEL DOMINICI. HE IS A SERGEANT WITH AGAIN ABOUT 28 YEARS IN THE POLICE DEPARTMENT. AND HE WAS THE SERGEANT AT THE SCENE ON THIS DAY.

AND NEXT IS OFFICER JAMES GODWIN. HE IS A SALINAS POLICE DEPARTMENT POLICE OFFICER AND IS A DEFENDANT IN THIS CASE.

WHAT IS GOING TO BE TALKED ABOUT THROUGHOUT THIS TRIAL, AT LEAST A LITTLE BIT, IS A PERIOD OF TIME OF ABOUT THREE MINUTES. THAT IS THE THREE MINUTES THAT THIS ENCOUNTER TOOK PLACE, ENDING WITH ROBERT C. HESTON ON THE FLOOR.

LET ME GO THROUGH BRIEFLY WHAT EVIDENCE YOU WILL HEAR ABOUT THIS THREE-MINUTE ENCOUNTER. AND YOU'VE HEARD THAT THERE WERE TWO CALLS, BUT I'LL START WITH THE SECOND CALL.

THE OFFICERS WERE CALLED AND TOLD THAT ROBERT C. HESTON HAD ASSAULTED HIS FATHER. AND THAT REPORT CAME FROM HIS FATHER AND FROM CLIFFORD SATREE.

SERGEANT DOMINICI AND OFFICER CRAIG FAIRBANKS, WHO SHOULD TESTIFY TODAY, WERE THE FIRST TO RESPOND TO THE SCENE. THEY HAD BOTH BEEN AT THE HOUSE PREVIOUSLY AND THEY WERE A FEW BLOCKS AWAY.

IT TOOK THEM ABOUT TWO MINUTES TO RESPOND TO THE CALL. SERGEANT DOMINICI FIRST, THE FIRST ONE ON THE SCENE ABOUT A BLOCK SHORT AND STOPPED. THEN DROVE FATHER DOWN THE STREET PASSED THE HOUSE AND SAW OBJECTS FLYING OUT OF THE HOUSE.

AS HE PULLED UP TO THE HOUSE HE SAW THE SON, WHO IS 40 YEARS OLD, ROBERT C. HESTON, DRAGGING HIS FATHER ACROSS THE FLOOR BACKWARDS BY ONE ARM AND DRAGGED HIM ACROSS THE FLOOR OUT OF SIGHT.

SERGEANT DOMINICI AND MR. HESTON AT THE TIME SAID THAT HE WEIGHED ABOUT 350 POUNDS.

SERGEANT DOMINICI KNEW THAT ROBERT C. HESTON, THE SON, WAS A VERY STRONG MAN. HE HAD JUST GOTTEN OUT OF PRISON AND HAVING SEEN HIM AT THE FIRST CALL, HE KNEW THAT HE HAD BEEN WORKING OUT. AND HE APPEARED TO BE A STRONG MAN.

NOW, AS SERGEANT DOMINICI THEN PULLED UP, HAVING SEEN THE FATHER THEN BE DRAGGED OUT OF SIGHT, SERGEANT DOMINICI STARTED ON FOOT UP THE PATHWAY TO THE HOUSE.

WHEN SERGEANT DOMINICI GOT TO THE -- ONTO THE FRONT PATH OF THE HOUSE AND WAS APPROACHING THE FRONT DOOR, ROBERT C. HESTON CAME OUT THROUGH THE FRONT DOOR. AND THROUGHOUT THIS EVENT YOU'LL SEE THAT ROBERT THE -- THE SON, WAS CONTINUING TO STAY IN THE HOUSE BUT BLOCK, BE THAT BARRIER TO GET INTO THE HOUSE.

AND FROM PAST EXPERIENCE ROBERT C. HESTON KNEW THAT THE POLICE WOULD BARRICADE THE HOUSE AND

DO CERTAIN THINGS. AND HE EVEN TALKED ABOUT THEY'RE GOING TO BARRICADE THE HOUSE, THEY'RE GOING TO DO THESE THINGS, BECAUSE HE KNEW IT HAD HAPPENED BEFORE.

BUT SERGEANT DOMINICI, AS HE APPROACHED THE FRONT DOOR, IS TALKING TO HESTON, TRYING TO MAKE CONTACT WITH HIM.

AT THAT POINT ROBERT C. HESTON THREW THIS PIECE OF WOOD WHICH WILL BE IN THE TRIAL AS EXHIBIT 249. HE THREW THIS PIECE OF WOOD. IT EITHER CAME FROM THE SHATTERED GRANDFATHER CLOCK OR FROM THE SHATTERED HOME ENTERTAINMENT CENTER BUT IT'S A PIECE FROM ONE OF THOSE PIECES OF FURNITURE, AND HE THROW IT AT SERGEANT DOMINICI, JABBING STYLE, STRIKING IT IN THE CHEST OF SERGEANT DOMINICI RIGHT HERE.

IT KNOCKED HIM BACK. HE YELLED OUT BUT HE REMAINED STANDING. IT KNOCKED HIS BULLET PROOF VEST.

OFFICER FAIRBANKS WAS MOVING ALONG THE FRONT OF THE HOUSE AND MOVING AT A DIFFERENT ANGLE AND SAW THAT OCCUR.

ROBERT C. HESTON RETURNED BACK INSIDE OF THE HOUSE, THE SON. AND AT THIS POINT NEITHER OFFICER FAIRBANKS NOR SERGEANT DOMINICI KNEW WHERE

THE FATHER WAS.

AND WHAT WE KNOW NOW IS THAT WE GOT UP AND THE FATHER HAD GOTTEN BACK TO A CORNER BY THE LIVING ROOM HALLWAY. AND THE FATHER HAS TESTIFIED THAT HE WANTED THE POLICE TO GET HIS SON OUT OF THE HOUSE, BUT HE DIDN'T WANT TO BE NEAR IT AND EVENTUALLY, SO THAT HE WOULDN'T GET INVOLVED, HE WENT DOWN THE HALLWAY AND WENT BACK AROUND TO THE KITCHEN AND WAS THEN OUT OF SIGHT.

AFTER ROBERT C. HESTON CAME BACK OUT THE FRONT DOOR AGAIN, AND SERGEANT DOMINICI WAS NOT ABLE TO MAKE ANY KIND OF COMMUNICATION CONTACT WITH HIM, TRYING TO TALK TO HIM, ALL HE SAW WAS A GLASSY STARE THAT DID NOT FOCUS ON ANYONE, AND DEBRIS OUTSIDE OF THE HOUSE.

SERGEANT DOMINICI THEN DEPLOYED HIS TASER. HE MISSED WITH ONE PROBE. HE HAD ACTUALLY DEPLOYED HIS TASER ONCE BEFORE AND ALSO MISSED. BOTH TIMES HE WAS TRYING TO SHOOT THIS THING AT A MOVING TARGET. THE TASER, LIKE ANYTHING ELSE, IS NOT A PERFECT DEVICE. IF YOU'RE SHOOTING AT A MOVING TARGET, IT'S HARD TO HIT. AND HE MISSED WITH ONE PROBE.

HESTON THOUGH, DID YELL OUT, BACKED UP A LITTLE BIT INTO THE HOUSE, CAME BACK OUT OF THE --

OR CAME BACK INTO A POINT THAT -- THAT OFFICER FAIRBANKS THEN FIRED HIS TASER. AND OFFICER FAIRBANKS IS PRETTY SURE THAT HE GOT IT BUT HESTON BACKED UP, REMAINED STANDING, DID NOT FALL DOWN, AS THE OFFICERS SEE IN THEIR TRAINING AND AS SEEN IN MANY OTHERS EVENTS WHERE OFFICERS FALL DOWN.

HE SEEMED TO BE PULLING OUT PROBES AND CLIFFORD WILL TELL YOU ABOUT SEEING PROBES AND HAVE HIM SWIPE DOWN PROBES, AS WILL OFFICER FAIRBANKS.

HESTON BACKED UP INTO THE HOUSE AGAIN. SERGEANT DOMINICI CALLED FOR MORE OFFICERS TO COME INTO THE SCENE AND HE ASKED FOR WHAT IS AN INCREASE TO CODE 3, WHICH MEANS RED LIGHTS AND SIGNS AND HE ASKED FOR OTHER OFFICERS TO BRING OTHER TASERS BECAUSE THE TASER HOLDS ONE CARTRIDGE AND NORMALLY OFFICERS DON'T CARRY MULTIPLE CARTRIDGES.

THE TASERS ARE SOMEWHAT LARGE, CARRIED ON A BELT OR CARRIED WITH TOO MANY DEVICES, BUT I'M HOLDING UP A CARTRIDGE WHICH WILL BE MARKED AS 203. SO THEY DON'T USUALLY CARRY MORE THAN ONE.

SO NOBODY COULD RELOAD AT THIS POINT. THERE WAS NO OTHER WEAPON TO USE EXCEPT A BATON, PEPPER SPRAY, WHICH IS AN IRRITANT SPRAY, OR A GUN.

THEY THEN WAITED FOR ABOUT A MINUTE WHILE -- WHILE ROBERT C. HESTON WENT ON WHAT WAS

DESCRIBED AS A RAMPAGE INSIDE OF THE HOUSE, OUTSIDE OF THE HOUSE, OBJECTS FLYING OUT OF THE HOUSE.

NEITHER FAIRBANKS NOR DOMINICI KNOW WHAT IS GOING ON.

AT A POINT THAT FAIRBANKS CAN LOOK THROUGH THE FRONT DOOR -- OR EXCUSE ME, THE FRONT WINDOW. WHICH, BY THE WAY, THE FRONT WINDOW IN PART HAD BEEN SHATTERED, ONE PANE OF THE WINDOW HAD BEEN SHATTERED WHEN HESTON SHOVED HIS FIST THROUGH THE WINDOW BEFORE THE POLICE ARRIVED.

YOU'LL SEE PHOTOGRAPHS OF BLOOD SPATTERS ON THE CEILING AND THE WALLS AS BLOOD IS SPATTERING. YOU'LL SEE A HOLE IN THE CEILING. IT WAS KNOCKED EITHER WITH A TOOL OR A FIST BY KNOCKING THE CEILING.

SO THIS RAMPAGE GOES ON WHILE THEY'RE WAITING FOR MORE OFFICERS.

SERGEANT JUAN RUIZ ARRIVES. HE COMES UP NEXT TO SERGEANT DOMINICI AND THEY TRY TO BRIEF WHAT HAS HAPPENED.

RUIZ KNOWS THAT THERE'S BEEN AN ASSAULT ON A PERSON. DOMINICI TELLS HIM HE THREW THE STICK AND IT HIT ME.

RUIZ ALSO KNEW THAT HE WAS ASSAULTIVE TOWARDS POLICE OFFICERS BECAUSE WHEN RUIZ TURNED TO

WALK UP THE STAIRS -- OR EXCUSE ME, TO WALK UP THE PATH, ROBERT C. HESTON FROM THE FRONT DOOR OF THE HOUSE THREW THIS GRANDFATHER CLOCK WEIGHT AT SERGEANT RUIZ.

NOW, YOU'LL HEAR THE PLAINTIFFS SAY THAT THIS IS A HARMLESS ACT. SERGEANT RUIZ WILL TESTIFY THAT -- THAT ROBERT C. HESTON LOOKED HIM STRAIGHT IN THE EYE WHEN HE THREW THIS CLOCK WEIGHT. AND THIS CLOCK WEIGHT FLEW THE DISTANCE FROM ME TO ABOUT THAT WALL BEHIND YOU.

THIS CLOCK WEIGHT WEIGHS ALMOST 12 POUNDS. IT IS A HEAVY OBJECT.

ROBERT C. HESTON THREW THREE OF THESE DURING THE RAMPAGE, ALL SHATTERED FROM THE GRANDFATHER CLOCK.

SERGEANT -- OFFICER FAIRBANKS WILL TELL YOU THAT WHEN HE LOOKED IN THROUGH THE FRONT WINDOW, HE SAW HESTON DOWN ON THE FLOOR SMASHING, MAKING POUNDING FIST MOVES.

FAIRBANKS AT THAT POINT THOUGHT IT WAS THE FATHER ON THE FLOOR GETTING PUNCHED. FAIRBANKS DREW HIS GUN. HE THOUGHT AT THIS POINT I'M GOING TO SHOOT HIM. BUT THAT WENT AWAY. HE HELD OFF AND IT TURNS OUT THAT WHAT HE WAS SMASHING ON WAS APPARENTLY MORE OF THE GRANDFATHER CLOCK OR MORE OF

A PIECE OF FURNITURE.

NOW WE GET TO COMMANDER OR SERGEANT RUIZ AT THE TIME COMING UP AND OFFICER LIVINGSTON COMING UP AND STANDING TO THE RIGHT OF SERGEANT RUIZ. THEY TRIED TO BRIEF BUT HESTON KEEPS COMING OUT.

SERGEANT RUIZ'S TACTIC OVER THE YEARS HAS ALWAYS BEEN TALK, TRY TO TALK. SO HE TRIES TO TALK TO DISTRACT, TO ASK QUESTIONS JUST TO GET HESTON TO COMMUNICATE, BUT HE WON'T COMMUNICATE. HE STILL IS COMING OUT, STILL BLOCKING ACCESS TO THE DOOR, STILL BLOCKING THE POLICE'S WAY IN THE FRONT DOOR.

SERGEANT RUIZ PULLS OUT AND DEPLOYS HIS TASER, OFFICER LIVINGSTON ALSO DEPLOYS HIS TASER. YOU'LL SEE THAT FROM THE TRAINING THAT OFFICERS DEPLOY, MULTIPLE TASERS IN HIGH RISK. AND THEY WERE TRAINED THAT THEY COULD AND SHOULD DEPLOY TASERS IN HIGH-RISK SITUATIONS. TWO TASERS, BECAUSE IT IS SO COMMON FOR THE WIRES TO BREAK OR TO COME OUT OR FOR SOMETHING TO GO WRONG. THIS IS NOT A PERFECT DEVICE.

WHEN RUIZ AND LIVINGSTON'S PROBES, THEY THINK, HIT -- ANOTHER THING THAT DOES NOT COME IN THE TRAINING VIDEOS BUT THEY ARE WARNED ABOUT DURING TRAINING, HE DIDN'T GO DOWN. HE STAYED STANDING.

CLIFFORD SATREE WILL TESTIFY THAT HE STAYED STANDING AND WAS STILL PULLING OUT THOSE PROBES, STILL WAVING AT THOSE WIRES. YOU'LL HEAR TESTIMONY THAT HE WAS STILL MOVING HIS ARMS.

ROBERT C. HESTON BACKED INTO AND TURNED INTO THE HOUSE AS HE WAS BEING HIT WITH THE TASERS BY SERGEANT RUIZ AND LIVINGSTON. AND HE TURNED BACK IN TOWARDS THE HOUSE AS OFFICER GODWIN IS ARRIVING. HE STILL IS UP AND STILL MOVING BACK INTO THE HOUSE AND IN ORDER TO MOVE BACK INTO THE HOUSE HE HAS TO STEP OVER DEBRIS IN THE HOUSE.

SO HE IS STILL FUNCTIONING, ALTHOUGH SERGEANT RUIZ -- HE'S GOING TO GET FIVE OR SIX RANKS FROM ME -- AS SERGEANT RUIZ IS WALKING IN, HE SEES HESTON IN WHAT IS DESCRIBED AS A FRANKENSTEIN WALK, WHICH INDICATES THAT THERE MAY BE A PARTIAL HIT, THAT IT IS SLOWING HIM DOWN.

SO HE'S STILL MOVING, STILL MOVING HIS HANDS AND ARMS. THEY FOLLOW HIM INTO THE HOUSE.

OFFICER GODWIN, WHO HAS COME UP, GETS INSIDE OF THE HOUSE AND HE -- HESTON JUNIOR IS STILL MOVING.

THE WHOLE POINT OF THIS IS TO CONTROL HIM BECAUSE HE IS, WHAT THEY HAVE BEEN TRAINED, IN A STATE OF EXCITED DELIRIUM.

WHEN A PERSON IS IN A STATE OF EXCITED DELIRIUM THAT THEY CANNOT PUT WEIGHT ON THE SUSPECTS, THEY CANNOT PUT KNEES ON THE SUSPECT AND THEY CANNOT PUT KNEES ON HIM TO CONTAIN HIM.

SO THEY KNOW THEY CANNOT PUT ANY WEIGHT ON THIS GUY, AND THEY'RE NOT TRAINED IN THE ALTERNATIVE. THEY'RE TOLD YOU CANNOT DO THIS.

SO GODWIN FIRES THE THIRD TASER OF THE SECOND, ACTUALLY THE FIFTH TASER BUT IT'S THE THIRD TASER OF THE GROUP OF RUIZ, LIVINGSTON AND GODWIN.

AND WHAT YOU WILL HEAR IS THAT WHEN GODWIN DEPLOYS, HESTON GOES DOWN. SO RUIZ AND LIVINGSTON'S TASER HAD NOT TAKEN HIM DOWN. GODWIN DEPLOYED, AND HE DOES GO DOWN.

AND YOU'LL HEAR A DESCRIPTION THAT HE GOES DOWN ONTO A COUCH, HITS HIS HEAD ON A TABLE, ROLLS, SOMEHOW, ON HIS OWN, ONTO HIS STOMACH, EITHER BY MOMENTUM OR ON HIS OWN WILL, BUT ENDS UP ON HIS STOMACH.

HIS ARMS ARE UNDERNEATH HIM IN WHAT OFFICERS CALLED OR WHAT THEY SOMETIMES ARE TRAINED IS CALLED TURTLE HOLDING. AND THAT'S A POSITION WHERE THE OFFICERS CANNOT GET THE PERSON'S ARMS OUT BY JUST LOCKING HIS WRISTS UNDERNEATH HIM.

ONCE HE IS DOWN, THE NEXT OFFICER,

SERGEANT DOMINICI, GOES IN THE DOOR. THE NEXT OFFICER TO THE DOOR IS OFFICER FAIRBANKS.

FAIRBANKS SEES THAT THE OFFICERS HAVE HAD TO STEP THROUGH AND OVER THE GRANDFATHER CLOCK AND THE OTHER DEBRIS.

FAIRBANKS GRABS THE GRANDFATHER CLOCK AND THERE'S A LOGJAM THAT SOME DESCRIBED AT THE FRONT DOOR. YOU'LL SEE FAIRBANKS ABOUT 65.

BUT AS HE GRABS THE CLOCK PAREDEZ IS BEHIND FAIRBANKS AND YOU'LL HEAR WHEN FAIRBANKS SEES HIM DRAG THE CLOCK OUT TO THE FRONT DOOR, AT LEAST TO THE FRONT PORCH, HE GOES IN AND PAREDEZ GOES IN. PAREDEZ GOES AROUND TO THE LEFT TO -- TO ROBERT HESTON'S LEFT ARM AS HE'S FACE DOWN.

FAIRBANKS GOES TO THE RIGHT BUT HE CAN'T GET TO THE ARM BECAUSE -- BECAUSE ROBERT HESTON IS TOO CLOSE TO THE COUCH AND SOME FURNITURE.

SO FAIRBANKS PUSHES THE COUCH OUT OF THE WAY AND THROWS THE COFFEE TABLE UP ON THE COUCH OR AT LEAST OUT OF THE WAY. AND FAIRBANKS AND PAREDEZ START TRYING TO CONTROL ROBERT HESTON'S ARMS.

PAREDEZ AND FAIRBANKS WILL TELL YOU THAT WHAT THEY FELT IN ROBERT C. HESTON WAS THAT HE WAS WILLFULLY TURTLING OR HOLDING HIS ARMS SO THAT THEY COULD NOT GET HIM UNDER CONTROL.

HE WAS LAYING ON THE FLOOR IN THE LIVING ROOM WHERE THE WINDOW GLASS AND THE GLASS FROM THE CLOCK WERE SHATTERED -- WAS SHATTERED AND LAYING ALL ABOUT THE FLOOR. IN FACT, HE MAY HIMSELF HAVE BEEN CUT BY THE WINDOW GLASS WHILE HE WAS LAYING ON THE FLOOR. THAT'S ROBERT C. HESTON.

AND WHEN PAREDEZ WENT UP TO TRY TO GET HIM, PAREDEZ FELT A LIVE WIRE. SOME OF THE TESTIMONY IS THAT IF THE OFFICER FEELS THE WIRE, THERE'S NOT A GOOD CONNECTION.

PAREDEZ TRIES TO GET HESTON'S BICEPS WITH BOTH HANDS AND PULL THEM OUT, BUT HE CAN'T PULL THEM OUT AND HE KEEPS PULLING AND PULLING. FAIRBANKS TRIES TO PULL AND HE KEEPS PULLING AND THE POINT OF THAT IS THAT GET HIS ARMS UNDER CONTROL, BECAUSE ALL THE OFFICERS WILL TESTIFY THAT THE TRAINING IS GET THE ARMS UNDER CONTROL. SEE THE HANDS. YOU'RE GOING TO BE HURT BY THE SUSPECT'S HANDS.

THE SUSPECT HAS A WEAPON AND IS GOING TO HAVE IT IN HIS HANDS AND THAT INCLUDES GLASS, THAT INCLUDES PIECES OF FURNITURE AND THAT INCLUDES GRANDFATHER CLOCK WEIGHTS, AND NOT JUST GUNS AND KNIVES. SO IT'S SEE THE HANDS. AND THAT'S WHAT THEY'RE ALL FOCUSED ON DOING IS GETTING THE ARMS

UNDER CONTROL.

AND THAT COULD JUST MEAN GETTING THE ARMS OUT AND GETTING THEM INTO WRIST LOCKS, BUT THEY CAN'T DO IT. THEY'RE UNABLE TO DO IT.

NOW, WHILE THIS IS GOING ON, JUST AFTER HESTON WENT DOWN, SERGEANT RUIZ SEES AT THE END OF HIS TASER -- THIS IS A TASER DEVICE. THERE'S THE CARTRIDGE GOES AT THE -- AT THE POINT END OF THE TASER DEVICE.

WHEN THERE IS A BAD CONNECTION FREQUENTLY AN OFFICER WILL SEE ARCING AND SPARKING AT THE END OF THE DEVICE. IT MEANS THAT THERE'S A BAD CONNECTION.

SERGEANT RUIZ SAW ARCING AND SPARKING AT THE END OF THE DEVICE AND TOLD EVERYONE MY WIRES ARE BROKEN, MINE IS NOT WORKING. LIVINGSTON SEES A PERSON WHO IS STILL FIGHTING AND LIVINGSTON IS SAYING MINE IS NOT WORKING. AND LIVINGSTON IS EITHER PULLING THE TRIGGER OR TRYING TO PULL THE TRIGGER AND SAYING MINE IS NOT WORKING.

GODWIN HEARS THE LOUD CLICKEDY CLACK NOISE OF WHAT HE SAYS IT MEANS IT'S NOT WORKING.

BECAUSE THEIR TRAINING IS THAT IF YOU'RE HEARING THIS CLICKEDY CLACKING NOISE THERE'S MORE OF A CHANCE YOUR DEVICE IS NOT WORKING. HE HEARS

THAT AND HE TAKES HIS CARTRIDGE OUT ALTOGETHER, AS RUIZ HAS ALREADY TAKEN HIS CARTRIDGE OUT.

THEY'RE STILL STRUGGLING IN THIS PERIOD OF TIME THAT IS GOING ON NOW FOR ABOUT 30, 40 SECONDS, THEY'RE STILL STRUGGLING.

RUIZ THEN SAYS I CAN DRY STUN HIM BECAUSE -- AND THEN I'LL TELL YOU A LITTLE BIT ABOUT A DRY STUN.

A DRY STUN MEANS I CAN TOUCH THE END OF THIS DEVICE ON HIS LEG AND IT WILL CAUSE HIM PAIN AND IT WILL MAKE HIM STOP, BUT IT WON'T CONTROL HIM.

RUIZ SAYS I CAN DRY STUN HIM. SIMPSON, OFFICER SIMPSON HAS NOW COME IN THE HOUSE. GODWIN HAS TAKEN HIS CARTRIDGE OFF. SIMPSON STARTS PULLING WITH PAREDEZ ON HESTON'S LEFT ARM. SO YOU NOW HAVE TWO OFFICERS PULLING ON THE LEFT ARM. NEITHER OF THOSE TWO OFFICERS CAN GET HIS LEFT ARM OUT AND IT IS VERY DIFFICULT TO DO IF SOMEBODY LOCKS UP.

SIMPSON SAYS TO GODWIN, TASE HIM AGAIN. WE CANNOT GET HIS ARMS OUT. TASE HIM AGAIN. AND THIS IS ABOUT THE 50 TO ONE-MINUTE MARK ON THE FLOOR.

WHEN RUIZ SAYS ALMOST SIMULTANEOUSLY I

CAN DRY STUN HIM, GODWIN SAYS, I'LL TASE HIM AND DOES. THE PURPOSE OF THAT IS IT KEEPS HIM UNDER CONTROL. HE CAN'T ROLL OVER, HE CAN'T COME UP WITH A WEAPON. THAT'S THE TRAINING OF THE OFFICERS.

ONCE GODWIN TASES HIM, THEY FEEL A RELAXATION. RUIZ HAD FELT THE RELAXATION BEFORE BECAUSE RUIZ WAS HOLDING HIS LEGS DOWN. RUIZ HAD FELT WHEN THE TASER WAS NOT OPERATING AND HIS MUSCLES WOULD RELAX AND HE WOULD CONTINUE TO FIGHT.

THE OTHER OFFICERS HAD FELT IT WHEN THEY WERE PULLING AND THE TASERS HAD STOPPED AND HE STILL WASN'T LETTING GO. ALL OF THE OFFICERS INDEPENDENTLY SAID THE TASERS WERE NOT OPERATING.

AND YOU'LL HEAR MR. SATREE TALK ABOUT HOW HE HAD BEEN PULLING OUT THE WIRES AND MOVING HIS ARMS BEFORE HE WENT DOWN ON THE GROUND.

YOU'LL HEAR THAT -- THAT ACCORDING TO THE PLAINTIFF'S THEORY THERE IS THIS THING CALLED TETANY, MAKES IT IMPOSSIBLE FOR ANY HUMAN BEING TO MOVE THE MUSCLES OF ANOTHER HUMAN BEING WHO IS BEING AFFECTED BY A TASER.

YOU'LL ALSO HEAR TESTIMONY THAT THE OFFICERS ARE TRAINED TO HANDCUFF WHILE THE TASER OPERATING, GET HIS ARMS OUT AND GET HIM UNDER CONTROL AND DO THINGS WHILE THE TASER IS OPERATING

BECAUSE THAT IS WHAT IS CALLED THE WINDOW OF OPPORTUNITY.

SO THAT'S WHAT HAS HAPPENED IN THAT THREE MINUTES.

THERE'S TALK THAT THERE SHOULD HAVE BEEN AN AMBULANCE CALL AND, IN FACT, INDEPENDENT OF THIS AN AMBULANCE HAD BEEN CALLED BY MR. SATREE.

WHEN SERGEANT DOMINICI FIRST WALKED UP TO SEE WHAT WAS GOING ON AND WAS HIT IN THE CHEST WITH THIS STICK, SERGEANT DOMINICI WILL TELL YOU THAT THAT WAS NOT THE TIME FOR ME TO BE CALLING AN AMBULANCE. IT WAS TIME FOR ME TO PROTECT THE SITUATION THAT IS GOING ON.

THAT COVERS THE THREE MINUTES.

GOING BACK TO THE FIRST CALL. WHAT THE OFFICERS KNEW FROM THE FIRST CALL WAS THAT MR. HESTON HAD CALLED AND SAID GET MY SON OUT OF THE HOUSE, HE'S ON DRUGS.

MR. HESTON WILL TESTIFY THAT WHEN HE CAME HOME FROM SHOPPING WITH HIS WIFE, HIS SON WAS INCOHERENT, STARING. HE HAD SEEN IT BEFORE MANY TIMES, HE KNEW THERE WAS GOING TO BE VIOLENCE, HIS WIFE KNEW THERE WAS GOING TO BE VIOLENCE. HIS WIFE WENT AND SAT IN THE BEDROOM. BUT SHE WAS ANGRY AND SHE HAS SAID SHE HAD GOTTEN ANGRY BEFORE. AND WHEN

SHE GOT ANGRY AT HIM BEFORE SHE STRUCK OUT AND KICK HIM, AND HIS RESPONSE TO THAT WAS TO BLACKEN OUT HER EYES BY A PUNCH TO HIS MOTHER'S FACE.

SO SHE WENT TO SIT IN THE BEDROOM. SHE SAW HIM IN THE WATER HEATER ROOM AND TAKING A BOOK OUT AND TAKING THERMOSTAT COVERS OFF THE WALLS. AND HER HUSBAND SAID LEAVE, GO.

SO BETTY LEFT AND DROVE TO HER DAUGHTER'S HOUSE, THAT'S MISTY AND CURT KASTNER.

MR. HESTON REMAINED BEHIND, AGAIN BECAUSE HE KNEW THERE WAS GOING TO BE VIOLENCE AND I'M SURE HE WILL TELL YOU HE WAS GOING TO TRY AND FIGURE OUT SOME WAY TO KEEP THIS -- TO GET HIS SON OUT OF THE HOUSE BUT NOT LEAVE.

MR. SATREE HAD ARRIVED ON THE FIRST CALL BECAUSE MR. HESTON CALLED AND SAID COME OVER AND GET ROBERT AND GET HIM OUT OF MY HOUSE.

CURT KASTNER DROVE TO THE FIRST CALL BECAUSE BETTY HESTON HAD GONE TO THE KASTNER HOME AND SAID WE NEED TO GET ROBERT OUT OF THE HOUSE AND POLICE ARE THERE AND ROBERT IS ON DRUGS AGAIN.

AND EVERYONE KNEW VIOLENCE WAS COMING. THEY WILL ALL TESTIFY THEY KNEW FROM PAST EXPERIENCE THERE WAS GOING TO BE VIOLENCE.

THE PLAINTIFFS AT THE FIRST CALL SAID

THERE'S NOT GOING TO BE VIOLENCE. THIS IS A FAMILY MATTER. HE'S IN A HOME -- HE'S IN HIS OWN HOME. HE'S A PAROLEE. WE'LL SEE IF WE CAN CALL HIS PAROLE OFFICER AND VIOLATE HIS PAROLE. IT'S A SATURDAY. NOBODY CAN GET A HOLD OF HIS PAROLE OFFICER.

THEY HAD TO GET AUTHORIZATION FROM A PAROLE OFFICER TO ARREST HIM FOR VIOLATION OF PAROLE IF THEY DIDN'T HAVE A CRIME. SMASHING UP HIS HOUSE, WHICH IT WAS HIS HOUSE BEFORE HIS PARENTS LET HIM LIVE THERE IS NOT A VIOLATION OF THE LAW. SO THEY SAID TO MR. HESTON, YOU SHOULD EVICT HIM AND GET A RESTRAINING ORDER AND THERE'S A LOT OF CIVIL ACTION YOU CAN TAKE, AND SIMPLY CALL US BACK BUT THIS IS A FAMILY PROBLEM AS IT SITS HERE RIGHT NOW BECAUSE THERE'S BEEN NO VIOLENCE COMMITTED UPON ANYONE, HE'S STIRRING UP YOUR HOUSE AND HIS HOUSE.

AND THE OFFICER STAYS FOR 15 OR 20 MINUTES AND ADVISED MR. HESTON ABOUT CIVIL REMEDIES AND TRIED TO TALK TO THE SON AND AT THAT POINT STARTED TO LEAVE AND WENT BACK TO THEIR CARS AND ACCORDING TO CLIFFORD SATREE, MR. HESTON SAID GO TELL THE POLICE TO LEAVE, I DON'T WANT THEM AROUND.

ACCORDING TO CLIFFORD SATREE, THEY DIDN'T WANT THE POLICE AROUND BECAUSE THEY FELT THE POLICE WOULD AGITATE HESTON IF THEY WERE NOT GOING TO GET HIM OUT OF THE HOUSE FOR MR. SATREE.

SO THEY'RE GOING BACK TO THEIR GUYS AND THEY'RE SITTING THERE WATCHING WHAT IS GOING ON AND LEFT AND SAID WE WANT YOU TO LEAVE.

ON THE OTHER HAND, CURT KASTNER WHO IS A LITTLE FARTHER UP THE STREET WHO HAD NEVER COME DOWN TO THIS INCIDENT, HE HAD STAYED BACK, TOLD THE OFFICERS DON'T LEAVE AND SO THERE'S GOING TO BE TROUBLE IF YOU LEAVE.

BUT THE RESIDENT OF THE HOME HAD TOLD THE OFFICERS, I DON'T WANT YOU HERE, LEAVE. SO THEY LEFT.

AND AS IT TURNS OUT, TWO OFFICERS STOPPED ABOUT, ABOUT SIX OR EIGHT BLOCKS AWAY IN A PARKING LOT TO TALK AND THEY WERE NEARBY WHEN THE SECOND CALL CAME IN ABOUT THREE OR FOUR MINUTES LATER, MAYBE FIVE MINUTES TOTAL.

SO THAT'S WHAT HAPPENED ON THE FIRST CALL.

AND THE REASON THAT EVERYONE KNEW THERE WAS GOING TO BE VIOLENCE, YOU HAVE ALREADY HEARD ABOUT.

THE HOUSE -- ANOTHER HOUSE WHERE THE HESTON FAMILY HAD LIVED HAD BEEN BARRICADED BY THE POLICE. THEY -- MR. AND MRS. HESTON HAD RUN OUT TO THEIR DAUGHTER'S HOUSE. ROBERT HESTON HAD SHOWN SATREE THE SCARS FROM THE DOG BITE. THEY HAD VISITED HIM IN THE HOSPITAL AFTER THE POLICE DOG BITE WHEN THE POLICE HAD SENT IN A DOG TO GET HIM OUT OF THE HOUSE.

THEY HAD SEEN PREVIOUS INCIDENTS WHERE THE HOUSE HAD BEEN TRASHED AND THINGS HAD BEEN THROWN OUT OF THE HOUSE. THEY KNEW ALL OF THAT PROCESS WAS NOW ROLLING DOWNHILL ON THAT DAY.

AND ALL THE POLICE COULD DO WAS INTERVENE AND IN A CRIMINAL ACT. THE POLICE ARE NOT PARAMEDICS. THE POLICE ARE NOT SOCIAL WORKERS. ALL THEY COULD DO IS INTERVENE IN A CRIMINAL ACT. AND THEY WILL TESTIFY, WE HAVE TIME TO CALL SOME OTHER SERVICE, WE CAN DO THAT, BUT WHEN THERE IS A VIOLENCE ON THE FATHER, TEARING UP OF THE HOUSE AND A PAROLEE COMMITTING CRIMES, OUR JOB IS TO PROTECT THE FATHER AND APPREHEND THE PAROLEE AND THAT'S WHAT THEY TRIED TO DO.

AND YOU WILL HEAR ABOUT THIS NONLETHAL, LESS LETHAL AND YOU'LL HEAR EXPERTS TALK ABOUT ALTERNATIVES. AND THE QUESTION PRESENTED THAT THE

EXPERTS WILL TESTIFY ABOUT IS WHAT WERE THE ALTERNATIVES IN THIS CIRCUMSTANCE FOR THE PERSON OF GREAT STRENGTH, STRENGTH INCREASED BY EXTREME METHAMPHETAMINE CONDITION, ALSO INCREASED BY MANY YEARS OF METHAMPHETAMINE ABUSE AND YOU HAVE ALREADY HEARD IT'S IN THE 15- TO 20-YEAR RANGE, WHEN A PERSON IS THIS CRAZY, WHAT ARE THE ALTERNATIVES? YOU DON'T WANT TO SHOOT HIM. THE BATON IS ONLY GOING TO BREAK BONES. IT'S NOT GOING TO CAUSE CONTROL BECAUSE THE PERSON FEELS NO PAIN.

YOU'LL SEE HOW MANY INJURIES HE HAD INFLICTED ON HIMSELF THAT DAY OR HAD ON HIS BODY.

THE PERSON DOESN'T FEEL PAIN. SO THE BATON IS ONLY GOING TO BREAK BONES. IT'S NOT GOING TO STOP HIM. PEPPER SPRAY IN A CONFINED SPACE IS NOT GOING TO WORK IN A ROOM AND SHOOTING IS IS OUT. AND SITTING ON HIM, JUMPING ON HIM, SWARMING HIM, AS ONE PERSON SAID THEY SHOULD HAVE DONE, SWARMING HIM IS ALL PROHIBITED BECAUSE HE'S IN EXCITED DELIRIUM.

SO THE BIG QUESTION IS WHAT ARE THE ALTERNATIVES THAT THE EXPERTS SAY SHOULD HAVE BEEN DONE? AND THAT WILL BE SOME OF THE EVIDENCE THAT COMES -- THE CONTRARY EVIDENCE THAT COMES OUT IN TESTIMONY.

FINALLY ABOUT TRAINING AND SUPERVISION, YOU'LL SEE THAT THE POLICE CHIEF DECIDED TO GO WITH TASER DEVICES IN MID-2003 BECAUSE OF THE PROBLEM OF PEOPLE DYING THAT WERE ON METHAMPHETAMINE OR IN EXCITED DELIRIUM.

THERE WERE INCIDENTS WHERE THEY WERE CHASED AND AT THE END OF THE CHASE THEY JUST DIED FROM EXERTION AND METHAMPHETAMINE.

AND SO IS THERE SOME WAY TO BRING PEOPLE UNDER CONTROL IN A WAY THAT, THAT DOES NOT CAUSE OR BE INVOLVED IN THEIR DEATH? AND AFTER A LOT OF STUDY, THEY DECIDED WE'LL PURCHASE THE TASERS BECAUSE THEY'RE EITHER NONLETHAL OR LESS LETHAL DEPENDING ON WHEN THEY WERE MARKETED.

AFTER THE STUDYING WAS DONE, THEY WERE ISSUED TO THE POLICE DEPARTMENT AND THE CHIEF HAD STATISTICS MAINTAINED ON TASER USE INJURIES AND SO ON.

AND TEN DAYS PRIOR TO THIS EVENT --

MR. BURTON: YOUR HONOR, WE OBJECT TO, TO -- I HAVE DISCUSSED THIS WITH MR. HURLEY. I'M NOT SURE EXACTLY WHERE HE IS GOING, BUT I THOUGHT WE HAD AN AGREEMENT.

THE COURT: WELL, I'M NOT SURE WHAT YOU'RE REFERRING TO ACTUALLY, BUT --

MR. BURTON: IT'S RELEVANT TO OTHER INCIDENTS.

THE COURT: I PRESUME THAT HE'S CONFINING HIMSELF TO WHAT THE EVIDENCE WILL SHOW, AND HE'S AT THIS POINT DESCRIBING SOME STUDY THAT WAS DONE?

MR. BURTON: RIGHT.

THE COURT: MEMBERS OF THE JURY, SOMETIMES THE EVIDENCE DOES NOT DEVELOP AS THE LAWYERS SAY IN THEIR OPENING STATEMENT, THAT'S WHY IT'S NOT EVIDENCE, BUT I'LL PERMIT COUNSEL TO COMPLETE HIS RECITATION OF WHAT THE EVIDENCE WILL SHOW.

GO AHEAD, COUNSEL.

MR. HURLEY: TEN DAYS PRIOR TO THIS EVENT THE CHIEF HAD LOOKED AT FORCE STATISTICS. THE POLICE DEPARTMENT IN SALINAS MONITORS ALL FORCE.

IN EACH CASE A SERGEANT HAS TO INVESTIGATE USE OF FORCE. A REPORT HAS TO BE DONE WITH WITNESSES AND SO ON IDENTIFIED. THAT GOES TO A COMMANDER LEVEL AND THEN A CAPTAIN LEVEL. THAT ALSO GOES TO THE CHIEF. AND EVERY ONE OF THESE USE OF FORCES ARE REVIEWED.

STATISTICS ARE KEPT ON USE OF FORCE AND ONLY TEN DAYS PRIOR TO THAT THE CHIEF HAD REVIEWED THE PREVIOUS ANNUAL REPORT FOR WHICH HE HAD ALSO

RECEIVED PERIODIC REPORTS.

SO YOU'LL SEE THAT THE POLICE DEPARTMENT WAS ACTIVELY SUPERVISING OFFICERS ON USE OF FORCE. YOU'LL ALSO HEAR ABOUT THE DATAPORT AND YOU'LL HERE FROM THE SALINAS POLICE OFFICERS THAT THE OFFICERS WERE TRAINED ABOUT THE DATAPORT, ABOUT THE ABILITY TO MONITOR IT.

BUT THE DATAPORT IS NOT THE KEY TO THE USE OF INVESTIGATING FORCE AND THAT'S TALKING TO PEOPLE ON THE FORCE THAT WAS USED AND THE OFFICERS.

THERE'S NO PANACEA. THERE IS NO SAVING GRACE IN THE DATA PORT IN A TASER. IT'S STILL POLICE WORK AND INTERNAL AFFAIRS. IT'S STILL INVESTIGATING WHAT HAPPENED.

THAT'S THE SUPERVISION PIECE. YOU'LL SEE ABOUT THE TRAINING PIECE, BUT I WILL TELL YOU, YOU WILL SEE THE SALINAS TRAINING AND YOU WILL HEAR FROM THE SALINAS ABOUT OFFICERS' TRAINING ON THE USES; THAT IT'S NOT A MEDICAL HAZARD TO USE A TASER DEVICE AND WHAT TO DO ON A TASER DEVICE THAT HAS BEEN -- AND THAT'S AN ISSUE -- I'M NOT GOING TO GET INTO SCIENCE THROUGHOUT THIS TRIAL, BUT I'LL LEAVE IT TO OTHER PEOPLE ON THE SCIENCE.

BUT THE EVIDENCE THAT THE SALINAS POLICE DEPARTMENT AND THE OFFICERS INTEND TO PUT ON IS

WHAT HAPPENED IN THIS EVENT, HOW WERE THEY TRAINED, AND HOW WERE THEY SUPERVISED. THAT'S WHAT THE EVIDENCE IS REGARDING THE SALINAS POLICE DEPARTMENT.

THANK YOU VERY MUCH.

THE COURT: VERY WELL. MEMBERS OF THE JURY, AS I INDICATED, LET'S TAKE A BREAK AT THIS POINT. IT'S ABOUT QUARTER TO THE HOUR. WE'LL COME BACK IN ABOUT TEN MINUTES.

(WHEREUPON, A RECESS WAS TAKEN.)

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE HELD OUT OF THE PRESENCE OF THE JURY:)

THE COURT: READY TO RESUME?

MR. BURTON: YES, YOUR HONOR.

MS. O'LINN: YES.

THE COURT: VERY WELL. SUMMON THE JURY.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN THE PRESENCE OF THE JURY:)

THE COURT: PLEASE BE SEATED.

VERY WELL. AT THIS POINT THE COURT WILL CALL ON DEFENSE COUNSEL FOR TASER INTERNATIONAL FOR ANY OPENING STATEMENT.

MS. O'LINN: THANK YOU, YOUR HONOR.

(WHEREUPON, COUNSEL FOR DEFENDANT TASER INTERNATIONAL GAVE HER OPENING STATEMENT.)

MS. O'LINN: GOOD MORNING, LADIES AND GENTLEMEN OF THE JURY. MY NAME IS MILDRED O'LINN, AND I REPRESENT THE DEFENDANT TASER INTERNATIONAL IN THIS CASE.

RICK SMITH, THE CEO OF TASER INTERNATIONAL, IS WITH US HERE TODAY, PURPLE SHIRT, PURPLE TIE AND YOU DIDN'T MEET HIM BEFORE SO I WANTED TO MAKE SURE I INTRODUCE HIM.

THE PLAINTIFFS' CLAIMS AGAINST MY CLIENT DEAL WITH PRODUCT LIABILITY AND STRICT LIABILITY BASED ON A CAUSATION ISSUE OVERALL. THEY CLAIM THAT THAT DEVICE MANUFACTURED BY MY CLIENT, M26 TASER, CAUSED THE DEATH OF MR. HESTON.

NOW, THEREIN LIES THE FIRST PROBLEM. THE OVERALL BOTTOM LINE IS THAT THERE SIMPLY IS NOT GOING TO BE A SCINTILLA OF MEDICAL, SCIENTIFIC OR ELECTRICAL ENGINEERING EVIDENCE PRESENTED IN THIS CASE WITH ANY CREDIBLE BASIS TO SUPPORT A THEORY THAT THIS DEVICE -- AND AS PLAINTIFF'S COUNSEL HAS STATED TO YOU, THE TINY AMOUNT OF ELECTRICITY THAT COMES OUT OF IT THAT GOES INTO THE BODY CAUSED THE DEATH OF THIS EXTREMELY VIOLENT INDIVIDUAL ON FEBRUARY 19TH, 2005. IT SIMPLY IS NOT SUPPORTED IN EVIDENCE.

THE FACT IS IS THAT WHEN THE EVIDENCE IS

PRESENTED TO YOU IN THIS MATTER, YOU WILL HEAR FROM ONE OF THE MOST RENOWNED EXPERTS ON THE USE OF THE TASERS ON HUMAN BODIES. JEFFRY HO IS A BOARD CERTIFIED EMERGENCY ROOM PHYSICIAN. HE HAS DONE MORE RESEARCH AND TESTING WITH THE TASER DEVICES THAN ANY OTHER DOCTOR IN THE WORLD.

AND QUITE FRANKLY, LADIES AND GENTLEMEN, THE EVIDENCE AS IT'S PRESENTED IN THIS CASE THAT WE WILL PRESENT TO YOU WILL ESTABLISH THAT THIS DEVICE IS LIKELY THE MOST TESTED AND RESEARCHED DEVICE THAT ANY PEACE OFFICER CARRIES IN THE ENTIRE WORLD. AND IT IS CHANGING THE FORCE OF LAW ENFORCEMENT AND IT HAS OVER THE PERIOD OF TIME THAT IT HAS BEEN DEPLOYED IN THE FIELD.

LIVES ARE BEING SAVED. AS A MATTER OF FACT, THAT'S TASER'S MOTTO, "SAVING LIVES EVERY DAY."

THE FACT THAT THIS DEVICE IS AVAILABLE TO THOSE PEACE OFFICERS MEANS THEY DON'T HAVE TO SHOOT PEOPLE LIKE MR. HESTON AND ON MANY OCCASIONS ACROSS THE WORLD THAT WOULD BE THEIR ONLY ALTERNATIVE IF THEY DID NOT HAVE THIS DEVICE.

AND LIKEWISE THE EVIDENCE IN THIS CASE WILL SHOW THAT THE OVERALL STATE-OF-THE-ART DEVICE TASER, THE BENEFIT TO SOCIETY IS EVEN BEYOND THAT

IN THE PROTECTION IT PROVIDES TO CITIZENS WHEN OFFICERS ARE CALLED TO THE SCENE TO DEAL WITH VIOLENT INDIVIDUALS, AND THE BENEFIT AGAIN THAT IT PROVIDES TO THOSE INDIVIDUALS THAT ARE COMMITTING THOSE VIOLENT ACTS THAT ARE DANGEROUS, BECAUSE THEY'RE TAKEN INTO CUSTODY WITHOUT TRAUMATIC INJURY FROM BATONS OR BEING HELD DOWN ON THE FLOOR.

AS CO-DEFENSE COUNSEL MENTIONED TO YOU, OFFICERS ARE TRAINED IN OTHER PROGRAMS NOT RELATED TO THE TASER, BUT IN OTHER PROGRAMS THEY'RE TRAINED THAT OFFICERS PILING ON TOP OF PEOPLE ON THE FLOOR FOR YEARS IT'S BEEN CONSIDERED A CONCERN THAT WE WOULD SUFFOCATE THEM, THAT THEY WOULD NOT BE ABLE TO BREATHE. SO IT WAS FORBIDDEN THROUGH THEIR TRAINING FOR THEM TO DO THAT.

SO THIS IS THE STATE-OF-THE-ART ALTERNATIVE FOR THEM, AND IT IS HIGHLY EFFECTIVE. EVEN THOUGH IT'S NOT PERFECT.

JUST FOR YOUR COMFORT, LET ME POINT OUT THAT THE DOUBLE A -- EIGHT DOUBLE A BATTERIES THAT THIS DEVICE RUNS ON. IT'S NOT AN ELECTRICAL POWER CENTER. IT'S EIGHT DOUBLE A BATTERIES. THEY'RE NOT IN THE DEVICE AND CAPABLE OF FIRING AT THIS MOMENT SO EVERYONE IS COMFORTABLE WITH THAT.

ALL RIGHT. YOU HAVE HEARD EXTENDED

PRESENTATION ABOUT THAT THREE MINUTES. THREE MINUTES OF TIME IS WHAT WE WILL BE DISCUSSING OVER THE PERIOD OF THIS TRIAL, IN ADDITION ALL OF THE RESEARCH AND DEVELOPMENT OF THIS DEVICE.

THE FACT IS THAT MR. HESTON, THE DECEDENT, WAS AN EXTREMELY VIOLENT INDIVIDUAL. HE WAS ACTING BIZARRELY. HE WAS DESTRUCTIVE. HE WAS DANGEROUS TO HIS FAMILY AND TO OTHERS, INCLUDING THE PEACE OFFICERS THAT ARRIVED ON THE SCENE WHO ATTEMPTED TO BRING HIM UNDER CONTROL.

HE WEIGHED 219 POUNDS. HE WAS 40 YEARS OLD. HE WAS LIVING WITH HIS FAMILY. HE WAS APPROXIMATELY 5-FOOT-10 ON THAT DAY.

AND WHEN YOU CONSIDER -- CONSIDER THE ALTERNATIVES AVAILABLE TO PEACE OFFICERS WHEN THEY ARRIVE ON SUCH A SCENE, AND -- AND THE OPPORTUNITY FOR THEM TO USE A DEVICE SUCH AS THIS, YOU HAVE TO UNDERSTAND THE TRAINING THAT THEY RECEIVE COMES FROM THEIR DEPARTMENT, BUT TASER PROVIDING SOME OF THE BEST TRAINING PROGRAMS THAT ARE PUT OUT THERE FOR LAW ENFORCEMENT IN ANY WEAPON SYSTEM IN THE WORLD.

AND THE SALINAS POLICE DEPARTMENT TAKES THAT TRAINING PROGRAM AND MAKES IT THEIR OWN. TASER PROVIDES THOSE TRAINING MATERIALS, POWER

POINT PRESENTATIONS, OWNER AND INSTRUCTOR MANUALS FOR THEM TO USE, BUT TASER DOES NOT DICTATE POLICY OR -- OR TRAINING PRACTICES TO AGENCIES ACROSS THE COUNTRY.

THEY JUST CAN'T DO THAT. THAT'S NOT THEIR POSITION. THEY ARE A MANUFACTURER. THEY PROVIDE THOSE MATERIALS AS SUPPORT MATERIALS, BUT LEGALLY THEY CAN'T DICTATE. THEY DO PROVIDE INFORMATION ABOUT THEIR PRODUCT AND ITS USES.

NOW, QUITE FRANKLY, YOU HAVE HEARD SOME INFORMATION ABOUT -- ABOUT RESEARCH INDICATING CONCERN ABOUT REPEATED OR PROLONGED DEPLOYMENTS. THE FACT IS THAT THERE IS -- THERE IS ABSOLUTELY NO CREDIBLE EVIDENCE TO ESTABLISH THAT IN HUMAN BEINGS THE -- THE ACIDOSIS ISSUE OCCURS WHEN WE DEPLOY THE TASER ON A HUMAN BEING.

NOW, THERE'S A PIG STUDY THAT MR. BURTON MENTIONED, AND THAT WAS DONE BY A MAN NAMED JAUCHIM AND ANOTHER ONE DONE BY DENNIS. AND, IN FACT, WHEN YOU SPREAD OUT A PIG -- I MEAN, ANIMAL LOVERS FORGIVE ME, IT'S SCIENTIFIC RESEARCH AND IT'S WHAT THE FACTS AND THE EVIDENCE WILL PRESENT HERE.

WHEN YOU SPREAD OUT A PIG ON A TABLE TO DO RESEARCH, AND IT'S NOT A NATURAL POSITION FOR THEM TO BE PLACED ON THEIR BACK WITH THEIR ARMS AND

LEGS EXTENDED, AND YOU DON'T PUT THEM ON A VENTILATOR, AND YOU PUT THIS ELECTRICAL CHARGE INTO THEM, THEY DON'T BREATHE. AND THEY HAVE THIS METABOLIC ACIDOSIS -- PARDON ME, RESPIRATORY ACIDOSIS THAT DEVELOPS IN THEIR BODY.

AND, IN FACT, HUMANS DON'T REACT IN THE SAME WAY. AND HUMANS, ACCORDING TO STUDIES IN PARTICULAR DONE BY DR. HO, ACTUALLY BREATHE MORE WHEN SUBJECTED TO -- TO THIS TYPE OF -- IN FACT, THAT ALLOWS THEM TO CLEAR THE ACIDOSIS OUT OF THEIR BODY. WE CLEAR THE ACIDOSIS OUT OF OUR BODY.

SO THE FACT IS THAT WHEN YOU'RE DEALING WITH SOMEONE ON METH WHO IS GOING TO BE BIZARRE, DESTRUCTIVE, VIOLENT INDIVIDUAL THAT THE PEACE OFFICERS EVEN DREW HIS GUN AT ONE POINT THINKING HE WOULD HAVE TO USE IT, IN FACT, THIS IS THE BEST OPTION AVAILABLE IN A POLICE OFFICER'S WORST NIGHTMARE SCENARIO. WHAT ARE THEY TO DO IN THAT SITUATION?

EXCITED DELIRIUM, AS COUNSEL MENTIONED, IS A CONDITION THAT HAS BEEN WELL-KNOWN TO LAW ENFORCEMENT THROUGHOUT DECADES. IT IS A CONDITION WHEN YOU OBSERVE AN INDIVIDUAL, FOR EXAMPLE, ON SOME TYPE OF A STIMULANT LIKE PCP, COCAINE, METHAMPHETAMINE, TYPICALLY THEY'RE HYPER AGITATED,

MANY TIMES THEY'RE HOT AND SWEATY AND THE OFFICERS ARE TRYING TO DEAL WITH THEM AND GET THEM UNDER CONTROL.

DOCTORS ACROSS THE COUNTRY WOULD TELL YOU THAT THE BEST OPPORTUNITY FOR THAT INDIVIDUAL IN THAT DOWNWARD SPIRAL IS -- IS TO QUICKLY AND EFFECTIVELY BRING HIM UNDER CONTROL AND GET HIM EMERGENCY MEDICAL CARE.

THE QUICKER THAT WE CAN GET MR. HESTON IN THE CARE OF MEDICAL PROFESSIONALS, THE BETTER CHANCE HE HAS BECAUSE OF THAT PROCESS, THE CHEMICAL PROCESS THAT IS HAPPENING IN HIS BODY.

NOW, THE FACT IS THAT ALL OF THAT ACIDOSIS IS THE RESULT OF PHYSICAL EXERTION.

NOW, MR. BURTON MENTIONED 25 DISCHARGES BY THESE OFFICERS. IT SOUNDS LIKE ELECTROCUTION. WE HELD HIM DOWN OR WE JUST KEPT -- OR WE HAD HIM DOWN ON THE GROUND AND WE KEPT PULLING THE TRIGGER OVER AND OVER AGAIN.

WELL, THE FACT IS QUITE OBVIOUS. MR. HESTON JUST GOT OUT OF PRISON, BY THE WAY. THEY TRAIN IN PRISON TO REMOVE TASER WIRES FROM THE BODY, SWIPE THE HANDS AND BREAK THE WIRES. THEY'RE NOT JUMPER CABLES. THEY'RE THIN LITTLE WIRES. THAT'S A WIRE (INDICATING.) THAT'S ONE OF THE

PROBES.

THERE'S TWO OF THEM. THEY SHOOT OUT FROM THE DEVICE INTO THE BODY AND YOU HAVE TO HAVE GOOD CONTACT, TWO POINTS OF CONTACT FOR THE ELECTRICAL CIRCUIT TO BE COMPLETED.

IF YOU DON'T HAVE TWO POINTS OF CONTACT, THERE'S NO ELECTRICITY GOING INTO THE BODY.

LADIES AND GENTLEMEN, WE KNOW WHEN THERE IS GOOD CONTACT FROM THIS DEVICE PEOPLE GO DOWN.

WHEN THIS DEVICE WAS FIRST DEVELOPED THERE HAD BEEN A PRIOR DEVICE IN EXISTENCE.

THAT WAS A STUN GUN. AND -- AND A NASA SCIENTIST NAMED JOHN COVER DEVELOPED THAT IN THE 70'S. AND THAT DEVICE WAS MARKETED TO LAW ENFORCEMENT IN THE WORLD AND IN PARTICULAR IN THE UNITED STATES, AND IT HAD SOME SUCCESS OUT IN THE FIELD BUT IT WAS A PAIN COMPLIANCE DEVICE.

IT DIDN'T HAVE THE SAME ELECTRICAL WAVE FORM, WAVEFORM THAT MR. SMITH PATENTED, AND IT DIDN'T GET THE SAME RESULT. IT DIDN'T CAUSE NEUROMUSCULAR REACTIONS IN THE BODY AND THROUGH THE MUSCLES. SO GUYS STILL FOUGHT THROUGH THE PAIN.

SO WHEN YOU ARE TALKING ABOUT PEOPLE WHO ARE MENTALLY UNSTABLE OR THEY'RE ON DRUGS OF ABUSE, STIMULANTS IN PARTICULAR, THEY OVERRIDE THAT PAIN.

THEIR BRAIN DOESN'T ACTUALLY KNOW THEY'RE IN PAIN AND STOP. THEY JUST PLOW THROUGH IT.

SO WHEN RICK SMITH HAD THIS EXPERIENCE WHERE A COUPLE OF HIS FRIENDS WERE KILLED AS A RESULT OF A ROAD RAGE INCIDENT AND THIS MAN THEY HAD A ROAD RAGE WITH TOOK A GUN OUT OF HIS GLOVE BOX AND SHOT INDIVIDUALS THAT RICK SMITH KNEW, HE ACTUALLY, WITH HIS BACKGROUND IN NEUROBIOLOGY, THEN WENT AND SAID THERE'S GOT TO BE A BETTER WAY. CAN'T WE SET OUR TASERS ON STUN OR SOMETHING. THERE'S GOT TO BE A WAY OF BRINGING VIOLENT PEOPLE UNDER CONTROL OTHER THAN THE GUNS IN THE UNITED STATES. HE REALLY WAS DRIVEN BY THAT.

AND THAT LEAD HIM TO FIND JACK COVER AND DEVELOP AN ELECTRICAL WAY FOR HIM THAT HE HOLDS THE PATENT ON THAT HAS SUCCESSFULLY CHANGED THE FACE OF DEALING WITH VIOLENT INDIVIDUALS IN LAW ENFORCEMENT IN THIS COUNTRY AND THROUGHOUT THE WORLD.

THE FACT IS THAT WHEN THESE, WHEN THESE TWO LITTLE PROBES ACTUALLY HAVE GOOD CONTACT, THE ELECTRICITY THAT IS GENERATED AND GOES INTO THE BODY IS VERY SMALL, FOUR MILLIAMPS, 4,000 TIMES LESS OF WHAT COMES OUT OF YOUR BATHROOM WALL SOCKET THAT TRIPS THAT G.F.I., TINY PULSES OF ELECTRICITY.

WHEN THESE PROBES HAVE GOOD CONTACT, WE

KNOW PEOPLE GO DOWN. THEY STOP FIGHTING. THAT DIDN'T HAPPEN. AND THAT MEANS THE OFFICERS PULLING THE TRIGGER 25 TIMES, THAT'S LIKE A BASEBALL BATTER BEING IN THE BOX AND THE PITCHES ARE COMING AND HE'S SWINGING AND HE'S SWINGING AND HE'S SWINGING, BUT JUST BECAUSE HE'S SWINGING, NO EFFECT ON THAT BALL, RIGHT? HE HAS TO MAKE CONTACT. THERE HAS TO BE CONTACT, TWO POINTS OF CONTACT HERE FOR THE ELECTRICITY TO EFFECT THE BODY.

AND CONVERSELY, IF WE HAVE GOT A MAN THAT IS WITHSTANDING 25 HITS, 25 DEPLOYMENTS FROM A TASER, WHAT WERE THESE OFFICERS SUPPOSED TO DO IF THAT WAS EVEN TRUE, IF -- IF HE WAS SUPERMAN ENOUGH TO OVERCOME 25 ACTUAL DEPLOYMENTS? YOU KNOW, THE SOLUTION IS OBVIOUS. IT'S A FIREARM SITUATION.

THERE'S SOMETHING YOU HAVE TO UNDERSTAND ABOUT ELECTRICITY. BESIDES THE TWO POINTS OF CONTACT HERE THAT ARE ABSOLUTELY ESSENTIALLY, ELECTRICITY DOES NOT BUILD UP IN THE BODY LIKE POISON. IT DOESN'T. IT DOESN'T ADD -- IT'S NOT CUMULATIVE.

IF IT DOESN'T INJURE YOU WHEN IT FIRST GOES IN, THAT ELECTRICITY IS GONE AND THEN THE NEXT ELECTRICITY COMES IN, YOU KNOW, IF THERE'S ACTUAL CONTACT, IT'S NOT CUMULATIVE. IT'S NOT LIKE TAKING

ONE TYLENOL AFTER ANOTHER AND YOU TAKE AN ENTIRE BOTTLE OF TYLENOL AND YOU GET SICK, EVEN THOUGH IT'S MEDICINE.

ELECTRICITY IS NOT CUMULATIVE.

YOU HEARD ABOUT CORONER REPORT. VERY INTERESTING THERE WERE THREE CORONER REPORTS IN THIS CASE AND YOU DIDN'T HEAR THAT UNTIL RIGHT THIS MINUTE.

AND THERE WERE THREE CORONER REPORTS BECAUSE OF A DISAGREEMENT WITH HOW THE OPINIONS WERE EXPRESSED AS FAR AS, QUOTE, "THE MEDICAL CAUSE OF DEATH," THE OPINIONS THAT WERE EXPRESSED IN THE FIRST REPORT.

THE SECOND REPORT WAS DONE BY DR. HAIN, WHO WAS THE MEDICAL EXAMINER, THE CORONER OF THE COUNTY.

DR. HADDIX, THE ONE THAT DID THE ORIGINAL REPORT, WAS THE CORONER, THE MEDICAL EXAMINER WHILE HAIN WAS ON VACATION FOR THIS PARTICULAR WEEK OR TWO. SO HAIN COMES BACK AND HE DOES ANOTHER REPORT.

AND THEN THERE WAS A THIRD MEDICAL EXAMINER HIRED TO DO ANOTHER REPORT, AND ALL OF THEM FOUND THAT MR. HESTON DIED AS A RESULT OF -- OF METHAMPHETAMINE AND AN AGITATED STATE.

NOW, SOME PEOPLE CALL THAT EXCITED DELIRIUM, SOME PEOPLE CALL IT AGITATED DELIRIUM. THE FACT IS THERE'S NO DOUBT THAT THIS MAN WAS AGITATED AND EXCITED THAT DAY. I THINK THAT'S PRETTY CLEAR.

THE FACT IS THAT ALL OF THE THREE REPORTS INDICATE THAT THERE'S THIS RELATIONSHIP BETWEEN THE POLICE STRUGGLE AND THE USE OF TASER AS -- AS A CONTRIBUTORY CAUSE. IT MEANS IT'S TEMPORAL. IT'S HAPPENING AT THE SAME TIME OR IMMEDIATELY BEFORE HE DIES YOU HAVE THIS INTERACTION WITH THE POLICE, THE POLICE STRUGGLE, AND THE USE OF TASER.

THAT DOES NOT MEAN THAT THAT TINY BIT OF ELECTRICITY WAS ACTUALLY THE THING THAT PUSHED HIM OVER THE EDGE OR CAUSED HIM TO HAVE THAT ACIDOSIS.

WHAT CAUSES ACIDOSIS? LET'S TALK ABOUT THE CHAIN OF EVENTS THAT CAUSE ACIDOSIS.

OKAY. HOW ABOUT THE METHAMPHETAMINE IN MR. HESTON'S BODY?

MR. HESTON HAS THAT STIMULANT IN HIS BODY. WE HAVE NO CLARITY OR CERTAINTY ON THE EXERTION THAT HAPPENED BEFORE THE POLICE ARE EVEN CALLED, BUT WE HAVE SOME PICTURE BECAUSE THIS FAMILY WAS ACTUALLY FEARFUL ENOUGH TO -- TO, YOU KNOW, HAVE MRS. HESTON LEAVES AND MR. HESTON CALLS

THE POLICE TO COME TO HIS HOUSE TO DEAL WITH HIS SON.

AND AS YOU HEARD FROM MR. HURLEY, THERE'S A VARIETY OF CIRCUMSTANCES THAT HAPPENED THERE. POLICE OFFICERS ARE UNABLE TO ARREST HIM FOR WHAT HAS HAPPENED AT THE HOUSE AT THAT MOMENT. THEY HAVE TO BE CAREFUL, OTHERWISE THEY GET SUED.

AND SO THEY GO DOWN THE STREET AND A COUPLE OF THEM WAIT IN THE AREA AND IN A VERY QUICK, SHORT TIME, THEY'RE HEADED BACK TO THE HOUSE.

AND THE PICTURE OF VIOLENCE THAT OCCURS, THAT'S ACIDOSIS RUN RAMPANT. ACIDOSIS IS CAUSED BY PHYSICAL EXERTION.

THEN WE HAVE THE ACTUAL ENCOUNTER THAT HAPPENS WHILE THE POLICE OFFICERS ARE TRYING TO CONTROL MR. HESTON, AGAIN ACIDOSIS DUMPING INTO THE BODY.

THE FACT IS THAT THIS LONG-TERM CHRONIC DRUG ABUSE OF MR. HESTON'S INTERFERES WITH HIS BODY TO DEAL WITH THAT ACIDOSIS AS WELL. AND HE -- HE IS NOT AS EFFICIENT IN DEALING WITH THE ACIDOSIS AND, THEREFORE, IT'S GOING TO CAUSE HIM THAT CARDIAC ARREST, ULTIMATELY.

LADIES AND GENTLEMEN, HISTORICALLY, PEACE

OFFICERS ACROSS THE WORLD HAVE HAD TO DEAL WITH THESE TYPES OF INDIVIDUALS AND WHETHER THEY SHOW UP AND USE K9'S, THEY USE BATONS, THEY SHOWING SOMEBODY OUT TO GET THEM UNDER CONTROL, THEY HOLD THEM DOWN, THEY USE PEPPER SPRAY. STILL, ULTIMATELY MANY OF THEM DIE IN CONFRONTATION. IN PARTICULAR, THE LONGER THE CONFRONTATION GOES ON, THE GREATER THE RISK. AND THE ULTIMATE EFFICIENT WAY TYPICALLY TO GET THEM UNDER CONTROL QUICKLY IS THIS DEVICE. THAT'S THEIR BEST HOPE.

NOW, UNDERSTAND THAT METABOLIC ACIDOSIS OR RESPIRATORY ACIDOSIS IS GOING TO HAPPEN TO MR. HESTON. IN THIS INSTANCE WHILE HE'S IN THIS BATTLE WITH THE POLICE OFFICERS HIS BUILD UP OF THE ACIDOSIS IN HIS BODY IS COMPROMISED OR HE'S UNABLE TO DEAL WITH IT BECAUSE OF HIS HISTORY OF DRUG ABUSE AND ULTIMATELY THOSE POLICE OFFICERS GET HIM UNDER CONTROL, THEY GET HIM MEDICAL ATTENTION AS QUICKLY AS POSSIBLE.

AND BY THE WAY, WHEN THEY DO CPR, CPR CAUSES ADDITIONAL ACIDOSIS IN THE BODY. SO THERE'S LOTS OF FACTORS HERE THAT CONTRIBUTE TO MR. HESTON METABOLIC ISSUES, BUT THE FACT IS THAT THERE IS NO MEDICAL EVIDENCE TO SUPPORT PLAINTIFF'S ARGUMENT, NO EVIDENCE THAT WILL BE PRESENTED HERE THAT THE

TASER CAUSES ANY SIGNIFICANT ACIDOSIS INCREASE IN THE BODY.

LET ME JUST TOUCH BASE ON HOW THE TASER WORKS HERE FROM THE VARIOUS POINTS THAT YOU HAVE HEARD ABOUT. THE DATAPORT IS IN THE BACK SO YOU CAN HOOK IT INTO A COMPUTER SO YOU CAN DOWNLOAD THIS.

THE DATAPORT MAKES THIS AN EXTREMELY UNIQUE DEVICE. THIS IS ONE OF THE ONLY WEAPON SYSTEMS IN THE WORLD THAT ACTUALLY REGISTERS HOW MANY TIMES THE TRIGGER IS PULLED.

LIKEWISE, ANOTHER UNIQUE PART OF THIS DEVICE IS THIS LITTLE CARTRIDGE. I DON'T THINK I'M GOING TO BE ABLE TO GET THIS OFF RIGHT HERE WITHOUT PROBABLY BREAKING A NAIL AND BEING DRAMATIC. THERE'S A GLASS DOOR ON THE FRONT OF THIS CARTRIDGE. THIS IS ACTUALLY A CASE OVER THE FRONT OF IT.

THE GLASS DOORS GO OVER THIS SPACE HERE WHERE THE PROBES ARE LOCATED INSIDE.

BLESS YOU.

WHEN THE TRIGGER IS PULLED ON THE M26, IT REGISTERS ONE TRIGGER PULL ON THE DATAPORT, IT GOES FOR FIVE SECONDS. THERE'S A REASON IT GOES FOR FIVE SECONDS, BECAUSE DURING THE DEVELOPMENT OF THE

TECHNOLOGY IT WAS DESCRIBED THAT OFFICERS WOULD PULL THE TRIGGER AND NOT HOLD IT DOWN. WHETHER IT'S MUSCLE MEMORY FROM THE WAY THEY SHOOT A GUN OR BECAUSE THEY WERE INVOLVED IN A VIOLENT CONFRONTATION, THEY WOULD LET GO OF THE TRIGGER.

SO WHEN THEY PULL IT ONCE IT GOES FOR FIVE SECONDS, WHICH WAS FOUND TO BE AN EFFECTIVE DURATION OF THE DEPLOYMENT.

IF THEY HOLD DOWN ON THE TRIGGER, IT CYCLES TO ANOTHER FIVE, ANOTHER FIVE, AND EVERY TIME IT REGISTERS IN THE DATAPORT.

AGAIN, LADIES AND GENTLEMEN, THAT MEANS THAT THERE'S BEEN A TRIGGER PULL. IT DOESN'T MEAN THAT THERE'S ACTUALLY BEEN AN EFFECTIVE CONTACT AND DEPLOYMENT ON THE BODY OF THE INDIVIDUAL.

WHEN THE TRIGGER IS PULLED THE TWO PROBES COME OUT ON THESE THIN LITTLE WIRES AT AN ANGLE. THEY SHOOT OUT AND THEY SPREAD ON THE BODY YOU HAVE A SPREAD OF CONTACT.

AND THEN THERE'S NEURO MUSCLE INCAPACITATION BETWEEN THOSE TWO POINTS.

NOW, WHAT DOES THAT MEAN? THE BRAIN SENDS MESSAGES TO YOUR MUSCLES WHEN YOU WANT YOUR MUSCLES TO DO THINGS.

AND WHEN YOUR BRAIN IS SENDING THAT

MESSAGE, WHEN THE TASER IS ACTIVATED AND THERE'S ACTUAL GOOD CONTACT, IT'S LIKE A THIRD PARTY GOT ON A TELEPHONE CALL WITH YOU AND SOMEONE ELSE AND THE THIRD PARTY GOT IN THERE AND THEY JUST STARTED SCREAMING AND YELLING SO YOU TWO COULDN'T HEAR EACH OTHER.

SO YOUR BRAIN AND MUSCLES CAN'T COMMUNICATE WHEN THE TASER IS DEPLOYED AND ACTIVATED WITH CONTACT. SO IT INTERFERES WITH THAT MUSCLE CONTROL, IT LOCKS IT UP.

THE OTHER THING ABOUT THIS, WHEN THE TRIGGER IS PULLED AND THE CARTRIDGE BLASTER IS PULLED OFF, ONE OF THE UNIQUE THINGS ABOUT THIS DEVICE IS THAT -- IS THAT THERE IS THESE LITTLE, THEY'RE CALL A.F.I.D., ANTI-FELON IDENTIFICATION AND THEY'RE LIKE CONFETTI. THEY BLOW OUT AND SPRINKLE EVERYWHERE AND THEY CONTAIN THE SERIAL NUMBER OF THE INDIVIDUAL CARTRIDGES. SO YOU CAN TELL WHO FIRED WHICH CARTRIDGE BY THE A.F.I.DS LAYING ON THE GROUND.

AND YOU PRETTY MUCH HAVE TO HAVE A PRETTY GOOD VACUUM TO GET THEM ALL UP. IT'S DIFFICULT TO CLEAN UP A CRIME SCENE SO TO SPEAK, BUT THAT'S ANOTHER UNIQUE FEATURE OF THIS DEVICE THAT WE'RE ABLE TO TRACK WHICH CARTRIDGE WAS ACTUALLY USED IN

AN INCIDENT. IT'S PRETTY NIFTY, ALL OF THE LITTLE TECHNOLOGY THAT GOES WITH THE DEVICE. IT'S WELL THOUGHT OUT.

AS PLAINTIFF'S COUNSEL STATED, IT WAS THE PERFECT DEVICE FOR USE WITH MR. HESTON. HE'S ACTUALLY THE -- THE TYPE OF INDIVIDUAL THAT THIS WAS DESIGNED TO BE USED WITH.

I'M JUST CHECKING MY NOTES TO MAKE SURE I DON'T MISS ANYTHING. I'M TRYING NOT TO REPEAT THINGS THAT HAVE BEEN SAID BY THE OTHER COUNSEL AS FAR AS THE WAY THINGS WORK, BECAUSE THERE'S REALLY NO NEED, WHERE THINGS WERE ACCURATELY STATED TO YOU, AS FAR AS THE WAY THE EVIDENCE WILL BE PRESENTED.

I DO WANT TO EMPHASIZE SOMETHING. SILENCE IS GOLDEN IS A RULE THAT OFFICERS DURING TRAINING ARE TAUGHT WITH REGARD TO THE DEPLOYMENT OF THIS DEVICE.

WHAT DOES THAT MEAN? WHEN YOU PULL THE TRIGGER ON A TASER, M26, IF YOU HEAR LOUD ARCING OR YOU SEE SPARKING AT THE END OF THE DEVICE, HEAR IT, IT MEANS YOU DON'T HAVE A GOOD CONTACT (INDICATING.) SILENCE IS GOLDEN. YOU'LL HEAR A CLICKING, CLICK, CLICK, CLICK, CLICK, CLICK, BUT NOT A "GRRREUI" AND I DON'T KNOW HOW THE COURT

REPORTER IS GOING TO PUT THAT DOWN ON THE RECORD. MY APOLOGIES (INDICATING.)

BUT THAT LOUD CRACKLING SOUND TELLS THE OFFICERS YOU DON'T HAVE GOOD CONTACT WITH THESE GUYS. EITHER THE WIRE HAS BEEN BROKEN OR YOU HIT THE DOOR FRAME. THOSE KIND OF THINGS HAPPEN DURING VIOLENT CONFRONTATIONS BECAUSE THIS IS NOT THE MOST ACCURATE DEVICE TO FIRE, QUITE FRANKLY, AS TWO PROBES FLYING IN DIFFERENT DIRECTIONS HAVE TO MAKE GOOD CONTACT.

THE 50,000 VOLTS -- BY THE WAY, YOU PROBABLY HEARD, 50,000 VOLTS. THAT'S KIND OF THE DRAMATIC NUMBER THAT THE MEDIA THROWS OUT THERE.

VOLTS. WHEN YOU'RE TALKING ABOUT ELECTRICITY, IT'S THE AMPERAGE THAT YOU'RE CONCERNED ABOUT. THE VOLTS IS JUST THE PRESSURE IN THE HOSE TO PUSH THE ELECTRICITY THROUGH. AND WITH THE TASER M26 THE IMPORTANCE OF THAT VOLTAGE IS THAT WE HAVE TO CARRY A TINY LITTLE BIT OF ELECTRICITY THROUGH WHATEVER CLOTHING AN INDIVIDUAL HAS ON TO GET IT INTO THEIR BODY FOR THAT TINY BIT OF ELECTRICITY TO HAVE THE EFFECT WE NEED TO PREVENT THE VIOLENCE THAT IS COMING FROM THEM.

AND WHAT HAPPENS IS THAT THE 50,000 VOLTS JUST PUSHES THAT ELECTRICITY THROUGH THE WIRES,

THROUGH THE PROBES, THROUGH THE BODY AND A TINY AMOUNT OF ELECTRICITY GOES INTO THE BODY.

LADIES AND GENTLEMEN, IN CONCLUSION, I WOULD LIKE TO SHARE THAT AGAIN THIS DEVICE HAS BEEN RESEARCHED BY PROBABLY EVERY MAJOR RESEARCH AGENCY IN EVERY COUNTRY IN THE WORLD BECAUSE OF THE NUMBER OF PLACES IT'S BEEN DEPLOYED AND THERE HAS BEEN NO CREDIBLE EVIDENCE THAT IS FOUND, THE NEED TO TAKE THESE THOUSANDS AND THOUSANDS DEVICES THAT ARE OUT THERE OFF OF THE STREETS OF EVERY MAJOR CITY IN THE UNITED STATES.

CERTAINLY IS THE STATE-OF-THE-ART DEVICE, IS -- IS HAVING AN IMPACT THAT HAS BEEN PUT OUT THERE BECAUSE IT HAS BEEN SO WELL RESEARCHED AND THE FACT THAT ONE INDIVIDUAL, DR. MEYERS, MIGHT COME IN HERE AND TELL YOU HE HAS A DIFFERENT OPINION, THAT EVIDENCE IS SIMPLY NOT CREDIBLE IN REFLECTION WITH THE AMOUNT OF RESEARCH AND EVIDENCE TO THE CONTRARY THAT EXISTS.

I APPRECIATE YOUR ATTENTION AND AT THE END OF THIS TRIAL WE'LL ASK YOU FOR A DEFENSE VERDICT IN FAVOR OF MY CLIENT TASER INTERNATIONAL.

THANK YOU.

THE COURT: VERY WELL. AT THIS POINT THE COURT WILL CALL ON PLAINTIFF TO CALL PLAINTIFF'S

FIRST WITNESS.

MR. WILLIAMSON: YOUR HONOR, AT THIS TIME THE PLAINTIFF WOULD CALL CRAIG FAIRBANKS.

YOUR HONOR, I JUST NOTICED THAT MY COMPUTER SHUT OFF SO IF I COULD HAVE A MOMENT TO GET IT BACK ON LINE.

THE COURT: CERTAINLY. I PRESUME THE SOMEONE IS GETTING MR. FAIRBANKS.

MR. WILLIAMSON: YES.

THE COURT: MR. FAIRBANKS?

THE WITNESS: YES.

THE COURT: COME FORWARD AND BE SWORN, SIR. COME ALL OF THE WAY UP HERE, SIR.

THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

CRAIG FAIRBANKS,

BEING CALLED AS AN ADVERSE WITNESS ON BEHALF OF THE PLAINTIFFS', HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

THE CLERK: PLEASE BE SEATED.

THE COURT: I GUESS IT'S FAIRBANKS. I WAS CALLING YOU BEARBANKS.

THE CLERK: COULD YOU STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE RECORD?

THE WITNESS: IT'S CRAIG FAIRBANKS. SPELLING OF THE LAST IS F-A-I-R-B-A-N-K-S.

THE COURT: YOU MAY INQUIRE.

MR. WILLIAMSON: THANK YOU, YOUR HONOR.

AS-ON CROSS-EXAMINATION

BY MR. WILLIAMSON:

Q GOOD MORNING EVERYONE. GOOD MORNING, OFFICER FAIRBANKS.

A GOOD MORNING.

Q AS I UNDERSTAND IT, YOU'RE CURRENTLY EMPLOYED BY THE SALINAS POLICE DEPARTMENT; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND YOU WERE FIRST SWORN IN AS A POLICE OFFICER IN OCTOBER OF 2000; CORRECT?

A THAT'S CORRECT.

Q AND WOULD IT BE CORRECT TO SAY THAT AFTER YOU COMPLETED YOUR ACADEMY TRAINING YOU WORKED THE FIRST TWO YEARS ON PATROL?

A ROUGHLY TWO, TWO AND A HALF.

Q AND AFTER THAT APPROXIMATELY TWO, TWO AND A HALF YEARS YOU WERE A SCHOOL RESOURCE OFFICER; CORRECT?

A CORRECT.

Q AND ABOUT HOW MANY YEARS DID YOU SPEND AS A RESOURCE OFFICER?

A ABOUT TWO, TWO TO TWO AND A HALF.
Q AND AS I UNDERSTAND IT, AFTER YOU WERE A SCHOOL RESOURCE OFFICER YOU THEN WENT BACK ON PATROL?
A CORRECT.
Q AND ARE YOU STILL SERVING IN THAT CAPACITY AS PATROL OFFICER AT THE PRESENT TIME?
A YES, I AM.
Q BY THE WAY, BEFORE WE GET FURTHER, YOU'RE OBVIOUSLY -- ESPECIALLY FOR SOMEONE LIKE ME -- A VERY TALL MAN. HOW TALL ARE YOU?
A 6-FOOT-9.
Q AND AT THE TIME OF THIS INCIDENT BACK IN FEBRUARY OF 2005, HOW MUCH DID YOU WEIGH APPROXIMATELY?
A I WOULD SAY PROBABLY ABOUT 255, 260.
Q OKAY. NOW, AS I UNDERSTAND IT, YOU ARE A TASER TRAINING INSTRUCTOR; IS THAT CORRECT?
A THAT'S CORRECT.
Q AND AS I UNDERSTAND IT FURTHER, THE REASON YOU WERE ASKED SPECIFICALLY TO BECOME A TASER INSTRUCTOR WAS THAT YOU WERE ALREADY A DEFENSIVE TACTICS INSTRUCTOR; IS THAT CORRECT?
A CORRECT.
Q WHEN DID YOU FIRST BECOME A TASER TRAINING

INSTRUCTOR?
A I BELIEVE IT WAS MID YEAR 2004 I THINK. I DON'T HAVE AN EXACT DATE.
Q OKAY. THAT WOULD HAVE BEEN LESS THAN A YEAR BEFORE THIS INCIDENT; CORRECT?
A ROUGHLY, YES.
Q AND NOW, IN ORDER TO BECOME A TASER TRAINING INSTRUCTOR, AS I UNDERSTAND IT, YOU PARTICIPATE IN ABOUT 20 HOURS OF SPECIALIZED TASER TRAINING; IS THAT RIGHT?
A THAT'S CORRECT.
Q AND THE TRAINING THAT YOU RECEIVE TO BECOME A TASER TRAINING INSTRUCTOR WAS GIVEN BY TASER INTERNATIONAL; IS THAT RIGHT?
A YES.
Q UM, WHERE DID YOU RECEIVE THE TRAINING, APPROXIMATELY THE 20 HOURS OF TRAINING TO BECOME A TASER TRAINING INSTRUCTOR -- EXCUSE ME, INSTRUCTOR? THAT'S KIND OF A TONGUE TWISTER, YOUR HONOR.
A IN STOCKTON, CALIFORNIA.
Q AND AS I UNDERSTAND IT, THAT CONSISTED OF TWO DAYS OF INSTRUCTION; IS THAT RIGHT?
A THAT'S CORRECT.
Q NOW, WOULD IT BE FAIR TO SAY THAT

APPROXIMATELY AT THE TIME THAT YOU RECEIVED THE INSTRUCTION TO BECOME A TASER TRAINING INSTRUCTOR, THAT THAT WAS ABOUT THE SAME TIME THAT YOUR DEPARTMENT IS -- THE SALINAS POLICE DEPARTMENT WAS BEGINNING TO INTRODUCE THE USE OF TASERS IN THE DEPARTMENT?

A IS THAT WHY I WAS SENT?

Q RIGHT.

A YES.

Q AND CAN YOU GENERALLY DESCRIBE TO US WHAT THE 20-HOUR TRAINING INSTRUCTOR COURSE CONSISTED OF?

A GENERALLY IT WAS A POWER POINT PRESENTATION WITH -- WITH AN OVERVIEW OF -- OF THE SCHEMATICS OF THE TASER, THE -- HOW IT'S USED, WHAT IT'S CAPABLE OF DOING, WHAT IT'S NOT CAPABLE OF DOING, A NUMBER OF DIFFERENT SCENARIO-BASED DISCUSSIONS, VIDEOS SHOWING ACTUAL USES AND A PRACTICAL USAGE AND EXPERIENCING IT PERSONALLY.

Q LET ME JUST STOP YOU THERE.

IN TERMS OF PRACTICAL USAGE, YOU'RE TALKING ABOUT YOU HAD A CHANCE TO FIRE THE DEVICE?

A RIGHT.

Q AND DID YOU FIRE IT AT A TARGET?

A YES.

Q AND YOU ALSO MENTIONED -- WELL, BEFORE WE GET

TO THE ACTUAL BEING SUBJECTED TO THE TASER, PART OF THIS WAS -- WAS A LECTURE; CORRECT?

A YEAH.

Q AND YOU MENTIONED YOU GOT TO SEE A POWER POINT PRESENTATION?

A CORRECT.

Q RIGHT. OKAY. NOW, ISN'T IT TRUE, OFFICER FAIRBANKS, THAT THE PARTICULAR VERSION OF TRAINING THAT YOU RECEIVE FROM TASER INTERNATIONAL WAS VERSION 8?

A I HAVE LEARNED SINCE, YES.

Q YOU HAVE LEARNED SINCE?

A YEAH.

Q YOU DIDN'T KNOW THAT AT THE TIME?

A IT WAS -- THERE ARE SUBSEQUENT VERSIONS THAT ARE AVAILABLE NOW AND ON THE WEEKENDS BY TASER SO THE INFORMATION --

Q BUT YOUR UNDERSTANDING, AS YOU SIT HERE TODAY, THE TRAINING YOU SPECIFICALLY RECEIVED WAS VERSION 8?

A THAT'S CORRECT.

Q OKAY.

YOUR HONOR, MAY I HAVE A MOMENT, PLEASE?

(PAUSE IN PROCEEDINGS.)

BY MR. WILLIAMSON:

Q PRIOR TO COMING HERE TO TESTIFY, OFFICER FAIRBANKS, HAVE YOU HAD A CHANCE TO REVIEW VERSION 8 OF THE POWER POINT PRESENTATION THAT YOU GOT?
A I REVIEWED VERSION 8, YES.
Q AND I WANT TO SHOW YOU WHAT I WANT MARKED AS 8.

MR. WILLIAMSON: THIS IS EXHIBIT, FOR IDENTIFICATION, YOUR HONOR, 110, YOUR HONOR.

(WHEREUPON, PLAINTIFFS' EXHIBIT NUMBER 110 WAS MARKED FOR IDENTIFICATION.)

BY MR. WILLIAMSON:
Q FIRST OF ALL, OFFICER FAIRBANKS, YOU HAVE A SCREEN IN FRONT OF YOU. DO YOU RECOGNIZE THE TITLE PAGE OF THE POWER POINT THAT SAYS TASER INTERNATIONAL, INC., ADVANCED TASER M26 VERSION 8.0 RELEASED OCTOBER 2002?
A THIS IS NOT ON.

THE COURT: AH. SOMETIMES I HAVE TO RESET MINE.

THE WITNESS: YEAH, IT'S ON.

THE COURT: SO IS 110 GOING TO BE IN EVIDENCE BY -- ARE YOU OFFERING IT BECAUSE YOU'RE DISPLAYING IT NOW? BECAUSE I WANT TO MAKE SURE IF YOU'RE GOING TO DISPLAY IT THERE'S NO OBJECTION TO IT COMING INTO EVIDENCE AND BEING DISPLAYED.

MR. WILLIAMSON: YOUR HONOR, I BELIEVE THERE HAS BEEN AGREEMENT THAT THIS IS ADMISSIBLE EVIDENCE AND WE DO PLAN TO ADMIT IT. WE HAVE THE POWER POINT SLIDES AND THE FORM TEXT OF THE HARD COPY.

THE COURT: I JUST WANT TO MAKE SURE THAT'S THE PROTOCOL THAT YOU'RE FOLLOWING. IF YOU PUT IT UP ON THE MONITOR I'LL ASSUME FROM YOUR PREVIOUS DISCUSSIONS THAT YOU KNOW IT IS IN EVIDENCE.

SO 110 IS IN EVIDENCE.

(WHEREUPON, PLAINTIFFS' EXHIBIT NUMBER 110 HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WAS ADMITTED INTO EVIDENCE.)

BY MR. WILLIAMSON:

Q NOW THAT IT'S ON THE SCREEN, OFFICER FAIRBANKS, DO YOU RECOGNIZE THE TITLE PAGE?

A YES, I DO.

Q I WOULD LIKE TO BEGIN TO SHOW YOU SOME SLIDES FROM THE PRESENTATION AND I'D LIKE TO ASK YOU A SERIES OF QUESTIONS ABOUT THAT.

FIRST OF ALL, WE HAVE HEARD A LOT ABOUT THE TASER IN OPENING STATEMENT, BUT NOW THIS IS THE EVIDENCE PORTION OF THE CASE. IF YOU COULD TAKE US

THROUGH THE TASER M26 OF MINE?

A THIS PHOTOGRAPH WOULD BE USED IN A POWER POINT SETTING TO FAMILIARIZE A STUDENT OR A FELLOW OFFICER I AM TRAINING WITH THE BASIC TERMINOLOGY OF THE UNIT.

Q OKAY. CAN YOU DESCRIBE SOME OF THE FEATURES OF THE DEVICE?

A AS FAR AS DETAIL?

THE COURT: I'M GETTING CONFUSED.

ARE YOU ASKING HIM TO TELL US WHAT HE TRAINS OR ARE YOU ASKING HIM TO JUST DESCRIBE THE DEVICE FOR OUR EDIFICATION?

BY MR. WILLIAMSON:

Q WELL, BASED ON HIS TRAINING, COULD YOU DESCRIBE, YOU KNOW, THE ASPECTS OF THE DEVICE?

THE COURT: SO, MEMBERS OF THE JURY, AS I UNDERSTAND IT, HE'S NOT BEING ASKED TO TAKE US THROUGH THE TRAINING HE DOES OF OTHER OFFICERS OR OF HIS OWN TRAINING. HE'S JUST BEING ASKED, BASED UPON HIS TRAINING, TO DESCRIBE THE DEVICE TO US.

YOU MAY PROCEED.

THE WITNESS: OKAY. POINTING OUT THE DIFFERENT NOTED PORTIONS OR PIECES BEING THE SAFETY I WOULD HAVE THIS IN MY HAND, SO I WOULD DESCRIBE HOW THE SAFETY WORKS AND HOW SUBSEQUENTLY TURNING

OFF THE SAFETY WOULD -- WOULD LIGHT THE LASER SETTING. DESCRIBE THE TRIGGER PULL AND THE CARTRIDGE AND DETACHING THE CARTRIDGE AND ON THE FRONT HERE IS THE AIR CARTRIDGE AND THE FIXED SIGHTING THAT IS ALONG THE TOP RAIL.

THE COLOR KIT, BEING MANY DIFFERENT COLOR KITS AVAILABLE. THIS PARTICULAR VERSION IS THE ONE THAT WE HAVE.

BY MR. WILLIAMSON:

Q LET ME STOP YOU THERE IF I COULD. DO YOU UNDERSTAND THE PURPOSE OF WHY THERE IS THIS KIND OF NEON YELLOW ON THE DEVICE?

A TO DISTINGUISH IT FROM A FIREARM.

Q OKAY. NOW, YOU MENTIONED THAT IT HAS A LASER AIMING DEVICE; CORRECT?

A CORRECT.

Q ALL RIGHT. SO THAT'S TO HELP YOU AND ASSIST YOU WHEN YOU'RE ABOUT TO FIRE THE WEAPON THAT YOU CAN USE A LASER TO TARGET?

A TO AIM.

Q OKAY. AND IT HAS A TRIGGER SIMILAR TO A FIREARM; CORRECT?

A I WOULD SAY BY DESIGN, YES, THE -- THE PULL OR THE ACTION ON THE TRIGGER IS VERY MUCH DIFFERENT.

Q OKAY. NOW, AS A TASER TRAINING INSTRUCTOR,

YOU ACTUALLY TEACH OTHER SALINAS POLICE OFFICERS HOW TO USE A TASER; CORRECT?

A THAT'S CORRECT.

Q AND YOU'RE TAUGHT TO TRAIN OR YOU TRAIN YOUR FELLOW OFFICERS AT THE SALINAS POLICE DEPARTMENT TO FIRE THE TASER AT CENTER MASS; CORRECT?

A CORRECT.

Q COULD YOU DESCRIBE WHAT THAT MEANS? WHAT IS CENTER MASS?

A CENTER MASS WOULD BE ESSENTIALLY THE LARGEST PORTION OF THE UPPER TORSO, TYPICALLY AROUND THE STERNUM.

Q AND IS THERE A PARTICULAR REASON WHY YOU TRAIN TO FIRE AT CENTER MASS?

A WELL, OTHER THAN IT BEING THE BIGGEST TARGETING AREA, TO PREVENT MISSING AS WE WANT TO INVOLVE MORE OF THE MUSCLE MASS OF THE SUSPECT, THE PERSON WE'RE DEALING WITH WITH THE USE OF A TASER TO GET A -- EXCUSE ME -- A MORE IDEAL EFFECT.

Q OKAY. LET ME SHOW YOU THE NEXT SLIDE ENTITLED DEFINITIONS.

A UH-HUH.

Q NOW, AS YOU UNDERSTAND IT, AS YOU SIT HERE TODAY AS A TRAINING INSTRUCTOR, WERE YOU TAUGHT SPECIFICALLY THAT -- THAT THE TASER CAUSES MUSCLES

TO TIGHTEN AND CRAMP?

A CONTRACT AS IT WERE.

Q AND YOU WERE TOLD OR YOU WERE TAUGHT THAT -- THAT THE TASER DISRUPTS THE BRAIN'S ABILITY TO VOLUNTARILY CONTROL THE MUSCLES; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND THAT'S ESSENTIALLY WHAT IS DEPICTED IN THIS SLIDE; CORRECT?

A CORRECT.

Q THAT CONCEPT.

LET ME MOVE ONTO THE NEXT SLIDE. THIS SLIDE EXPLAINS WHY IT WORKS. AND WHAT DO YOU REMEMBER AS FAR AS YOUR TRAINING AS WHY IT WORKS?

A USING ANALOGIES HAS BECOME THE MOST EFFICIENT WAY OF DESCRIBING IT.

THERE IS IN SOME TASER LITERATURE I HAVE USED IT IS THE -- THE ANALOGY IS USED IN SIMPLE CONVERSATION TO THE BRAIN BEING ONE PARTY IN THE CONVERSATION AND YOU PUT THE MUSCLES AS THE OTHER PARTY AND THEN YOU PUT A THIRD PARTY THAT STARTS YELLING ON THE LINE. YOU'RE NOT ABLE TO COMMUNICATE ANYMORE.

WHEN THE PERSON STOPS YELLING, YOUR BRAIN IS ABLE TO COMMUNICATE. THAT AND -- AND YOUR BRAIN WILL -- WILL COMMUNICATE WITH YOUR MUSCLES AND A

SERIES OF X'S AND O'S.

FOR EXAMPLE, THE TASER, THE "T" WAVES THAT ARE INTRODUCED TO DISRUPT THE CENTRAL NERVOUS SYSTEM THROW THE REST OF THE ALPHABET IN THERE SO IT GETS CONFUSED.

Q SO AS I UNDERSTAND YOUR ANALOGY, THE TASER IS ESSENTIALLY THE YELLING PARTY ON THE LINE?

A THE THIRD PARTY, YES.

Q AND WHY DON'T YOU TAKE A LOOK AT THIS NEXT SLIDE. WERE YOU TAUGHT THAT THE TASER DEVICE AFFECTS BOTH THE SENSORY AND MOTOR SYSTEMS?

A YES.

Q AND WHAT DO YOU UNDERSTAND THAT TO MEAN?

A THE -- WELL, THE SENSORY NERVOUS SYSTEM IS -- IS, I WOULD SAY, ALMOST A SUPER EFFICIENT NERVE SETS THAT TELL YOU THAT YOU'RE COLD, SOMETHING IS PAIN.

SO THE SENSORY NERVOUS SYSTEM, YOU KNOW, PAIN COMPLIANCE. IF YOU WERE TO BE PINCHED OR POKED, YOU WOULD -- YOU WOULD -- YOUR BODY WOULD COMMUNICATE AND YOUR BRAIN, THAT'S YOUR SENSORY SYSTEM.

THE MOTOR NERVOUS SYSTEM, THE OTHER PORTION OF THE CENTRAL NERVOUS SYSTEM IS THAT WHICH YOUR BRAIN COMMUNICATES WITH YOUR MUSCLES. SO A

SENSORY NERVOUS SYSTEM, USING ANOTHER ANALOGY IF I MAY. YOU TOUCH A HOT STOVE, YOUR SENSORY NERVOUS SYSTEM TELLS YOU TO MOVE AWAY, YOUR MOTOR NERVOUS SYSTEM ACTUALLY MOVES YOU AWAY.

Q OKAY. LET ME SHOW YOU -- I WANT TO GET INTO THE CONCEPT OF PAIN COMPLIANCE AND I'LL DO THAT IN A SECOND. BUT WERE YOU TAUGHT IN YOUR TRAINING THAT THERE WAS A DIFFERENCE BETWEEN THE TRAINING AND YOUR EARLIER VERSIONS OF BASICALLY THE STUN GUN?

A YEAH.

Q AND WHAT WERE THE PRIMARY DIFFERENCES BETWEEN THE TWO?

A THE STUN GUNS WOULD ACT PRIMARILY ON PAIN COMPLIANCE AND AFFECT THE SENSORY NERVOUS SYSTEM.

Q OKAY. LET ME GO ONTO THE NEXT SLIDE, IF I COULD.

THIS GOES BACK TO WHAT YOU WERE TESTIFYING EARLIER ABOUT THE TWO TYPES OF SYSTEMS IN OUR BODY, THE CENTRAL NERVOUS SYSTEM, THE SENSORY NERVOUS SYSTEM AND THE MOTOR NERVOUS SYSTEM; CORRECT?

A CORRECT.

Q OKAY. NOW, YOU STARTED TO TALK ABOUT PAIN COMPLIANCE. HOW DO YOU DEFINE THAT TERM? WHAT

DOES PAIN COMPLIANCE MEAN?

A PAIN COMPLIANCE, USING A METHOD TO -- TO GAIN COMPLIANCE OF A COMBATIVE OR -- OR RESISTANT INDIVIDUAL BY INTRODUCING A METHOD OF PAIN.

Q OKAY. AND WAS IT YOUR UNDERSTANDING THAT THE TASER IS NOT -- AT LEAST IN ITS PROBE MODE WHERE THE PROBES FIRE, THAT IT'S NOT A PAIN COMPLIANCE DEVICE?

A SO WE WERE TOLD THAT IT WASN'T A PAIN COMPLIANCE DEVICE?

Q RIGHT.

A THAT'S CORRECT.

Q IN OTHER WORDS, LET ME BE CLEAR ABOUT THIS. THERE ARE TWO TYPES OF WAYS TO USE THE DEVICE, ONE IS IN PROBE MODE --

A UH-HUH.

Q -- WHERE YOU FIRE THE PROBES. AND THE OTHER ONE WE HAVE HEARD IN OPENING STATEMENT IS THE DRY STUN MODE WHERE YOU ACTUALLY CONNECT OR CONTACT THE BODY WITH THE DEVICE ITSELF?

A RIGHT.

Q NOW, LET'S FOCUS ON THE PROBE MODE FOR A SECOND.

A OKAY.

Q DO YOU UNDERSTAND MY QUESTION IN THE PROBE

MODE THAT YOU ARE TAUGHT THAT IT WAS NOT A PAIN COMPLIANCE DEVICE?

A THAT'S CORRECT.

Q NOW, THE DIFFERENCE BETWEEN A PAIN COMPLIANCE DEVICE AND A DEVICE SUCH AS THE TASER M26 THAT OVERRIDES THE SENSORY OF MOTOR NERVOUS SYSTEMS IS THAT IT'S MORE EFFECTIVE ON PEOPLE, FOR EXAMPLE, WHO ARE ON DRUGS; CORRECT?

A YES.

Q AND THE REASON FOR THAT IS, WOULD YOU AGREE, THAT PEOPLE WHO ARE ON DRUGS THAT ARE SIMPLY AFFECTED BY SOME OTHER KIND OF DEVICE, NOT A TASER, CAN FIGHT THROUGH THE PAIN?

A TYPICALLY, YES, I WOULD SAY THAT'S CORRECT.

Q BUT BECAUSE THE TASER OVERRIDES THE BRAIN'S ABILITY TO CONTROL THE MUSCLES, THAT IT ACTUALLY WORKS GREAT ON SOMEONE WHO IS ON DRUGS BECAUSE THEY HAVE NO ABILITY TO FIGHT THROUGH THE PAIN; RIGHT?

A THAT'S CORRECT.

Q AND, ISN'T IT TRUE, OFFICER FAIRBANKS, THAT WHEN YOU RECEIVED YOUR TRAINING AT THE TASER SCHOOL, YOU WERE SPECIFICALLY TAUGHT THAT PEOPLE ON DRUGS CANNOT WITHSTAND THE ELECTRICAL EFFECTS OF THE TASER, TRUE?

A TRUE.

Q AND, IN FACT, ISN'T IT TRUE, SIR, THAT PEOPLE UNDER THE INFLUENCE OF DRUGS RESPOND TO TASER ELECTRICAL DISCHARGES EXACTLY THE SAME WAY THAT PEOPLE WHO ARE NOT ON DRUGS?

A I WOULD SAY THAT'S CORRECT, YEAH.

Q AND, IN FACT, OFFICER FAIRBANKS, THAT'S ONE OF THE MAIN BENEFITS OF THE TASER, ISN'T IT, THAT IT AFFECTS ALL PEOPLE THE SAME, UNLIKE, FOR EXAMPLE, PEPPER SPRAY, WHERE YOU MIGHT USE PEPPER SPRAY ON SOMEONE WHO IS UNDER THE INFLUENCE OF DRUGS AND THEY MIGHT BE ABLE TO CONTINUE TO FIGHT OR DO WHATEVER THEY'RE DOING?

A ARE YOU ASKING IS THAT WHY IT IS SO VALUABLE?

THE COURT: I THINK HE ASKED ARE YOU ASKING.

MR. WILLIAMSON: RIGHT.

THE WITNESS: IS THAT IT?

BY MR. WILLIAMSON:

Q WELL, LET ME PUT IT THIS WAY: IS IT SO VALUABLE BECAUSE IT IS A VERY, VERY EFFECTIVE TOOL TO USE WITH PEOPLE WHO ARE ON DRUGS?

A YES.

Q AND YOU WERE TAUGHT THAT; RIGHT?

A YES.

Q LET ME MOVE ONTO THE NEXT SLIDE. YOU

RECOGNIZE THIS SLIDE, RIGHT, OFFICER FAIRBANKS?
A YEAH.
Q AND THIS DESCRIBES THE WAY THE DARTS COME OUT OF THE DEVICE AND IT DESCRIBES SPECIFICALLY THE SPREAD PATTERN; RIGHT?
A RIGHT.
Q AND THIS SHOWS THE RULE OF THUMB BEING ONE FOOT OF SPREAD FOR EVERY SEVEN FEET DISTANCE FOR THE PERSON THAT YOU'RE FIRING AT; RIGHT?
A RIGHT.
Q AND SO I ASSUME IT'S OBVIOUS THE FURTHER YOU ARE AWAY FROM THE PERSON, THE WIDER THE SPREAD?
A CORRECT.
Q AND THE CLOSER YOU ARE, CONVERSELY, THE CLOSER YOU ARE TO THE SPREAD?
A RIGHT.
Q NOW, YOU MENTIONED EARLIER THAT AS PART OF YOUR TASER TRAINING YOU ACTUALLY WERE SUBJECTED, YOURSELF, TO A TASER DISCHARGE; IS THAT CORRECT?
A THAT'S CORRECT.
Q AND, IN FACT, DURING THE TWO TEN-HOUR TRAINING SESSIONS, YOU ACTUALLY WERE TASED TWICE DURING THAT CLASS?
A YEAH.
Q NOW, DO YOU RECALL WHEN YOU WERE SUBJECTED TO

THIS TASER DISCHARGE, WHETHER THE PROBES WERE SHOT AT YOU OR WERE THEY ATTACHED SOMEHOW TO YOUR BODY?

A THEY WERE ATTACHED.

Q AND AS I UNDERSTAND ON ONE OF THE OCCASIONS THAT YOU WERE -- THAT YOU WERE SUBJECTED TO A TASER DISCHARGE DURING YOUR TASER INSTRUCTOR CLASS, THAT ONE OF THE PROBES WAS PLACED CLOSE TO YOUR FOOT?

A CORRECT.

Q AND SO THAT PROBE WASN'T ATTACHED TO YOUR BODY; RIGHT?

A CORRECT.

Q AND ONE WAS -- THE SECOND PROBE WAS ATTACHED TO YOUR BODY; RIGHT?

A RIGHT.

Q AND CAN YOU EXPLAIN WHAT THE PURPOSE OF THAT EXERCISE WAS?

A THE PURPOSE OF THAT, WITH THAT PARTICULAR INSTRUCTOR, WAS TO SHOW THE CLASS OR -- OR THAT -- THAT THE -- THE ELECTRICAL CURRENT LEADS THE PROBE, OR I BELIEVE IT WAS AN ALLIGATOR CLIP AT THIS TIME, AND ACTUALLY JUMPS INTO YOUR BODY. IT DOESN'T HAVE TO BE A SEGUE INTO ANOTHER SLIDE.

I DON'T KNOW IF IT'S ON HERE. IT SHOWS THAT THE ELECTRICAL ENERGY CAN PASS THROUGH I BELIEVE IT'S AN INCH AND A HALF OF CLOTHING OR

SOMETHING ELSE THAT MIGHT BE IN THE WAY OF A DIRECT HIT BY THE PROBE.

Q OKAY. WHEN YOU UNDERWENT THAT EXERCISE, ONE PROBE WAS ATTACHED. WAS IT ATTACHED TO YOUR BACK?

A IT WAS MY LEFT SHOULDER.

Q AND THEN THE SECOND ONE WAS ATTACHED -- DO YOU REMEMBER A COUPLE INCHES FROM YOUR FOOT?

A I BELIEVE IT WAS NO MORE THAN AN INCH BEHIND MY RIGHT HEEL.

Q OKAY. AND -- AND ARE YOU FAMILIAR WITH THE TERM ARCING?

A YES.

Q AND WHAT DOES THAT MEAN AND JUST IN LAY LANGUAGE IF YOU CAN?

A INSTEAD OF USING THAT WORD I WILL EXPLAIN THE ANALOGY BASED ON IT.

SEEING THE BLUE LIGHT ARC OR LIGHT FROM THE END OF THE ALLIGATOR CLIP INTO THE BODY.

Q AND DO YOU UNDERSTAND WHY THE REASON THE DEVICE GENERATES A PEAK OF 50,000 TO FORCE THE ENERGY FROM THE PROBE THAT IS AN INCH OR TWO AWAY FROM YOUR FOOT THAT IT HAS THE POWER TO JUMP FROM THAT POSITION INTO YOUR BODY AND THAT'S THE ARCING?

DO YOU UNDERSTAND THAT?

A I UNDERSTAND THAT. I HAVE NEVER BEEN PROVIDED

WITH THAT INFORMATION.

Q OKAY. NOW, LET'S GO BACK TO THE SPECIFIC INSTANCE WHEN YOU WERE SUBJECTED TO THE TASER DISCHARGE WITH THE DART NEAR YOUR FOOT. YOU STILL FELT THE EFFECTS OF THE TASER, DIDN'T YOU?

A YES.

Q AND, IN FACT, YOU WERE TAUGHT THAT THE TASER COULD STILL BE EFFECTIVE WHEN IT IS NOT ATTACHED TO A PERSON'S BODY; RIGHT?

A YES.

Q YOU MENTIONED A VIDEO ON HERE AND ACTUALLY THAT'S THE NEXT SLIDE. HOLD ON A SECOND. I WANT TO SHOW YOU THE SLIDE. BEFORE WE RUN THE VIDEO, DO YOU RECOGNIZE THE SLIDE FROM YOUR TRAINING?

A I DO.

Q AND OKAY. MR. BURTON, COULD YOU RUN THAT, PLEASE?

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT, OFF THE RECORD.)

MR. WILLIAMSON: WE DON'T HAVE THE SOUND. WE'LL HAVE THAT SET UP THIS AFTERNOON.

THE COURT: IS IT ON ON HERE?

MR. WILLIAMSON: I'M SORRY.

THE COURT: I SEE, YOU'RE NOT HOOKED UP INTO THE SPEAKERS.

MR. BURTON: WE HAVE AN AUDIO ISSUE. THERE'S SOUND WITH THIS.

MR. WILLIAMSON: NO, WE'RE NOT HOOKED UP, YOUR HONOR. FOR SOME REASON WE DIDN'T SEE WIRES TO DO THAT SO I DON'T KNOW WHY.

MR. BURTON: WE'LL REPLAY IT AFTER THE LUNCH BREAK.

MR. WILLIAMSON: IF WE COULD DO THAT.

Q THE PURPOSE OF THIS PARTICULAR VIDEO, AND I'LL SHOW IT AGAIN IN JUST A SECOND. THIS WAS TO DEMONSTRATE WHAT WE HAVE JUST BEEN DISCUSSING; THAT THE TASER, WHICH IS ATTACHED TO SOME CLOTHING AND APPEARS TO BE, YOU KNOW, IT SAYS TWO AND A HALF CUMULATIVE INCHES, AND THERE'S A PIECE OF MEAT AND THAT'S TO SIMULATE A PERSON'S BODY; IS THAT CORRECT?

A YES.

Q AND THE SPECIFIC PURPOSE OF THIS VIDEO IS TO SHOW THAT WHEN A DART IS NOT ATTACHED OR A PROBE IS NOT ATTACHED TO A PERSON, IT CAN STILL GENERATE ENOUGH POWER TO -- TO PIERCE THE CLOTHING AND ENTER THE PERSON'S BODY; CORRECT?

A CORRECT.

Q NOW, BASED ON YOUR OWN EXPERIENCE BEING SUBJECTED TO A TASER DISCHARGE IN CLASS, WITH TWO

WIRES ATTACHED TO YOU, DO YOU THINK THAT YOU COULD HAVE PULLED THE TASER DARTS OUT WHILE YOU WERE EXPERIENCING MUSCLE CONTRACTIONS?

A I DON'T BELIEVE SO. THAT'S IN MY PARTICULAR EXPERIENCES.

Q AND WHAT ABOUT YOUR EXPERIENCE IN THE CLASS WHEN YOU ONLY HAD ONE PROBE ATTACHED. DO YOU THINK THAT YOU WOULD HAVE BEEN ABLE TO PULL OUT THE PROBE THEN?

A I FEEL LIKE I WAS ABLE TO MOVE A LITTLE MORE, EVEN THOUGH THERE WAS A CYCLE.

Q OKAY. LET ME SHOW YOU THE NEXT SLIDE. THIS IS KIND OF WHAT WE COVERED, THE 50,000 AND THE LOW AMPERAGE. YOU'RE NOT BEING CALLED HERE AS AN ELECTRICIAN OR AN ELECTRICAL EXPERT BUT YOU GENERALLY UNDERSTOOD THE OUTPUT OF THE DEVICE?

A YES.

Q NOW, I WANT TO SHOW YOU THE NEXT SLIDE. THIS IS A VIDEO CLIP AND I AM GOING TO RUN IT IN JUST A SECOND, BUT DURING THE COURSE OF YOUR EXPERIENCE IN CLASS BEING SUBJECTED TO A TASER DISCHARGE, WE HAVE TALKED ABOUT MUSCLE CONTRACTIONS.

DID YOU FEEL THAT SENSE OF YOUR MUSCLES CONTRACTING WHILE YOU WERE GOING THROUGH THE EXPERIENCE?

A YES.
Q AND ONE THING I FORGOT TO ASK YOU EARLIER, HOW MANY SECONDS WERE YOU SUBJECTED TO -- LET'S FIRST OF ALL START WHEN THE TWO PROBES WERE ATTACHED TO YOU.
A IT WAS APPROXIMATELY TWO AND A HALF SECONDS.
Q SO YOU WEREN'T SUBJECTED TO A FULL FIVE-SECOND DISCHARGE?
A WELL, WITH THE SECOND, YES.
Q I'M SORRY?
A WITH THE SECOND, YES. IT WAS ALMOST AS IF MY FIVE SECONDS WERE DIVIDED INTO TWO-AND-A-HALF-MINUTE INCREMENTS.
Q THAT WAS A POOR QUESTION. LET ME ASK IT A DIFFERENT WAY.

YOU WERE NOT SUBJECTED TO A FULL FIVE SECONDS AT ONE TIME. THEY WERE DIVIDED BETWEEN TWO DIFFERENT EXPERIENCES; IS THAT CORRECT?

A THAT'S CORRECT.
Q I WANT YOU TO -- TO SPECIFICALLY FOCUS ON THE CALVES OF THIS PARTICULAR GENTLEMAN WHO IS BEING SUBJECTED TO A FIVE-SECOND DISCHARGE BY TWO DIFFERENT DEVICES. OKAY. AND AFTER WE RUN THE VIDEO I'M GOING TO ASK YOU A QUESTION ABOUT IT.

YOUR HONOR, I SEE THE HOUR, AND GIVEN THE

AUDIO, WHICH I WOULD LIKE TO HAVE PLAYED, WOULD THIS BE A GOOD TIME TO BREAK?

THE COURT: CERTAINLY. IT'S NOON AND WE'LL COME BACK AT 1:00 O'CLOCK.

(WHEREUPON, THE LUNCH RECESS WAS TAKEN.)

AFTERNOON SESSION

THE COURT: PLEASE BE SEATED. MEMBERS OF THE JURY, APPARENTLY WE NEED TO CALL A WITNESS OUT OF ORDER, SO WE'RE GOING TO INTERRUPT THE TESTIMONY OF THE WITNESS ON THE STAND NOW AND TAKE SOMEONE OUT OF ORDER AND SO MR. FAIRBANKS WILL BE BACK WITH US AT ANOTHER TIME TO FINISH HIS TESTIMONY.

WHO ARE WE CALLING?

MR. BURTON: THANK YOU, YOUR HONOR. THE PLAINTIFFS ARE CALLING CLIFFORD SATREE.

THE COURT: COME ALL OF THE WAY UP, MR. SATREE, AND BE SWORN.

THE CLERK: COME FORWARD, SIR.

CLIFFORD SATREE,

BEING CALLED AS A WITNESS ON BEHALF OF THE PLAINTIFFS, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: YES.

THE CLERK: PLEASE BE SEATED. CAN YOU PLEASE STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE RECORD?

THE WITNESS: CLIFFORD NORMAN SATREE THE

THIRD, S-A-T-R-E-E, SATREE.

DIRECT EXAMINATION

BY MR. BURTON:

Q GOOD AFTERNOON, MR. SATREE.

A GOOD AFTERNOON.

Q AND YOU'RE APPEARING HERE TODAY PURSUANT TO SUBPOENA?

A YEAH.

Q AND YOU KNEW THE DECEDENT IN THIS CASE, ROBERT C. HESTON; IS THAT CORRECT?

A YES.

Q AND WHAT DID YOU CALL HIM?

A BOBBY.

Q AND WHEN DID YOU MEET BOBBY?

A I MET HIM AT SUN STREET IN REHAB.

Q AND DO YOU KNOW ABOUT WHEN THAT WAS?

A I CAN'T RECOLLECT.

Q OKAY. WERE YOU BOTH IN REHABILITATION AT THE SAME TIME?

A YEAH, WE WERE ROOMMATES IN A CLEAN AND SOBER ENVIRONMENT.

Q AND DO YOU KNOW HOW LONG THAT LASTED?

A SIX MONTHS, MAYBE.

Q AND WHAT -- HE, AS FAR AS YOU COULD TELL WAS CLEAN AND SOBER DURING THAT PERIOD?

A YEAH.
Q AND COULD YOU JUST DESCRIBE WHAT YOUR IMPRESSION OF HIM WAS DURING THAT PERIOD OF TIME?
A HE WAS A GREAT GUY. HE WAS A GOOD FRIEND AND HE WOULD GO OUT ON A LIMB FOR JUST ABOUT ANYBODY.
Q WAS HE WORKING, AS FAR AS YOU KNEW?
A YEAH, I WAS WORKING WITH HIM FOR HIS FATHER.
Q AND WHAT WERE YOU DOING?
A CONCRETE WORK.
Q AND WAS THAT IN SALINAS?
A MOSTLY.
Q AND THE SURROUNDING AREA?
A YEAH.
Q OKAY. AND SO DID YOU GET TO KNOW HIS FAMILY, TOO?
A YEAH.
Q AND DID YOU SEE HIS INTERACTION WITH HIS FAMILY?
A UH-HUH.
Q AND YOU HAVE TO SAY YES OR NO.
A YES.
Q FOR THE COURT REPORTER.
AND AT SOME POINT DID YOU LEARN THAT -- THAT HE -- HE FELL OFF THE WAGON SO TO SPEAK?
A YEAH.

Q AND WHAT WAS YOUR UNDERSTANDING OF WHAT HAPPENED?
A I REALLY HAVE NO IDEA.
Q BUT YOU KNEW HE WOUND UP BEING INCARCERATED?
A YEAH. YES.
Q AND THEN WAS THERE A TIME THAT YOU LEARNED HE GOT OUT OF PRISON?
A YES. I WAS WORKING WITH HIM.
Q SO YOU STARTED WORKING WITH HIM AGAIN WHEN HE GOT OUT OF PRISON?
A YEAH.
Q AND -- AND, UM, WHAT WAS YOUR IMPRESSION OF HIM AT THAT TIME? WAS IT ANY DIFFERENT THAN YOUR IMPRESSION BEFORE?
A NO, JUST THE SAME OLD BOBBY.
Q AND DID THERE COME A TIME WHEN YOU WERE ASKED TO COME TO HIS HOUSE?
A YEAH.
Q AND BECAUSE THERE WAS SOME KIND OF PROBLEM?
A YEAH, HIS FATHER CALLED ME AND ASKED ME TO COME AND HELP HIM.
Q AND -- AND WHAT DID HIS FATHER TELL YOU?
A JUST THAT HE WAS ACTING STRANGE AND COULD I COME OVER.
Q AND -- AND WHAT DID YOU DO AFTER YOU GOT THIS

CALL?
A I GOT A RIDE OVER THERE AND TRIED TO HELP CALM HIM DOWN.
Q SO WHEN YOU GOT THERE, WERE THERE POLICE OFFICERS THERE ALREADY?
A YES.
Q AND -- AND WHAT DID -- CAN YOU JUST TELL THE JURY WHAT YOU SAW RIGHT WHEN YOU GOT THERE?
A JUST COP CARS SURROUNDING THE AREA, A COUPLE ON THE LAWN.
THE COURT: A COUPLE OF CARS ON THE LAWN OR --
THE WITNESS: POLICE OFFICERS.
BY MR. BURTON:
Q OKAY. DID YOU SEE BOBBY?
A YES, I DID.
Q AND WHAT WAS HE DOING?
A HE WAS A LITTLE BIT ANTSY AND HE WAS SAYING THAT THERE WAS SOMEONE IN THE ATTIC WITH A GUN AND HE WAS LIKE TRYING TO PROTECT HIS FATHER AND HE WAS KIND OF GOING BOTH WAYS AT THAT POINT.
Q OKAY. AND CAN YOU KIND OF EXPLAIN WHAT YOU MEAN BY "GOING BOTH WAYS"?
A WELL, HE -- HE REALLY COULDN'T UNDERSTAND WHAT WAS GOING ON. HE WAS JUST TRYING TO HELP HIS DAD

BUT -- BUT FROM WHAT I DON'T KNOW.
Q AND THIS WAS WHILE THE POLICE OFFICERS WERE STILL THERE?
A YEAH.
Q OKAY. AND DID THE POLICE OFFICERS LEAVE?
A YES, THEY DID.
Q AND THERE WASN'T ANY KIND OF ALTERCATION OR INCIDENT BEFORE THEY LEFT, WAS THERE?
A NO.
Q AND THEN WHAT HAPPENED AFTER THE POLICE OFFICERS LEFT?
A HE GOT AGITATED AND PUSHED HIS FATHER DOWN AND PUSHED THE GRANDFATHER CLOCK OVER.
Q HE PUSHED THE GRANDFATHER CLOCK OVER?
A YEAH.
Q AND THEN WHAT HAPPENED AFTER HE PUSHED THE GRANDFATHER CLOCK OVER?
A HE TRIED TO PROTECT HIS DAD FROM -- FROM WHATEVER IT IS THAT HE WAS PROTECTING HIM FROM.
Q AND WHY DON'T YOU TELL US WHAT YOU SAW AND WHY YOU CAME TO THAT CONCLUSION?
A HE WAS JUST LIKE BETWEEN HIS FATHER AND LIKE, SAY, ME AND EXPLAINING ABOUT THE ATTIC ALSO.
Q DID HE SEEM TO BE IRRATIONAL?
A AT TIMES.

Q AND DID HE SEEM AGITATED?
A YES.
Q AND THEN WHAT HAPPENED NEXT?
A THE POLICE OFFICERS CONVERGED ON THE HOUSE AND --
Q THEY CAME BACK?
A YEAH.
Q AND BEFORE THEY CAME BACK, DID YOU DO ANYTHING TO SUMMON THEM?
A YES, I CALLED THEM BACK.
Q SO YOU CALLED 911?
A YEAH.
Q AND WAS THAT ON A CELL PHONE OR A PORTABLE --
A ON MY CELL PHONE.
Q ON YOUR CELL PHONE. SO YOU HAD A CELL PHONE THAT YOU WERE CALLING 911?
A YES.
Q AND WHEN YOU CALLED 911, DID YOU STAY ON THE LINE?
A YES.
Q AND DURING THIS CALL ON 911, DID YOU TRY TO ACCURATELY TELL THE DISPATCHER OR WHOEVER WAS ON THE OTHER SIDE OF THE CALL EXACTLY WHAT YOU WERE SEEING?
A YES.

MR. BURTON: YOUR HONOR, AT THIS TIME WE WOULD ASK TO PLAY, AND I BELIEVE THIS IS OKAY WITH THE DEFENSE, EXHIBIT 101-C, WHICH IS THE ENTIRE 911 CALL.

AND WHILE IT'S PLAYING, I'LL BE SHOWING A TRANSCRIPT THAT WE HAVE AGREED TO ON THE ELMO SO THAT THE JURY CAN FOLLOW IN PRINT IF THEY NEED TO.

THE COURT: VERY WELL. SO 101-C, A -- THIS IS A TAPE OF SOME SORT? IS IT A DIGITAL --

MR. BURTON: IT'S DIGITIZED.

THE COURT: ALL RIGHT. SO WE'LL HAVE TO GET A COPY OF IT SO WE CAN HAVE IT AVAILABLE FOR THE JURY IF THEY WANT TO PLAY IT.

101-C IS IN EVIDENCE AND THE TRANSCRIPT. IS THAT SEPARATELY MARKED?

MR. BURTON: IT'S THE 101-C TRANSCRIPT.

THE COURT: SO WE'LL CALL IT 101-C TAPE AND 101-C TRANSCRIPT. AND BOTH ARE IN EVIDENCE WITHOUT OBJECTION IS WHAT I'M BEING TOLD.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 101-C, HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WAS ADMITTED INTO EVIDENCE.)

THE COURT: YOU MAY PROCEED.

MR. BURTON: THANK YOU, YOUR HONOR.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT OFF THE RECORD.)

THE COURT: YOU MIGHT POINT ON THE TRANSCRIPT WHERE WE ARE.

MR. BURTON: (INDICATING.)

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT OFF THE RECORD.)

BY MR. BURTON:

Q MR. SATREE, THAT'S YOUR VOICE ON THE TAPE?

A YES, IT IS.

Q AND I IMAGINE IF YOU KNEW IT WAS GOING TO BE PLAYED IN A FEDERAL COURT, YOU WOULD HAVE WATCHED YOUR LANGUAGE A LITTLE BETTER?

A PROBABLY.

Q DID YOU TRY THROUGHOUT THAT CALL TO RELAY AS ACCURATELY AS YOU COULD WHAT WAS HAPPENING?

A YES, I DID.

Q OKAY. THERE WAS ONE PART, SIR, IN BETWEEN AFTER THE OFFICERS LEFT AND BEFORE THEY CAME BACK WHERE YOU SAID HE WAS OUTSIDE OF THE HOUSE AND THEN HE WAS GOING THROUGH THE WINDOW?

A YEAH.

Q CAN YOU JUST DESCRIBE WHAT YOU SAW THEN?

A UM, HE WAS ON THE PORCH AND HE PUNCHED THE WINDOW OUT ON THE RIGHT SIDE OF THE DOOR.

Q DID IT APPEAR TO YOU THAT WHEN HE WAS OUT ON THE PORCH THAT THE DOOR HAD BEEN SLAMMED BEHIND HIM?

A I'M NOT SURE.

Q DID HE ACTUALLY CRAWL IN THROUGH THE WINDOW?

A I THINK HE REACHED IN AND OPENED THE DOOR.

Q AND THEN WENT BACK INTO THE HOUSE?

A YEAH.

Q WHAT -- WHAT -- CAN YOU JUST DESCRIBE WHAT HAPPENED RIGHT AFTER YOU HUNG UP WITH THE DISPATCHER?

A COPS WERE JUST STANDING AROUND LOOKING AT HIM.

Q AND DID YOU HEAR THE OFFICERS SAY ANYTHING?

A NOT REALLY, NO.

Q COULD YOU TELL WHETHER BOBBY HESTON WAS OKAY OR NOT?

A HE DIDN'T LOOK OKAY. I DON'T THINK HE WAS.

Q AND WHAT LOOKED -- WAS THE MATTER WITH HIM?

A WELL, HE WAS OUT. HE WAS JUST LIKE ONE OF THEM WAS KICKING HIM WITH HIS FOOT LIKE TO SEE IF HE WAS MOVING.

MR. BURTON: THANK YOU. AND THANK YOU, MR. SATREE.

NO FURTHER QUESTIONS.

THE COURT: VERY WELL. ANY CROSS?

MR. HURLEY: YES, YOUR HONOR.

CROSS-EXAMINATION

BY MR. HURLEY:

Q MR. SATREE, WHEN YOU FIRST MET ROBERT HESTON AT SUN STREET, YOU WERE BOTH IN FOR REHABILITATION FOR METHAMPHETAMINE?

A NO.

Q WHAT WERE YOU IN FOR?

A I WAS IN FOR VOLUNTARILY FOR DRINKING.

Q FOR DRINKING?

A YEAH.

Q AND AT THE TIME OF THIS EVENT YOU WERE ON FOUR PRESCRIBED MEDICATIONS; CORRECT?

A I REALLY DON'T RECALL.

Q DO YOU REMEMBER TELLING THE POLICE THAT YOU WERE ON KLONOPIN, PROZAC AND VICODIN AND ANOTHER DRUG?

A IF I DID, I PROBABLY WAS.

Q DO YOU REMEMBER TELLING THE POLICE THAT?

A NO.

Q AND THEN TWO DAYS AFTER THIS EVENT YOU WENT BACK TO PRISON; CORRECT?

A TWO DAYS?

Q YES.

A I'M NOT SURE HOW LONG IT WAS.

Q FEBRUARY 2005 DID YOU GO BACK TO PRISON?
A I WENT FOR MY FIRST TIME TO PRISON.
Q AND THAT WAS FOR FELON IN POSSESSION OF A SHOTGUN; IS THAT RIGHT?
A AND VIOLATION -- IT WAS FOR A VIOLATION, A CODE VIOLATION.
Q AND FOR FELON IN POSSESSION OF A SHOTGUN; CORRECT?
A YEAH.
Q AND AT THE TIME OF THIS EVENT, ON THE DAY OF THIS EVENT, YOU SAID YOU CAME RIGHT AWAY. ISN'T IT TRUE THAT MR. HESTON CALLED YOU BACK BECAUSE YOU SAID YOU COULDN'T GET A RIDE?
A I CALLED -- EITHER HE CALLED ME OR I CALLED HIM, ONE OR THE OTHER.
Q AND YOU TOLD HIM YOU HADN'T BEEN ABLE TO COME OVER BECAUSE YOU COULDN'T GET A RIDE?
A THAT WAS ONLY LIKE A HALF AN HOUR.
Q SO FROM THE TIME THAT HE CALLED YOU UNTIL YOU GOT THERE IT WAS MORE THAN A HALF AN HOUR; CORRECT?
A I WOULD SAY IT WAS APPROXIMATELY A HALF AN HOUR.
Q AND WHEN YOU WERE AT SUN STREET YOU AND ROBERT HESTON DISCUSSED SOME OF HIS PAST INCIDENTS WITH THE POLICE; CORRECT?

A UH-HUH.
Q YES?
A YES.
Q AND HE SHOWED YOU HIS DOG BITE SCAR FROM A POLICE DOG?
A YES.
Q AND HE TOLD YOU THAT HAPPENED IN HIS PARENTS' HOME?
A YES.
Q AND HE TOLD YOU THE POLICE BARRICADED THE HOUSE TO GET HIM OUT OF THE HOUSE?
A YES.
Q AND HE TOLD YOU HE HAD THROWN A LOT OF THINGS OUT OF THE HOUSE?
A YES.
Q AND DID HE TELL YOU ON ANOTHER OCCASION HE PUNCHED HIS MOTHER?
A NO.
Q AND AFTER SUN STREET, DID YOU AND MR. HESTON ATTEND ANY KIND OF MEETINGS OR ANY KIND OF REHAB?
A AFTER SUN STREET, WHEN WE WERE BACK WORKING?
Q AFTER -- AFTER YOU LEFT SUN STREET, DID YOU AND MR. HESTON GO TO ANY OTHER KIND OF REHABILITATION MEETINGS?
A MAYBE A FEW, YEAH.

Q AND THEN YOU SAW HIM AGAIN AFTER HE GOT OUT OF PRISON; CORRECT?
A YES.
Q AND HE GOT OUT OF PRISON ABOUT THREE WEEKS BEFORE THIS EVENT OCCURRED; RIGHT?
A I COULDN'T TELL YOU.
Q DO YOU HAVE ANY RECOLLECTION OF THAT?
A NO.
Q HAVE YOU -- HAVE YOU TOLD THE POLICE PREVIOUSLY THAT YOU HAVE TROUBLE WITH YOUR MEMORY?
A I DON'T KNOW IF I DO OR NOT.
Q YOU DON'T KNOW?
A WHAT I DON'T HAVE -- I DON'T HAVE CHRONOLOGICAL -- I HAVE PROBLEMS CHRONOLOGICALLY MEMORIZING.
Q NOW, YOU WORKED A FEW TIMES FOR MR. HESTON'S CEMENT COMPANY AFTER, AFTER HIS -- AFTER ROBERT C. HESTON GOT OUT OF PRISON; CORRECT?
A YES.
Q AND TWO NIGHTS BEFORE THIS EVENT OCCURRED, YOUR FRIEND ROBERT C. HESTON CALLED YOU FROM THE KING'S DEN BAR; IS THAT RIGHT?
A YES.
Q AND HE TOLD YOU TO COME OVER THERE AND MEET HIM; RIGHT?

A YES.
Q AND YOU DID GO OVER THERE AND MEET HIM; CORRECT?
A YES.
Q AND THAT WAS ABOUT MIDNIGHT?
A PROBABLY.
Q AND YOU STAYED UNTIL THE BAR CLOSING?
A JUST ABOUT, YEAH.
Q AND DURING THAT TIME THAT YOU WERE AT THE KING'S DEN BAR, YOU HAD HAD A CONVERSATION WITH HIM WHERE HE STARTED TALKING ABOUT GLASS BOTTOM BOATS; DO YOU REMEMBER THAT?
A YES.
Q AND YOU DIDN'T UNDERSTAND WHAT HE WAS TALKING ABOUT. HE WAS GOING ON ABOUT GLASS BOTTOM BOATS?
A YES.
Q AND THEN THE NEXT DAY, ACTUALLY THE DAY OF THIS INCIDENT, FEBRUARY 19TH, AT 3:00 A.M., YOU RECEIVED A CALL FROM, FROM ROBERT C. HESTON TELLING YOU HE WANTED YOU TO PICK HIM UP; CORRECT?
A PICK HIM UP?
Q YES.
A I DIDN'T HAVE A DRIVER'S LICENSE THEN SO I DON'T KNOW WHY HE WOULD CALL ME TO PICK HIM UP.
Q DO YOU REMEMBER HIM CALLING YOU AND TELLING

YOU HE WAS OVER BY BLANCO ROAD AND YOU WERE WITH A GIRL SO YOU ASKED THE GIRL TO COME --

A YES. YES.

Q AND SO YOU ASKED THE GIRL TO DRIVE YOU OVER THERE SO YOU COULD PICK UP ROBERT C. HESTON; RIGHT?

A YES.

Q AND YOU RECALL THAT WHEN HE WAS ON THE PHONE WITH YOU HE SOUNDED AGITATED AND ANXIOUS?

A YEAH.

Q AND -- AND IT SOUNDED LIKE HE WANTED TO GET OUT OF THERE; RIGHT?

A YES.

Q AND SO YOU ASKED THE GIRL TO DRIVE YOU OVER THERE TO HELP YOU GET HIM OUT OF THERE; CORRECT?

A YES.

Q AND BUT WHEN YOU GOT THERE THERE WERE POLICE CARS AT THE ADDRESS THAT HE TOLD YOU TO GO TO; RIGHT?

A YES.

Q AND SO WHEN YOU SAW THERE WERE POLICE CARS THERE YOU DECIDED TO LEAVE; RIGHT?

A YES.

Q AND SO WOULD THAT HAVE BEEN ABOUT THREE 3:00 IN THE MORNING AT ON FEBRUARY 19TH?

A PROBABLY.

Q CONSIDERING YOUR TRAVEL TIME, IF HE CALLED YOU AT 3:00, YOU GOT THERE SOME TIME BETWEEN 3:00 AND 4:00?

A PROBABLY.

Q NOW, THAT MORNING HE PICKED YOU UP AT ABOUT 6:30 A.M.; RIGHT?

A SOMETHING LIKE THAT.

Q SO ABOUT THREE AND A HALF HOURS AND YOU WENT OVER BUT THE POLICE WERE THERE; RIGHT?

A YEAH.

Q AND YOU DON'T KNOW IF HE GOT ANY SLEEP IN THAT THREE HOURS BETWEEN THE TIME THAT YOU WENT TO BLANCO ROAD AND THE TIME THAT HE PICKED YOU UP?

A I HAVE NO IDEA.

Q AND THEN YOU -- YOU AND ROBERT, YOUR FRIEND ROBERT, DROVE OUT TO PACIFIC GROVE AREA TO FOAM STREET; CORRECT?

A YES.

Q AND YOUR UNDERSTANDING WAS THAT YOU WERE GOING OUT THERE TO CLEAN WOOD SUPPORTS OFF OF A CEMENT JOB; CORRECT?

A NO, WE WERE GOING TO DO SOME KIND OF CONCRETE WORK.

Q YOU DON'T KNOW WHAT YOU WERE GOING TO DO?

A I DON'T RECALL.

Q BUT YOU KNOW THAT YOU WEREN'T GOING TO BE LAYING CEMENT, YOU WERE GOING TO BE DOING SOME KIND OF CLEAN UP; CORRECT?

A NO, I JUST -- I CAN'T REMEMBER.

Q AND -- AND YOU GOT OUT THERE -- WELL, WHEN YOU WERE ON YOUR WAY OUT THERE, YOUR FRIEND ROBERT TOLD YOU THAT HE WAS GOING TO ROLL YOU UP LIKE A PIZZA AND THROW YOU OUT OF THE TRUCK?

A YEAH, SOMETHING LIKE THAT BUT HE WAS ALWAYS MAKING, YOU KNOW, WEIRD STATEMENTS.

Q BUT HE OUT OF THE BLUE TOLD YOU HE WAS GOING TO ROLL YOU UP LIKE A PIZZA AND THROW YOU OUT OF THE TRUCK?

A YEAH.

Q AND THEN YOU GOT TO FOAM STREET AND HE SAID WE'RE NOT DOING THIS AND HE TURNED AROUND AND DROVE BACK; RIGHT?

A YES.

Q AND SO HE NEVER DID WORK THAT DAY, YOU DROVE ALL OF WAY BACK TO SALINAS; RIGHT?

A YES.

Q AND SO DID YOU TALK ANYMORE IN THE TRUCK AT ALL?

A YEAH.

Q AND WAS HE STILL TALKING TO YOU ABOUT ROLLING

YOU UP LIKE A PIZZA AND THROWING YOU OUT?

A NO.

Q AND HE DROPPED YOU OFF AT ANOTHER PERSON'S HOUSE NAMED SIMPSON; RIGHT?

A RIGHT.

Q AND THEN YOU STAYED AT THIS GUY SIMPSON'S HOUSE UNTIL -- UNTIL ROBERT H. HESTON, THE FATHER, CALLED YOU; CORRECT?

A CORRECT.

Q AND THEN WHEN HE CALLED YOU, HE TOLD YOU THAT HE WANTED TO -- TO COME AND TAKE JUNIOR OUT OF THE HOUSE; RIGHT?

A SOMETHING ALONG THE LINES.

Q AND YOU SAID HE WANTED TO GET HIM OUT OF HERE; RIGHT?

A OKAY.

Q AND IS THAT WHAT HE SAID TO YOU?

A I BELIEVE SO.

Q AND YOU HAVE HAD YOUR DEPOSITION TAKEN IN THIS MATTER BEFORE; RIGHT?

A YEAH.

Q AND THEN WHEN YOU WALKED UP YOU SAW ROBERT H. HESTON, THE FATHER, STANDING OUTSIDE BY THE RAIL AND YOU SAW ROBERT C. HESTON, THE SON, STANDING INSIDE; CORRECT?

A BOBBY -- ROBERT WAS SITTING DOWN ON THE BRICKS OF THE FRONT AND BOBBY WAS IN THE HOUSE, YEAH.

Q AND AT THIS POINT IN TIME, KNOWING ROBERT C. HESTON, YOU KNEW THAT HIS DRUG OF CHOICE WAS METHAMPHETAMINE; CORRECT?

A YES.

Q AND WHEN YOU SAW HIS CONDUCT THAT FIRST TIME THAT YOU WENT OUT TO THE HOUSE ON FEBRUARY 19TH, YOU CONCLUDED THAT HE WAS ON METHAMPHETAMINE; CORRECT?

A I THOUGHT HE WAS ON SOMETHING.

Q AND DIDN'T YOU CONCLUDE THAT HE WAS ON METHAMPHETAMINE?

A I COULDN'T MAKE THAT CONCLUSION.

Q HAVE YOU EVER TESTIFIED THAT YOU MADE THAT CONCLUSION?

A I DON'T KNOW, BUT I HAVE NEVER SEEN HIM ON DRUGS BEFORE SO I DON'T KNOW.

MR. HURLEY: I'LL LODGE WITH THE COURT THE ORIGINAL DEPOSITION OF CLIFFORD SATREE.

THE COURT: YOU WANT TO HAVE THE WITNESS READ THIS TO SEE WHETHER OR NOT HE IS CONFRONTED WITH HIS PRIOR TESTIMONY?

MR. HURLEY: YES, YOUR HONOR.

THE COURT: YOU GUYS CAN OPEN THESE UP.

MR. HURLEY: I CAN GET HIM THE CERTIFIED COPY IF YOU WANT THE ORIGINAL.

THE COURT: CERTAINLY. TELL US WHAT PAGE YOU WANT THE WITNESS TO LOOK AT.

HERE YOU ARE, SIR. THAT'S A DEPOSITION.

MEMBERS OF THE JURY, THIS MIGHT BE A CONVENIENT TIME FOR ME TO EXPLAIN WHAT IS GOING ON.

PRIOR TO A TRIAL ANY WITNESS THAT MIGHT TESTIFY IN A CASE CAN BE SWORN AND ASKED QUESTIONS IN WHAT IS CALLED A DEPOSITION.

AND DURING THE COURSE OF THE TRIAL THAT DEPOSITION CAN BE USED TO -- TO GIVE YOU THE TESTIMONY THAT THE PERSON HAD PRIOR.

SOMETIMES IT'S USED JUST TO HAVE THE PERSON READ IT AND THAT MIGHT REFRESH THEIR MEMORY.

OTHER TIMES IT'S A PARTY TO THE CASE AND COUNSEL IS JUST PERMITTED TO READ WHAT IS IN THE DEPOSITION.

SO THIS IS NOT A PARTY TO THE CASE. HE'S ALLOWED TO LOOK AT THE DEPOSITION AND SEE WHETHER THAT REFRESHES HIS RECOLLECTION AND IF IT DOESN'T, IT STILL CAN BE READ INTO THE RECORD AS A PRIOR STATEMENT.

WHAT REFERENCE ARE YOU HAVING US GO TO?

MR. HURLEY: YES, YOUR HONOR.

Q MR. SATREE, IF YOU COULD READ PAGE 82 IN THAT DEPOSITION.

THE COURT: PAGE 82.

BY MR. HURLEY:

Q PAGE 82, AND THEN GO TO LINE 14.

A LINE 14?

Q YES. READ LINES 14 TO 23.

A "NO, I DON'T..."

Q YOU CAN READ IT TO YOURSELF AND TELL ME.

(PAUSE IN PROCEEDINGS.)

THE WITNESS: WHAT DID YOU WANT ME TO COMMENT ON?

BY MR. HURLEY:

Q DO YOU RECALL CONCLUDING THAT ROBERT C. HESTON WAS ON METHAMPHETAMINE?

MR. BURTON: OBJECTION. IT'S NOT IMPEACHING AND NO FOUNDATION.

THE COURT: WELL, I DON'T HAVE IT IN FRONT OF ME SO YOU'RE SUGGESTING THAT IT DOESN'T STATE THAT IN THE TRANSCRIPT?

YOU CAN READ -- HAVING GIVEN THE WITNESS AN OPPORTUNITY TO READ IT, YOU CAN READ HIS TESTIMONY IF YOU WANT.

THE WITNESS: I DON'T SEE HERE WHERE IT SAYS THAT.

(PAUSE IN PROCEEDINGS.)

MR. HURLEY: I'M GOING TO COMMENCE READING AT PAGE 82, LINE 14 TO 23.

"QUESTION: DIDN'T YOU -- WELL, WHEN THE POLICE WERE THERE AND ARRIVED THE FIRST TIME YOU CAME TO THE CONCLUSION THAT BOBBY WAS ON METHAMPHETAMINE, DIDN'T YOU?

"ANSWER: I FIGURED HE WAS ON SOMETHING.

"QUESTION: BUT DIDN'T YOU CONCLUDE HE WAS ON METH?

"ANSWER: I FIGURED THAT SINCE THAT WAS HIS DRUG OF CHOICE, THAT WAS PROBABLY SO.

Q NOW, ONE OF THE REASONS THAT YOU KNEW HE WAS ON METHAMPHETAMINE WAS BECAUSE HE WAS ACTING PARANOID.

THE COURT: NOW, YOU'RE CHANGING IT TO WHAT HE KNEW. IF YOU'RE NOW FRAMING A NEW QUESTION YOU CAN ADOPT THAT HE FIGURED HE WAS OR HE THOUGHT HE WAS BUT YOU CAN'T WITHOUT AN ADOPTION WITH THE FOUNDATION THAT HE KNEW HE WAS.

(PAUSE IN PROCEEDINGS.)

BY MR. HURLEY:

Q DID YOU CONCLUDE HE WAS ON METHAMPHETAMINE BECAUSE HE WAS PARANOID?

A YEAH.

Q NOW, YOU YOURSELF SAID THAT YOU DIDN'T WANT THE POLICE TO BE THERE BECAUSE YOU THOUGHT YOU COULD HANDLE ROBERT HESTON; CORRECT?
A YEAH, I FIGURED BETWEEN ME AND THE DAD WE WOULD CALM HIM DOWN.
Q AND THEN WHEN THE POLICE -- DID YOU HEAR THE POLICE CALL TO TRY TO GET A HOLD OF A POLICE OFFICER?
A NO, I DIDN'T.
Q YOU WEREN'T CLOSE ENOUGH TO HEAR THAT CONVERSATION?
A NO.
Q AND THEN YOU SAW THAT THE POLICE OFFICERS WERE GOING TO LEAVE; CORRECT?
A YEAH.
Q AND WHEN THEY WENT OUT AND STOOD BY THEIR CARS, ROBERT HESTON, ROBERT H. HESTON, THE FATHER, TOLD YOU TO GO TELL HIM TO LEAVE BECAUSE THEY WERE AGITATING HIS SON; CORRECT?
A CORRECT.
Q SO YOU WENT OVER AND TOLD THE POLICE OFFICERS TO PLEASE LEAVE; IS THAT RIGHT?
A YES.
Q NOW, ON THE SECOND CALL YOU SAW ROBERT'S BROTHER-IN-LAW, CURT KASTNER, ON THE STREET;

CORRECT?

A YES.

Q AND HE HAD ACTUALLY BEEN THERE FOR THE FIRST CALL TOO; RIGHT?

A I DON'T RECALL.

Q AND CURT KASTNER DID NOT COME IN THE HOUSE AT ALL BETWEEN THE TIME THE POLICE LEFT THE FIRST TIME AND WHEN THEY CAME BACK THE SECOND TIME; RIGHT?

A NO, I DON'T BELIEVE SO.

Q SO I DIDN'T ASK A VERY GOOD QUESTION.

SO WHERE WAS CURT KASTNER STANDING THE ENTIRE TIME THAT YOU COULD SEE?

A I DIDN'T SEE CURT UNTIL THE SECOND TIME OF THE COPS, UP UNTIL THE TIME HE WAS TASED.

Q BUT YOU WERE INSIDE OF THE HOUSE YOURSELF; RIGHT?

A AFTER -- AFTER HE WAS TASED.

Q BEFORE HE WAS TASED DID YOU EVER GO IN THE HOUSE?

A NO, I WENT UP TO THE DOOR.

Q YOU GOT TO THE FRONT DOOR?

A YEAH.

Q BUT YOU NEVER WENT IN THE HOUSE?

A HUH-UH.

Q NO?

A NO.
Q AND THE REASON YOU NEVER WENT IN THE HOUSE WAS BECAUSE ROBERT C. HESTON WOULD NOT LET YOU GO IN THE HOUSE; RIGHT?
A YEAH.
Q AND HE SEEMED TO BE TRYING TO STAND IN BETWEEN YOU AND HIS FATHER; RIGHT?
A YES.
Q AND YOU SAW HIM KNOCK DOWN HIS FATHER IN A FOOTBALL STYLE SHOVE; CORRECT?
A YES.
Q AND WHEN YOU SAW HIM KNOCK DOWN HIS FATHER, YOU SAID THAT YOU TRIED TO ACT LIKE A RODEO CLOWN AND DISTRACT HIM AWAY FROM HIS FATHER; CORRECT?
A YES.
Q AND YOU ALSO SAY THAT YOU TRIED TO PULL HIM OUT THE DOOR BUT THEN HE STARTED SWINGING AT YOU; RIGHT?
A YES.
Q AND THEN WHEN YOU -- WHEN YOU WENT BACK OUT THE DOOR, YOU SAW HIM KNOCK OVER THE GRANDFATHER CLOCK; RIGHT?
A YES.
Q AND YOU SAW THAT HIS FATHER WAS UPSET BECAUSE HE HAD RECEIVED THAT CLOCK AS A 50 YEAR BIRTHDAY

GIFT; CORRECT?

A YES.

Q AND AFTER ROBERT C. HESTON KNOCKED OVER THE CLOCK YOU STARTED SMASHING -- HE STARTED SMASHING IT?

A I DON'T RECALL.

Q AND DID YOU RECALL SEEING HIM THROWING THINGS AND KNICKKNACKS OUT OF THE DOOR?

A I BELIEVE SO.

Q AND WHEN YOU SAY YOU BELIEVE SO, YOU SAW HIM THROWING THING; RIGHT?

A A COUPLE THINGS, YEAH.

Q AND THEN YOU SAW ROBERT C. HESTON START DRAGGING HIS FATHER ACROSS THE FLOOR BY HIS ARM; RIGHT?

A YES.

Q AND WAS THAT AT THE POINT THAT HE THAT YOU STEPPED IN LIKE A RODEO CLOWN OR DID YOU DO IT TWICE?

A I BELIEVE I DID IT TWICE.

Q AND THAT'S THE SECOND TIME HE KNOCKED DOWN THE FATHER; CORRECT?

A I THINK HE ONLY KNOCKED HIM DOWN ONE TIME.

Q DID YOU SEE HIM KNOCK HIM DOWN AT THE FRONT PORCH?

A NO.
Q AND THEN WHEN YOU SAW HIM KNOCK DOWN HIS FATHER AND TO THE FLOOR, YOU WENT OUTSIDE TO MAKE A 911 CALL; IS THAT CORRECT?
A YEAH.
Q NOW, DOES IT REFRESH YOUR RECOLLECTION THAT WHEN THE POLICE CARS DID ARRIVE HE WAS DRAGGING HIS FATHER ACROSS THE FLOOR?
A IT DOESN'T REFRESH ME.
Q SO YOU SAW HIM DRAGGING HIS FATHER ACROSS THE FLOOR AND BECAUSE YOU SAW THAT YOU WENT OUTSIDE TO MAKE A TELEPHONE CALL; CORRECT?
A I WAS ALREADY ON THE PORCH.
Q AND YOU LEFT THE PORCH AND WENT DOWN BY THE TREE IN THE FRONT YARD; RIGHT?
A YES.
Q AND THE REASON YOU DID THAT IS THAT YOU DIDN'T WANT ROBERT C. HESTON TO SEE YOU CALL THE POLICE?
A I DON'T KNOW. I JUST WANTED TO REMOVE MYSELF FROM THE SCENE. I DON'T THINK HE FIGURED I WAS CALLING THE POLICE.
Q WHY IS THAT?
A BECAUSE HE WAS JUST IRRITATED.
Q AND WHEN YOU HAD ALREADY CALLED THE POLICE, HAD HE ALREADY BROKEN THE FRONT WINDOW?

A I BELIEVE SO.
Q ALL RIGHT. SO THERE WAS A POINT WHEN HE ACTUALLY STEPPED ALL OF THE WAY OUTSIDE AND ROBERT H. HESTON, THE FATHER, SLAMMED THE FRONT DOOR; CORRECT?
A IT GOT SHUT.
Q THE DOOR GOT SHUT?
A YES.
Q AND WAS THERE ANYONE ELSE IN THE HOUSE THAT YOU KNOW OF?
A I DON'T BELIEVE SO, NO.
Q AND YOU WERE OUTSIDE ON THE FRONT LAWN; CORRECT?
A YES.
Q AND WHEN THE DOOR GOT SHUT, ROBERT C. HESTON WAS ENRAGED AND TRIED TO KICK THE DOOR IN; RIGHT?
A I SAW HIM ENRAGED AND I DON'T KNOW ABOUT SEEING HIM KICK THE DOOR.
Q AND YOU DIDN'T SEE HIM KICK THE DOOR?
A I DON'T BELIEVE SO.
Q AND YOU SAW HIM PUNCH THE WINDOW?
A YEAH.
Q AND DESCRIBE THAT.
A HE PUNCHED HIS ARM THROUGH IT.
Q AND DID YOU SEE HIM BLEEDING?

A YEAH.
Q AND WAS HE BLEEDING FROM THE HAND THAT HE STUCK THROUGH THE WINDOW?
A YEAH.
Q THEN YOU SAW THE POLICE OFFICERS ARRIVED AFTER THAT; CORRECT? AND WE HAVE HEARD THAT ON THE 911 CALL?
A YES.
Q AND THERE'S A POINT ON THE 911 CALL WHERE YOU SAY, "OKAY, THEY'VE GOT HIM DOWN." BUT THEN YOU SAY "HE'S PULLING THINGS OUT"?
A HE PULLED THE FIRST TASERS OUT AND THAT'S ALL I THINK HE PULLED OUT.
Q AND THEN HE GOT BACK UP AND WE HAVE HEARD ON THE 911 CALL THAT HE WAS THROWING MORE STUFF OUT THE DOOR; CORRECT?
A YEAH.
Q WE JUST HEARD THE CALL?
A YEAH.
Q AND -- AND THEN YOU TESTIFIED THAT YOU SAW SOME OTHER OFFICERS FIRE SOME TASERS AT HIM AFTER THE FIRST TIME; CORRECT?
A YES.
Q NOW, WHEN THESE OFFICERS -- LET'S CALL IT THE SECOND GROUP THAT FIRED TASERS. YOU KNOW THAT TWO

TASERS WERE FIRED WHILE YOU WERE STANDING OUT ON THE FRONT LAWN; CORRECT?

A YES.

Q AND YOU KNEW THAT THEN THERE WERE THREE OTHER TASERS FIRED A MINUTE OR SO AFTER THAT?

A I WASN'T SURE HOW MANY THERE WAS.

Q BUT YOU SAY THAT THEY BARRAGE TASED HIM; IN FACT, YOU USED THE WORD THEY ROASTED HIM. YOU TOLD THE POLICE THAT; CORRECT?

A YEAH.

Q AND YOU TOLD THE POLICE THAT HE YELLED IN SURPRISE. YOU HEARD HIM YELL; RIGHT?

A YEAH.

Q NOW, LET'S GO BACK.

A BECAUSE HE WAS GOING TO HELP WHOEVER WAS IN THE ATTIC. HE THOUGHT THE POLICE WAS GOING TO HELP HIM.

Q HE KEPT YELLING ABOUT SOMEBODY WITH A GUN IN THE ATTIC; RIGHT?

A YES.

Q AND HE YELLED THAT A NUMBER OF TIMES; RIGHT?

A YES.

Q AND HE KEPT SAYING SOMEONE IS IN THE ATTIC WITH A GUN?

A YES.

Q AND DID YOU SEE HIM MAKE THE HOLE IN THE CEILING BY THE VENT?
A I SAW HIM SWATTING AT A VENT.
Q NOW, WHEN THIS EVENT WAS OVER, A POLICE OFFICER DROVE YOU FIRST TO YOUR FRIEND'S HOUSE TO GET SOME THINGS AND THEN DROVE YOU OVER TO THE POLICE STATION TO BE INTERVIEWED; CORRECT?
A YES.
Q AND DO YOU REMEMBER BEING INTERVIEWED AT THE POLICE STATION?
A YES.
Q AND THIS WAS WITHIN A FEW HOURS OF AFTER THE INCIDENT OCCURRED; CORRECT?
A THREE OR FOUR HOURS. AND YOU KNOW THAT YOU WERE VIDEOED AND AUDIOED WHEN THAT TOOK PLACE, YOU KNOW THAT NOW; RIGHT --
A NO.
Q AND HAVE YOU EVER WATCHED THAT DURING YOUR DEPOSITION?
A NO.
Q AND YOU HAVE NO RECOLLECTION OF EVER WATCHING THAT VIDEO?
A NO.
THE COURT: YOU HAVE TO ANSWER AUDIBLY.
THE WITNESS: NO.

BY MR. HURLEY:

Q NOW, WHEN YOU WERE INTERVIEWED BY THE POLICE, YOU TOLD THE POLICE THAT WHEN THIS SECOND GROUP OF OFFICERS FIRED TASERS, THAT -- THAT HE YELLED IN SURPRISE BUT HE WAS STILL STANDING.

DO YOU REMEMBER TELLING THE POLICE THAT?

A NO, I DON'T.

Q DO YOU REMEMBER SEEING THAT?

A NO, I DON'T.

Q AND AT THAT POINT THE OFFICERS TOLD YOU TO BACK UP AND GET OVER BY THE TREE. DO YOU REMEMBER THE OFFICERS TELLING YOU TO GET OVER BY THE TREE?

A YES.

Q AND AFTER THE THREE OFFICERS IN THE SECOND GROUP FIRED THEIR TASERS, AS YOU RECALL SEEING THREE, ROBERT C. HESTON WAS --

MR. BURTON: OBJECTION. THAT MISSTATES HIS TESTIMONY I THINK.

THE COURT: I'LL SUSTAIN FOR LACK OF FOUNDATION. YOU NEED TO TAKE US BACK, BECAUSE THERE WAS SOME QUESTION IN HIS MIND, AS I RECALL HIS TESTIMONY, WITH RESPECT TO THE NUMBER THAT WAS FIRED.

MR. HURLEY: VERY WELL.

Q YOU SAW THE FIRST TWO OFFICERS AND THEN YOU

SAW OTHER TASERS FIRED. DO YOU HAVE A RECOLLECTION OF HOW MANY TASERS YOU PERSONALLY SAW FIRED BY SECOND GROUP?

A NO, I DON'T.

Q DO YOU KNOW IF IT WAS MORE THAN TWO?

A I DON'T KNOW.

Q DID YOU HEAR THE SOUND OF TASERS?

A I DIDN'T KNOW WHAT THEY SOUNDED LIKE AT THE TIME, BUT I DO NOW.

Q ALL RIGHT. KNOWING WHAT YOU KNOW NOW, DID YOU HEAR TASERS?

A YES.

Q AND DO YOU KNOW HOW MANY TASERS YOU HEARD.

A NO.

Q AND COULD YOU DESCRIBE TASERS BEING OUT?

A YES.

Q AND COULD YOU DESCRIBE HOW MANY TASERS --

THE COURT: YOU MEAN AFTER THE FIRST GROUP?

BY MR. HURLEY:

Q AFTER THE FIRST GROUP?

A NO.

Q AND COULD DO YOU REMEMBER WHO WAS CARRYING A TASER?

A A DARK HAIR AND A MUSTACHE, THE FIRST GUY ON

THE SCENE.

Q NOW, WHEN YOU SAY A DARK HAIR AND A MUSTACHE WITH THE FIRST GUY ON THE SCENE --

A HE WAS THE CLOSEST TO THE DOOR.

Q LET'S GO BACK AGAIN.

DID YOU SEE ROBERT C. HESTON THROW A LONG PIECE OF WOOD AT A POLICE OFFICER?

A NO.

Q YOU HAVE SAID IN THE 911 TAPE THAT YOU THOUGHT ONE OF THE OFFICERS WAS INJURED. DO YOU REMEMBER SAYING THAT?

A YES.

Q AND YOU HEARD THAT JUST NOW?

A YES.

Q AND WHY DID YOU THINK AN OFFICER WAS INJURED?

A I DON'T HAVE ANY IDEA. IT MUST HAVE BEEN SOME REASON AT THE TIME.

Q NOW, WHEN YOU GAVE THE STATEMENT TO THE OFFICERS ON THE AFTERNOON OR EVENING OF THIS EVENT, THE -- THE -- WHAT OCCURRED IN THE EVENT WAS FRESH IN YOUR MEMORY; CORRECT?

A YES.

Q AND YOUR BEST MEMORY WOULD HAVE BEEN IN THAT AFTERNOON AND EVENING AFTER THE EVENT OCCURRED; CORRECT?

A YES.
Q AND NOW, WHEN YOU SAW -- GOING BACK AGAIN, YOU SAW THE ONE TASER, TWO TASER. AND THEN YOU SEE A PAUSE. NOW YOU GO UP TO THREE TASER, NUMBER THREE. YOU SAW AN OFFICER FIRE A TASER; CORRECT?
A YES.
Q AND YOU DON'T KNOW IF YOU SAW ANY MORE OFFICERS FIRE A TASER; CORRECT?
A I DON'T KNOW. I WAS AROUND THE CORNER AT THAT POINT BY THE TREE. THEY ALL WENT INSIDE.
Q AND DID YOU SEE THE TASERS FIRED OUTSIDE ON THE LAWN?
A YES.
Q AND DID YOU -- AND THEN THE SECOND GROUP OF OFFICERS THAT YOU SAY FIRED, WAS THAT GROUP OUTSIDE ON THE LAWN?
A NO, THEY WERE INSIDE AT THE DOORWAY.
Q WELL, WERE THEY INSIDE TOTALLY OR AT THE DOORWAY?
A I COULD SEE THE BACKS OF THEM.
Q HOW MANY BACKS COULD YOU SEE?
A FOUR, FIVE.
Q AND DO YOU RECALL TELLING THE POLICE THAT WHEN THE OFFICERS WENT INSIDE, THEY TASED HIM AGAIN?
A YES.

Q AND BY SAYING "AGAIN," YOU SAW SOMEONE TASE HIM SOMEWHERE NEAR THE THRESHOLD AND THEN YOU SAW SOMEBODY ELSE TASE -- AN OFFICER, INSIDE OF THE HOUSE; CORRECT?

A YES.

Q AND SO YOU SAW AT LEAST TWO TASERS AFTER THE FIRST GROUP?

A YES.

Q AND YOU TOLD THE POLICE THAT HESTON WAS PULLING THE PROBES OUT AND THROWING THEM BACK WHEN THE SECOND OFFICER TASED HIM. DO YOU REMEMBER TELLING THEM THAT?

A NO.

Q DID YOU NOT SEE THAT OR YOU DON'T REMEMBER SEEING IT?

A I DON'T THINK I SAW IT.

Q DO YOU KNOW WHY YOU WOULD TELL THE POLICE THAT?

A NO.

Q AND THEN YOU WENT AROUND TO THE BACK-DOOR TO GO INTO THE KITCHEN; CORRECT?

A RIGHT.

Q AND BY THE TIME THAT YOU GOT TO THE BACK-DOOR AND WENT INSIDE OF THE KITCHEN, YOU LOOKED OUT IN THE LIVING ROOM AND YOU SAW POLICE OFFICERS TRYING

TO RESUSCITATE ROBERT HESTON; DO YOU REMEMBER THAT?
A NO.
Q DO YOU RECALL TELLING THE POLICE THAT?
A NO.
Q IS THERE SOME REASON WHY -- WHY -- WITHDRAW THAT.
AS YOU SIT HERE TODAY, DO YOU NOT HAVE A RECOLLECTION OF SEEING THE POLICE TRYING TO RESUSCITATE, OR IS IT YOUR TESTIMONY THAT THE POLICE DID NOT TRY TO RESUSCITATE?
A I HAVE NO RECOLLECTION OF IT.
Q BUT YOUR RECOLLECTION WAS GOOD ON THE AFTERNOON AFTER THE EVENT; CORRECT?
A YES.
Q NOW, WHAT YOU SAW, THE WAY YOU SAW ROBERT C. HESTON ACTING THAT DAY WAS VERY UNUSUAL TO YOU, WASN'T IT?
A YES.
Q AND YOU TESTIFIED THAT YOU HAVE SEEN HUNDREDS OF PEOPLE ON METHAMPHETAMINE AND ROBERT C. HESTON THAT DAY WAS DIFFERENT THAN ALL OF THE HUNDREDS YOU HAD SEEN BEFORE; CORRECT?
A YES.
Q AND YOU YOURSELF HAVE TAKEN METHAMPHETAMINE COUNTLESS TIMES, OVER A HUNDRED, AND WHAT YOU SAW

IN HIM THAT DAY WAS TOTALLY DIFFERENT THAN YOU EVER EXPERIENCED; CORRECT?

A YES.

MR. HURLEY: YOUR HONOR, AT THIS TIME I WOULD LIKE TO PLAY A PORTION OF THE POLICE INTERVIEW OF MR. SATREE, AND I HAVE TRANSCRIPTS.

THE COURT: ALL RIGHT. AND SO HOW ARE WE MARKING -- IS THIS ALSO ON A TAPE OR A CD OF SOME SORT?

MR. HURLEY: IT IS A DVD.

THE COURT: ALL RIGHT. HOW IS IT MARKED?

MR. HURLEY: THE DVD ITSELF IS EXHIBIT 206 AND THE TRANSCRIPT WOULD BE TRANSCRIPT FOR EXHIBIT 206.

IT WILL TAKE ME ABOUT THREE MINUTES TO HAND OUT THE TRANSCRIPTS AND MAKE SURE IT STARTS. IT WOULDN'T RUN THROUGH THIS.

THE COURT: CERTAINLY. GO AHEAD AND DO IT. WE'LL STAY IN PLACE. WE'RE NOT GOING TO LEAVE JUST TO HAVE YOU SET THIS UP.

MR. HURLEY: ALL RIGHT.

THE COURT: WOULD YOU GIVE A TRANSCRIPT FOR THE JURY. IS THERE ENOUGH FOR THE JURY?

MS. MATCHAM: YES, I BELIEVE.

(WHEREUPON, PLAINTIFFS' EXHIBIT NUMBER 206,

HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WAS ADMITTED INTO EVIDENCE.)

MS. MATCHAM: YOUR HONOR, IF I MAY APPROACH, I THINK THIS IS FOR YOU.

THE COURT: AH.

(PAUSE IN PROCEEDINGS.)

MR. HURLEY: YOUR HONOR, I WOULD REQUEST THAT THE JURY AND THE COURT TURN TO THE TRANSCRIPT, PAGE 25, LINE 20.

THE COURT: VERY WELL.

MR. HURLEY: AND THE FILM SHOULD BE IN FROM THERE.

MR. BURTON: I'M SORRY, I WOULD LIKE THE WHOLE PASSAGE THAT HE IS GOING TO PLAY AND MAKE AN OBJECTION THAT IT IS HEARSAY.

THE COURT: PARDON ME?

MR. BURTON: I WOULD LIKE TO HAVE THE WHOLE PASSAGE HE'S GOING TO PLAY TO MAKE AN OBJECTION BECAUSE IT'S HEARSAY AND IT WOULD ONLY COME IN AS IMPEACHMENT.

THE COURT: I DIDN'T UNDERSTAND THE FIRST PART.

HE IS PERMITTED, FOR PURPOSES OF IMPEACHING THE WITNESS, TO PLAY AN INCONSISTENT

STATEMENT. HE DOESN'T HAVE TO PLAY THE WHOLE THING. HE COULD PLAY ANY PART OF IT, BUT I DON'T UNDERSTAND THE OBJECTION, QUITE FRANKLY.

MR. BURTON: I JUST DON'T KNOW WHAT THE WHOLE PASSAGE IS THAT HE IS PLAYING.

I'M ASKING MR. HURLEY IF COUNSEL COULD IDENTIFY WHAT HE'S GOING TO PLAY.

THE COURT: HE'S TURNED US TO PAGE 25, LINE 20 AND YOU WANT TO KNOW TO HOW FAR HE'S GOING TO -- I THOUGHT THIS WAS ALL IN EVIDENCE BY STIPULATION. THERE WAS NO OBJECTION TO THE WHOLE THING SO I'VE GOT THE WHOLE TRANSCRIPT IN EVIDENCE AT THIS POINT.

MR. BURTON: I'M SORRY IF THAT HAPPENED. I THOUGHT IT WAS ONLY THE EXCERPTS THAT HE WAS GOING TO ADMIT AS INCONSISTENT STATEMENTS THAT WERE COMING IN. I'M SORRY IF I MISUNDERSTOOD THAT, YOUR HONOR.

THE COURT: WHAT IS -- WHAT IS 206?

MR. HURLEY: 206 IS THE POLICE INTERVIEW OF CLIFFORD SATREE.

THE COURT: THE ENTIRE TRANSCRIPT?

MR. HURLEY: YES, IT IS.

THE COURT: AND ARE YOU OBJECTING TO THE TRANSCRIPT?

MR. BURTON: WE OBJECT TO THE TRANSCRIPT IN TERMS OF HEARSAY. CERTAIN PASSAGES MAY BE INCONSISTENT IN COMING IN AS IMPEACHMENT.

THE COURT: WELL, IT SEEMS THAT I NEED TO TAKE CARE OF THAT OUT OF THE PRESENCE OF THE JURY IN ANOTHER WAY, BECAUSE THEY HAVE BEEN GIVEN AN ENTIRE TRANSCRIPT.

WHY DON'T YOU PAY ATTENTION AT THIS POINT TO ONLY THE PORTION OF THE TRANSCRIPT THAT IS BEING PLAYED FOR YOU, MEMBERS OF THE JURY, AND DON'T TURN YOUR ATTENTION TO ANY OTHER PORTION UNTIL I HAVE GIVEN YOU PERMISSION TO DO SO.

WHAT IS THE INCLUSIVE PORTION THAT YOU'RE GOING TO PLAY FOR COUNSEL? STARTING ON PAGE 25, LINE 20 TO WHEN?

MR. HURLEY: AT THIS POINT IT WOULD BE, YOUR HONOR, PAGE 23, LINE 7 OF THE TRANSCRIPT.

THE COURT: SO ALL OF THE MATERIAL BETWEEN THE BEGINNING PART AND PAGE 23, LINE 7. VERY WELL.

MR. BURTON: COULD I HAVE A MOMENT, YOUR HONOR?

(PAUSE IN PROCEEDINGS.)

(WHEREUPON, AN AUDIOTAPE WAS PLAYED IN OPEN COURT, OFF THE RECORD.)

THE COURT: I HEAR SOME AUDIO. HAVE YOU NOW STARTED IT?

MR. HURLEY: NO, YOUR HONOR. I JUST AM MAKING SURE.

THE COURT: OH, OKAY.

(PAUSE IN PROCEEDINGS.)

THE COURT: ARE YOU WAITING FOR IT TO CUE UP OR SOMETHING?

MR. HURLEY: NO, IT'S READY TO CUE UP.

MR. BURTON: IF I COULD HAVE A FEW MORE MINUTES, YOUR HONOR.

THE COURT: I HAVE SATISFIED MYSELF THAT THIS IS IN THE AREA, THE SAME AREA THAT THE WITNESS HAS TESTIFIED.

SO ANY OBJECTION TO PROCEEDING AT THIS POINT IS OVERRULED SUBJECT TO MY GIVING THE JURY INSTRUCTIONS TO DISREGARD PORTIONS OF IT, IT DOES SEEM TO ME THAT IN THE INCLUSIVE PORTION IT RELATES TO HIS TESTIMONY HERE ON DIRECT AND EARLIER ON CROSS-EXAMINATION.

MR. BURTON: I HAVE NO OBJECTION.

THE COURT: YOU MAY PROCEED.

YOU MIGHT WANT TO ADJUST THE SOUND SO YOU HAVE LESS BASS AND MORE TREBLE.

(WHEREUPON, AN AUDIOTAPE WAS PLAYED IN

OPEN COURT, OFF THE RECORD.)

THE COURT: ARE YOU AT MAXIMUM VOLUME ON BOTH YOUR COMPUTER AND THE SYSTEM?

(WHEREUPON, AN AUDIOTAPE WAS PLAYED IN OPEN COURT, OFF THE RECORD.)

THE COURT: NOW, YOU HAD US MARKED TO THAT POINT. ARE YOU GOING TO CONTINUE TO PLAY IT?

BY MR. HURLEY:

Q NOW, MR. SATREE, WHEN YOU WENT AND LOOKED IN THE FRONT DOOR, YOU SAW THAT ROBERT C. HESTON WAS DOWN ON THE FLOOR; IS THAT RIGHT?

A YEAH.

Q SO --

THE COURT: SIT FORWARD, SIR, SO WE HAVE THE BENEFIT OF THE MICROPHONE.

THE WITNESS: YES.

THE COURT: THANK YOU.

BY MR. HURLEY:

Q SO YOU TRAVELLED FROM WHERE YOU WERE BY THE TREE UP TO THE FRONT DOOR, AND YOU LOOKED IN THE FRONT DOOR, AND THEN YOU WENT BACK AROUND THE HOUSE TO GET TO THE KITCHEN?

A YES.

MR. HURLEY: THANK YOU. NOTHING FURTHER, YOUR HONOR.

THE COURT: ANY QUESTIONS FROM COUNSEL FOR TASER?

MS. O'LINN: BRIEFLY, YOUR HONOR.

CROSS-EXAMINATION

BY MS. O'LINN:

Q GOOD AFTERNOON, MR. SATREE.

A GOOD AFTERNOON.

Q IMMEDIATELY AFTER THIS INCIDENT, WHAT HAPPENED TO YOU?

A TO ME?

Q YES. YOU WENT BACK TO PRISON, DIDN'T YOU?

A I NEVER HAD BEEN TO PRISON BEFORE.

Q YOU WENT TO PRISON?

A YEAH.

Q AND HOW LONG WERE YOU THERE?

A EIGHT MONTHS OR NINE MONTHS.

Q AND YOU WERE ARRESTED BY THE SALINAS POLICE DEPARTMENT IN THE PAST; CORRECT?

A YEAH.

Q OKAY. AND WHILE YOU WERE IN PRISON, DID YOU EVER DISCUSS WITH ANYONE WHAT HAD HAPPENED TO YOUR FRIEND BOBBY?

A I DON'T RECALL.

Q DID YOU HAVE -- DID YOU HAVE ANY EXPERIENCE IN PRISON WITH -- WITH DISCUSSIONS ABOUT -- ABOUT HOW

TASERS WORK?

A NO.

Q NOT WITH OTHER PRISONERS ABOUT HOW --

A NO.

Q -- ABOUT HOW TO BREAK WIRES OFF YOUR BODY --

A NO.

Q -- IF YOU'RE SHOT WITH A TASER?

A NO.

Q AND AT THE END OF YOUR CALL TO THE POLICE DEPARTMENT YOU SAID THAT, IF YOU RECALL, THAT HE'S NOT GIVING UP; IS THAT CORRECT?

A YES.

Q AND WHY DID YOU SAY THAT?

A BECAUSE HE WAS STILL MAKING NOISE AND MOVING AROUND.

Q OKAY. AND THAT WAS RIGHT BEFORE THE TELEPHONE CALL ENDED; CORRECT?

A YES.

MS. O'LINN: THANK YOU, YOUR HONOR. NOTHING FURTHER.

THE COURT: VERY WELL. ANY REDIRECT?

MR. BURTON: NO, YOUR HONOR. THANK YOU. I WOULD ASK THAT THE WITNESS BE EXCUSED.

THE COURT: VERY WELL.

MR. HURLEY: THE WITNESS WAS UNDER

SUBPOENA AND HE'S NOW EXCUSED.

THE COURT: VERY WELL. YOU'RE NOW EXCUSED, SIR. YOU'RE FREE TO GO OR YOU'RE FREE TO REMAIN AS A MEMBER OF THE AUDIENCE TO WATCH THE TRIAL. IT'S UP TO YOU, BUT YOU'RE FREE TO GO.

THE WITNESS: THANK YOU.

THE COURT: THANK YOU.

MR. BURTON: WE'LL RESUME WITH OFFICER FAIRBANKS.

THE COURT: HOW ARE YOU DOING? ORDINARILY I TAKE A BREAK AT AROUND 2:30 OR SO. SO LET'S HAVE THE OFFICER BACK.

VERY WELL. OFFICER FAIRBANKS, PLEASE RETURN TO THE STAND. I'LL REMIND YOU THAT YOU HAVE ALREADY BEEN SWORN IN THIS MATTER.

MR. WILLIAMSON: THANK YOU, YOUR HONOR.

AS-ON CROSS-EXAMINATION (RESUMED)

BY MR. WILLIAMSON:

Q YOU CAN PUT THAT ASIDE, OFFICER FAIRBANKS.

WELL, GOOD AFTERNOON, OFFICER FAIRBANKS.

A GOOD AFTERNOON.

MR. WILLIAMSON: WE HAVE COMPLETE FAITH IN THE SYSTEM, YOUR HONOR, WE JUST DON'T HAVE FAITH IN OURSELVES, BUT I THINK I HAVE GOT IT STRAIGHT HERE SO LET'S HOPE IT WORKS.

Q OFFICER FAIRBANKS, THIS MORNING WHEN WE LEFT OFF I WAS ABOUT TO SHOW YOU A VIDEO.

WHAT I WOULD LIKE TO DO AGAIN, TO REPEAT THIS MORNING, WAS IF WE COULD SPECIFICALLY FOCUS ON THE CALVES OF THE INDIVIDUAL AND THEN I'M GOING TO ASK YOU A QUESTION ABOUT THAT.

A OKAY.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT, OFF THE RECORD.)

BY MR. WILLIAMSON:

Q DO YOU RECALL SEEING THAT USE VIDEO DURING YOUR TRAINING?

A YES.

Q AND DO YOU KNOW IF, FOR EXAMPLE, THAT WAS A POLICE OFFICER?

A I DON'T KNOW THAT FOR SURE. I WOULD ASSUME.

Q AND THEN YOU RECALL THEN IN THAT PARTICULAR USE VIDEO THAT THE INDIVIDUAL WAS SUBJECTED TO A FULL ONE FIVE-SECOND DISCHARGE WITH TWO TASERS. DO YOU RECALL THAT?

A YES.

Q OKAY. NOW, DID YOU HAPPEN TO OBSERVE HIS CALF MUSCLES AS I DIRECTED YOU TO DO DURING THAT?

A YES.

Q AND YOU SAW THE PRETTY VIOLENT SHAKING OF HIS CALF MUSCLE, THE CONTRACTION OF THE CALF MUSCLE?
A YES.
Q AND WAS THAT YOUR EXPERIENCE WHEN YOU WERE SUBJECTED TO THE TASER DISCHARGE?
A SOMEWHAT. IT APPEARS HE MIGHT BE TAPPING HIS TOES AS WELL, VOLUNTARILY.
Q OKAY. LET ME ASK YOU THIS: IN YOUR EXPERIENCE, YOU HAVE USED A TASER IN THE FIELD?
A YES.
Q AND IN YOUR TRAINING HAVE YOU ALSO SUBJECTED PEOPLE OR OTHER OFFICERS TO OFFICERS WITH TASERS?
A YES.
Q AND IN YOUR EXPERIENCE, WHETHER IT BE OUT IN THE FIELD OR IN YOUR TRAINING, THAT PEOPLE WHO ARE SUBJECTED TO TASER DISCHARGES HAVE SEVERE MUSCLE CONTRACTIONS THAT YOU'RE ABLE TO OBSERVE THAT?
A YES.
Q NOW, WHEN YOU WERE SPECIFICALLY SUBJECTED TO A TASER DISCHARGE DURING YOUR TRAINING, WOULD IT BE CORRECT TO SAY THAT YOU COULDN'T MOVE YOUR ARMS OR LEGS?
A ONE OF THE INSTANCES.
Q OKAY. AND THE INSTANCE WOULD BE THE ONE WHERE BOTH PROBES WERE ATTACHED TO YOU; CORRECT?

A CORRECT.
Q NOW, I WANT TO SHOW YOU THE NEXT SLIDE ENTITLED "PROPULSION SYSTEM."
FIRST OF ALL, DO YOU RECOGNIZE THIS SLIDE?
A YES.
Q AND AS I UNDERSTAND IT, WHEN YOU FIRST FIRE THE M26, ESSENTIALLY THE FRONT CARTRIDGE OPENED, A DOOR OPENED, I GUESS, AND TWO PROBES WITH WIRES FLY OUT THE FRONT; RIGHT?
A CORRECT.
Q AND YOU -- YOU -- I'M NOT SURE IF WE COVERED THIS THIS MORNING, BUT THE MAXIMUM RANGE OF THE WIRES IS 21 FEET; CORRECT?
A YES.
Q AND DO YOU RECALL FROM YOUR TRAINING THAT THE PROBES FIRE AT A LITTLE OVER 160 FEET PER SECOND?
A YES.
Q AND THE DARTS THEMSELVES, THEY'RE PRETTY SHARP, THEY HAVE A SHARP POINT AT THE END; CORRECT?
A YES.
Q AND THEY HAVE ALSO KIND OF A BARB SIMILAR TO A FISH HOOK?
A CORRECT.
Q THAT'S PART OF THAT PROBE; CORRECT?

A YES.
Q AND OBVIOUSLY -- WELL, STRIKE THAT.
THE PURPOSE, AS YOU UNDERSTAND IT FROM YOUR TRAINING, IS THAT THE POINT OF THE DART IS SO SHARP IS THAT IT'S MEANT TO STICK INTO EITHER CLOTHING OR SKIN; CORRECT?
A CORRECT.
Q NOW, AS PART OF YOUR TRAINING OF YOUR FELLOW OFFICERS IN THE SALINAS POLICE DEPARTMENT, DO YOU TRAIN THEM WITH WHAT THE EFFECTIVE RANGE OF THE TASER M26 IS?
A THE EFFECT OF THE RANGE? YES.
Q AND WHAT IS THAT?
A 12 TO 18 FEET.
Q OKAY.
A IDEAL EFFECTIVE RANGE I SHOULD SAY.
Q WELL, I WAS GOING TO ASK YOU AND THAT WOULD BE A DIFFERENT WORD, AND THAT WOULD BE OPTIMUM?
A OPTIMUM, OKAY.
Q AND WOULD THE OPTIMUM RANGE OF THAT -- HOW MANY FEET?
A 12 TO 18 FEET.
Q AND WHY IS THE OPTIMUM RANGE OF THE TASER LESS THAN THE 21 FEET OF THE WIRE? WHY IS THAT LESS?
A WELL, I BELIEVE 18 FEET IS GETTING TOWARDS THE

END BY BEING AT THE MAXIMUM DISTANCE THERE COULD BE FAILURES SUCH AS AN INDIVIDUAL FALLING BACKWARD AND REMOVING THE -- THE PROBES FROM THEMSELF OR WIRES BREAKING.

Q SO, IN OTHER WORDS, IF A PERSON, FOR EXAMPLE, IS CLOSE TO THE MAXIMUM RANGE OF THE 21 FEET AND -- AND DUE TO THE TASER DISCHARGE THEY FALL BACKWARDS, THAT'S PROBABLY GOING TO EITHER BREAK THE WIRES OR THE PROBES ARE GOING TO COME OUT OF THAT PERSON.

IS THAT A FAIR STATEMENT?

A SURE.

Q NOW, ALSO AS PART OF YOUR TRAINING WERE YOU TAUGHT THAT WHEN A PROBE STRIKES A PERSON THAT IT ESSENTIALLY CAUTERIZES OR BURNS THE SKIN AND LEAVES A VERY DISTINCT MARK ON THE SKIN?

A YES.

Q I'D LIKE TO SHOW YOU THE NEXT SLIDE THEN. WELL, WE HAVE ALREADY TALKED ABOUT THIS.

OKAY. DO YOU RECOGNIZE THIS SLIDE FROM YOUR VERSION 8 POWER POINT TRAINING?

A YES.

Q AND I'D LIKE TO FOCUS YOU ON THE RIGHT SIDE OF THE SLIDE. YOU SEE THE BOTTOM WHERE THE GENTLEMAN APPEARS TO HAVE TWO CIRCULAR RED MARKS ON HIS BACK?

A YES.

Q AND THOSE WOULD BE CONSISTENT WITH A -- WOULD THEY NOT, WITH A PERSON WHO HAS BEEN SHOT WITH A TASER AND THAT'S THE RESIDUAL MARK THAT IS LEFT AFTERWARDS; RIGHT?

A YES.

Q AND, IN FACT, THIS -- THIS SLIDE WAS IN THE PRESENTATION TO DEMONSTRATE FOR PEOPLE LIKE YOURSELF WHAT YOU COULD EXPECT TO -- TO OBSERVE WHEN YOU SHOT SOMEBODY WITH A TASER AND THE MARK THAT IT LEFT; RIGHT?

A YES.

Q NOW, LET'S GO ON TO THE NEXT SLIDE, IF I COULD. I WANT TO TALK ABOUT THE CYCLING OF THE DEVICE AND HOW THAT WORKS.

BASED ON YOUR TRAINING, WAS IT YOUR UNDERSTANDING THAT THE DEVICE AUTOMATICALLY CYCLES WHEN THE TRIGGER IS DEPRESSED FOR FIVE SECONDS?

A YES.

Q AND WHAT HAPPENS WHEN YOU DEPRESS THE TRIGGER, LET'S SAY, DURING THE FIRST SECOND OR TWO, WHAT HAPPENS IN TERMS OF THE SITE?

A IF YOU ONLY HOLD IT FOR THE FIRST TWO SECONDS --

Q I'M SORRY, I DIDN'T MEAN TO INTERRUPT YOU.

LET'S ASSUME SOMEONE HOLDS THE TRIGGERS

OR PRESSES IT OR LET'S GO OF THE TRIGGER AFTER A SECOND OR SO, WHAT HAPPENS TO THE DEVICE?

A IT WOULD CYCLE FOR ABOUT FIVE SECONDS.

Q SO REGARDLESS, DURING THAT FIVE-SECOND PERIOD, REGARDLESS OF HOW LONG YOU PRESS THE TRIGGER, THE DEVICE CONTINUES TO CYCLE; CORRECT?

A CORRECT.

Q FOR FIVE SECONDS?

A RIGHT.

Q AND WHAT HAPPENS WHEN YOU CONTINUE TO -- TO DEPRESS THE DEVICE; IN OTHER WORDS, YOU DEPRESSED THE TRIGGER AND YOU HOLD IT DOWN, WHAT HAPPENS TO THE DEVICE?

A IT WOULD CONTINUE TO CYCLE.

Q I WANT TO GO ON TO THE NEXT SLIDE TO SHOW YOU.

NOW, WERE YOU TAUGHT DURING YOUR TRAINING THAT THE TASER CYCLE, WHEN IT MAKES GOOD CONTACT WITH THE PERSON, IS RELATIVELY QUIET?

A YES.

Q BUT NONETHELESS, YOU CAN STILL HEAR THE TASER CYCLING; TRUE?

A TRUE.

Q AND YOU CAN HEAR A VERY DEFINITE CLICKING SOUND WHEN THE DEVICE WAS IN CONTACT WITH THE PERSON AND IS STILL CYCLING; RIGHT?

A YES.
Q OKAY. LET ME SHOW YOU THE NEXT VIDEO. HOLD ON JUST A SECOND.
WELL, LET'S TAKE A LOOK AT THIS VIDEO AND THEN I'LL ASK YOU SOME QUESTIONS ABOUT IT.
(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT, OFF THE RECORD.)
BY MR. WILLIAMSON:
Q OKAY. OFFICER FAIRBANKS, DO YOU AGREE THAT THIS PARTICULAR SET OF VIDEOS WAS MEANT TO DESCRIBE THE SITUATION WHERE -- WHERE THE CONTACT WAS A GOOD CONTACT WITH THE PERSON AND TO DEMONSTRATE WHAT THE SOUND OF THE DEVICE WOULD BE WITH THIS GOOD CONTACT?
A YES.
Q AND WOULD YOU ALSO AGREE THAT IN EACH ONE OF THE VIDEOS THAT YOU JUST SAW, THAT THE CLICKING SOUND OF THE DEVICE IS VERY AUDIBLE, THAT YOU COULD HEAR THAT QUITE EASILY?
A YES.
Q NOW, OFFICER FAIRBANKS, DO YOU AGREE THAT THE TASER IS DESIGNED TO INCAPACITATE A PERSON?
A YES.
Q AND AFTER A PERSON IS INCAPACITATED BY THE DEVICE, WOULD YOU AGREE THAT HE'S THEN IN A

POSITION, HE OR SHE IS IN A POSITION TO BE TAKEN INTO CUSTODY AT THAT POINT?

A IDEALLY.

Q OKAY. AT THIS POINT I WANT TO SHOW YOU THE NEXT SLIDE WHICH IS ENTITLED "TACTICAL CONSIDERATIONS."

DO YOU RECOGNIZE THIS SLIDE?

A YES.

Q AND THE SLIDE INDICATES THAT A FULL FIVE-SECOND DEPLOYMENT SHOULD BE APPLIED WITHOUT INTERRUPTION. WELL, THAT'S AUTOMATIC WITH THE DEVICE; CORRECT?

A YEAH.

Q AND IT REFERS TO THE, TO THE -- TO SOMETHING CALLED THE WINDOW OF OPPORTUNITY.

WHAT DO YOU UNDERSTAND THE WINDOW OF OPPORTUNITY TO BE?

A THE WINDOW OF OPPORTUNITY, AS WE TRAIN, WOULD BE THE POINT IN TIME WHERE THE FIVE-SECOND CYCLE IS CYCLING AND -- AND THE INDIVIDUAL OR SUSPECT IS INCAPACITATED TO GAIN A POSITION OF ADVANTAGE TO FACILITATE HANDCUFFING AT THE END OF THAT FIVE-SECOND CYCLE.

Q WOULD YOU AGREE THAT THE PURPOSE OF THE TASER DEPLOYMENT IS TO CONTROL A SUBJECT AND GET HIM INTO

RESTRAINTS AS QUICKLY AS POSSIBLE?
A NOT NECESSARILY. CHANGING A SITUATION, THAT MAY NOT BE ABLE TO OCCUR.
Q BUT WHEN YOU WANT TO RESTRAIN A PERSON, YOU WANT TO GET THEM INTO CUFFS AS QUICKLY AS YOU CAN; RIGHT?
A YES.
Q AND -- AND ONCE THE PERSON IS INCAPACITATED BY THE TASER, YOU WANT TO MOVE IN AS QUICKLY AS YOU CAN, AS YOU SAID, GAIN A POSITION OF ADVANTAGE, AND CUFF THAT PERSON; CORRECT?
A YES.
Q WOULD YOU AGREE THAT -- THAT IDEALLY WHEN AN OFFICER DEPLOYS HIS TASER, THERE SHOULD BE OTHER OFFICERS PRESENT WHO -- WHO CAN GAIN THIS POSITION OF ADVANTAGE TO PUT A PERSON IN RESTRAINTS?
A IDEALLY, YES.
Q SO ASSUMING THAT YOU HAVE DRAWN YOUR TASER AND FIRED IT AT A PERSON, THE NEXT THING YOU WOULD WANT TO DO IS GAIN THAT POSITION OR GET INTO THAT POSITION OF ADVANTAGE WHILE THE PERSON IS INCAPACITATED AND THEN TAKE THEM INTO CUSTODY, IDEALLY?
A ARE YOU SPEAKING A PERSON BEING ME HAS -- HAS TASED SOMEONE?

Q RIGHT.
A WELL, NO, I WOULD BE HOLDING THE TASER --
Q OKAY. I'M SORRY. I DON'T MEAN TO TALK OVER YOU, AND I APOLOGIZE TO THE COURT FOR DOING THAT.
WHAT I MEAN TO SAY IS THAT LET'S ASSUME THAT YOU'RE THE PERSON USING THE TASER AND YOU HAVE A GROUP OF OTHER OFFICERS PRESENT WHO ARE AVAILABLE TO TAKE A PERSON INTO CUSTODY. IDEALLY THE SITUATION WOULD BE THAT YOU WOULD FIRE YOUR TASER AND YOU WOULD INCAPACITATE THAT PERSON; RIGHT?
A YES.
Q AND THEN THE TEAM OF OTHER OFFICERS WOULD MOVE IN AND RESTRAIN THE PERSON AND EVENTUALLY HANDCUFF THEM; CORRECT?
A YES. YES.
Q WOULD IT BE FAIR TO SAY, OFFICER FAIRBANKS, THAT, IN FACT, AS A TRAINING INSTRUCTOR YOU TRAIN OTHER POLICE OFFICERS; THAT -- THAT ONCE A PERSON HAS BEEN SHOT WITH A TASER, AND FALLEN TO THE GROUND, THAT THEY SHOULD MOVE IN AS QUICKLY AS POSSIBLE AND GAIN THIS POSITION OF ADVANTAGE TO TAKE THE PERSON INTO CUSTODY. THAT'S, IN FACT, WHAT YOU TRAIN OTHER OFFICERS?
A TO GET INTO A POSITION TO, YES.
Q I WANT TO SHOW YOU THE NEXT SLIDE.

THIS IS ACTUALLY A VIDEO. AND I WANT YOU TO SPECIFICALLY, AS WE TALK ABOUT THIS VIDEO IN A SECOND, I WANT YOU TO FOCUS --

YOU CAN SEE THIS GENTLEMAN IN THE VIDEO; RIGHT?

A YES.

Q AND HE OBVIOUSLY IS A POLICE OFFICER. DO YOU RECOGNIZE HIM BY THE WAY?

A DO I RECOGNIZE HIM PERSONALLY?

Q YEAH.

A NO.

Q AND YOU CAN SEE HE'S A PRETTY MUSCLED INDIVIDUAL. DO YOU AGREE WITH THAT?

A YES.

Q AND LET'S WATCH THE VIDEO, AND I SPECIFICALLY WANT TO FOCUS YOU ON THE GENTLEMAN'S ARMS. OKAY?

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT, OFF THE RECORD.)

BY MR. WILLIAMSON:

Q OKAY. NOW, DID YOU NOTICE THIS HEAVILY MUSCLED INDIVIDUAL, THE KIND OF -- AS SOON AS HE GOT SHOT WITH THE TASER HIS ARMS WENT IN LIKE THIS AND HIS FISTS WERE CLINCHED AND HE BASICALLY STAYED IN THAT POSITION UNTIL HE FELL TO THE GROUND.

IS THAT ACCURATE?

A YES.
Q AND -- AND WOULD THAT BE CONSISTENT WITH THE TRAINING THAT YOU HAVE HAD THAT WHEN A PERSON IS -- IS SHOCKED WITH A TASER THAT THE MUSCLE CONTRACTIONS IMMEDIATELY CAUSE ARMS TO BE VERY UNRIGID?
A SOMETIMES.
Q OKAY. AND IN YOUR EXPERIENCE WHEN YOU WERE GOING THROUGH THE TRAINING CLASS AND YOU WERE TASED, DID YOUR ARMS BECOME RIGID?
A ONE OF THEM ON THE SECOND APPLICATION.
Q OKAY. HAVE YOU HAD THE EXPERIENCE OF -- OF BEING IN THE FIELD WHERE YOU HAVE DEPLOYED YOUR TASER WHERE, WHERE A PERSON'S ARMS WILL BECOME RIGID ALMOST IMMEDIATELY AS SOON AS THEY'RE SUBJECTED TO A TASER DISCHARGE?
A YES.
Q AND, IN FACT, THAT'S THE EFFECT THAT YOU WANT, ISN'T IT?
A YEAH.
Q AND WHEN THE TASER IS EFFECTIVE, IT'S INTERRUPTING THE BRAIN'S ABILITY TO CONTROL THE MUSCLES, CAUSING THOSE MUSCLES TO BE AFFECTED BY THE -- BY THE SIMULTANEOUS CONTRACTIONS OF THE MUSCLES; RIGHT?

A YES.
Q AND AGAIN, BASED ON YOUR EXPERIENCE, YOUR TRAINING AND EXPERIENCE IN THE FIELD, IT'S TYPICAL THAT WHEN A PERSON IS SUBJECTED TO A TASER, THEY FALL TO THE GROUND VERY QUICKLY?
A NOT NECESSARILY.
Q WELL, I'M NOT SAYING IN ALL CASES BUT I'M SAYING GENERALLY MOST PEOPLE, IN FACT, THE VAST MAJORITY OF PEOPLE SUBJECTED TO TASER CHARGE, GO DOWN ALMOST IMMEDIATELY?
A YES.
Q AND, IN FACT, WHEN I SHOWED YOU THE VIDEOS EARLIER OF THE POLICE OFFICERS THAT WERE ALL TASED, EACH ONE OF THEM WENT DOWN, DIDN'T THEY?
A OR ASSISTED TO THE GROUND, YES.
Q I WANT TO MOVE ONTO THE NEXT SLIDE. WHOOPS. WE JUST SKIPPED A FEW.

BEAR WITH ME. COULD I HAVE A MOMENT, YOUR HONOR?

I WANT TO SHOW YOU THIS NEXT SLIDE. I ACTUALLY WAS RIGHT. I THOUGHT WE SKIPPED ONE. EFFECTS OF THE M26.

NOW, THIS SLIDE DESCRIBES SOME OF THE COMMON EFFECTS THAT A PERSON EXPERIENCES WHEN THEY ARE SUBJECT TO A DISCHARGE; CORRECT?

A YES.
Q AND THE FIRST LINE IS THAT SUBJECT CAN FALL IMMEDIATELY TO THE GROUND. THAT'S JUST WHAT WE HAVE BEEN TALKING ABOUT; RIGHT?
A YES.
Q AND YOU'LL HEAR OFTEN PEOPLE SCREAM BECAUSE THE PAIN ASSOCIATED WITH THE DEVICE; RIGHT?
A OBVIOUSLY, YES.
Q AND OBVIOUSLY INVOLUNTARY MUSCLE CONTRACTIONS, WE HAVE ALREADY TALKED ABOUT THAT. I WANT TO NOW SHOW YOU -- I WANT TO SHOW YOU AGAIN SOME MORE USE VIDEOS FROM THE TRAINING, AND I'LL ASK YOU SOME QUESTIONS AFTER WE HAVE LOOKED AT THE VIDEO.
(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT, OFF THE RECORD.)
BY MR. WILLIAMSON:
Q NOW, OFFICER FAIRBANKS, AS YOU COULD SEE FROM THE VIDEOS, THESE WERE MEANT TO DESCRIBE SITUATIONS WHERE EITHER A PERSON WAS STANDING STILL OR MOVING TOWARDS THE OFFICER; CORRECT?
A CORRECT.
Q AND IN EACH ONE OF THESE CASES, THE -- THE OFFICERS WANTED -- WERE NOT ASSISTED DOWN, THEY ACTUALLY FELL DOWN AS A RESULT OF THE TASER DISCHARGE; RIGHT?

A RIGHT.
Q OKAY. WERE YOU TAUGHT THAT THE DECISION TO DEPLOY WAS ONLY BASED ON STOPPING A THREAT? THAT'S THE REASON TO USE A TASER?
A YES.
Q OKAY. NOW, TAKE A LOOK AT THIS NEXT SLIDE. THIS REFERS TO WHAT THE TASERS MIGHT DO.

WE HAVE ALREADY TALKED ABOUT THESE VERY DISTINCT SIGNATURE MARKS THAT THE TASER LEAVES AS A RESULT OF THE ONES THAT ARE CAUSED BY THE ELECTRICITY FLOWING THROUGH THE BODY; RIGHT?
A RIGHT.
Q AND ONCE AGAIN, IN THIS SLIDE YOU SEE IN THE MIDDLE OF THE SLIDE IT CAUSES MUSCLE CONTRACTIONS. SO THAT'S SOMETHING THAT WE HAVE ALREADY DISCUSSED; CORRECT?
A YES.
Q OKAY. LET'S GO ON TO THE NEXT SLIDE.

THIS SLIDE REFERS TO SOMETHING WE ALSO TALKED ABOUT A LITTLE EARLIER ABOUT THE FACT THAT AN ARREST TEAM SHOULD COME IN AND HANDCUFF THE SUBJECT AS QUICKLY AS POSSIBLE AFTER THE DISCHARGE; CORRECT?
A YES.
Q AND THIS IS -- SOME OF THESE SLIDES ARE A

LITTLE REPETITIVE AND WE'LL GO THROUGH THEM QUICKLY, BUT THIS REFERS TO THE REASONS WHY THE TASER IS MORE EFFECTIVE THAN, FOR EXAMPLE, OTHER TYPES OF DEVICES LIKE PEPPER SPRAY OR THE ORIGINAL SHOCKING DEVICE BEFORE THE TASER CAME OUT; RIGHT?

A RIGHT.

Q OKAY. AND NOW, DURING YOUR TRAINING DID YOU RECEIVE SOME INSTRUCTION REGARDING A DATAPORT?

A YES, DURING THE TRAINING, YES.

Q AND, FOR EXAMPLE, YOU WERE TRAINED THAT THE DATAPORT RECORDS EACH TRIGGER PULL AND THE TIME OF EACH TRIGGER PULL; CORRECT?

A UP TO 585, YES.

Q AND WERE YOU EXPLAINED THE REASON WHY THE DATAPORT WAS DESIGNED INTO THE PRODUCT?

A UM, FOR MONITORING OR JUST IT WASN'T -- I DON'T RECALL IT SPECIFICALLY BEING EXPLAINED AS TO WHY.

Q WELL, YOU EXPLAINED, FOR EXAMPLE, DURING YOUR TRAINING THAT THE DATAPORT WAS MEANT TO MONITOR THE USAGE OF THE DEVICE SO THAT ABUSES COULD BE RECOGNIZED, BUT ALSO IT COULD CONFIRM WHEN AN OFFICER REPRESENTED THAT, FOR EXAMPLE, WE ONLY USED THE DEVICE ONCE OR TWICE, IT WOULD RECORD THAT?

A YES.

Q AND, IN FACT, IT WAS AN HONEST REPRODUCTION OF THE NUMBER OF TASERS THAT WERE FIRED AT A PARTICULAR POINT IN TIME; CORRECT?

A IT WOULD BE, YEAH. THE RECORD?

Q RIGHT.

A YES.

Q OKAY. NOW, LET ME JUST BE CLEAR ABOUT SOMETHING.

AS A TASER TRAINING INSTRUCTOR, YOU WERE NOT GIVEN THE RESPONSIBILITY TO MAINTAIN THE TASERS IN THE DEPARTMENT; IS THAT A FAIR STATEMENT?

A THAT IS CORRECT.

Q AND YOU AGREE THAT THE DATAPORT PROTECTS OFFICERS FROM UNFOUNDED ALLEGATIONS; RIGHT?

A ALSO, YES.

Q AND THE FLIPSIDE OF THE COIN IS THAT IT HOLDS OFFICERS ACCOUNTABLE FOR ITS MISUSE OF THE PRODUCT.

A YES.

Q AND YOU AGREE WITH THAT, DON'T YOU?

A YES.

Q AND ONE LAST SLIDE AND WE'LL BE DONE WITH THIS.

WERE YOU GENERALLY AWARE, BASED ON YOUR TRAINING, OR HOW -- OR THE MECHANISM BY WHICH YOU WOULD DOWNLOAD THE DATA FROM THE DATAPORT?

A AS FAR AS THE SOFTWARE OR --
Q RIGHT.
A YEAH.
Q AND YOU COULD CERTAINLY TELL ME IF YOU DON'T KNOW THE ANSWER TO THIS, BUT DO YOU KNOW WHETHER THE SALINAS POLICE DEPARTMENT HAD PURCHASED THE SOFTWARE IN FEBRUARY OF 2005 TO DOWNLOAD THE DATAPORT?
A IN FEBRUARY 2005 AFTER THE INCIDENT IN QUESTION.
Q NO, I MEANT AT THE TIME --
A I BELIEVE IT WASN'T PURCHASED.
Q THANK YOU.
AND ISN'T IT TRUE, SIR, THAT, THAT AT THE TIME OF THIS INCIDENT THE SALINAS POLICE DEPARTMENT HAD NO POLICY IN PLACE CONCERNING SETTING THE CLOCKS ON THE DATAPORT TO MAKE SURE THAT THEY RECORDED AN ACCURATE TIME?
A THERE WAS NO POLICY THAT I HAD KNOWLEDGE OF.
Q AND ISN'T IT ALSO TRUE THAT AT THE TIME OF THIS INCIDENT, THE SALINAS POLICE DEPARTMENT HAD NO POLICY OR PRACTICE IN PLACE REGARDING DATAPORT DOWNLOADS AFTER A TASER WAS USED DURING A PARTICULAR INCIDENT?
A YEAH.

Q YES, THERE WAS NO POLICY?
A RIGHT.
Q NOW, DURING YOUR 20 HOURS OF TASER TRAINING THAT WAS GIVEN TO YOU BY TASER INTERNATIONAL, WERE YOU TOLD GENERALLY ABOUT THE POSSIBLE HEALTH RISK POSED BY THE USE OF THE TASER?
A YES.
Q AND ISN'T IT TRUE THAT YOU WERE NEVER TOLD DURING YOUR TRAINING THAT, THAT THERE MIGHT BE RISKS ASSOCIATED WITH, WITH REPETITIVE FIRING OF THE TASER, HEALTH RISKS I MEAN?
A WAS I AT THE TIME?
Q YES.
A NO.
Q WOULD IT BE FAIR TO SAY THAT THE ONLY RISK THAT YOU EVER WERE TRAINED ABOUT DURING YOUR TASER TRAINING THAT WAS GIVEN TO YOU BY TASER INTERNATIONAL, WERE ASSOCIATED WITH, FOR EXAMPLE, FALLING. WERE YOU TAUGHT THAT?
A YES.
Q AND WERE YOU TAUGHT THAT THERE WERE RISKS ASSOCIATED WITH THE PROJECTILE GOING INTO A PERSON'S EYE, FOR EXAMPLE, THINGS OF THAT NATURE?
A YES. YES, AND THE LASER CAUSING EYE DAMAGE, ALCOHOL BASED COMPONENTS.

Q AND WERE YOU ALSO TAUGHT ABOUT THE DANGERS OF POTENTIAL FLAMMABLE LIQUIDS BEING IN CLOSE PROXIMITY TO A PERSON WHEN A DISCHARGE --

A YES.

Q -- THAT MIGHT CAUSE A FIRE?

A YES.

Q AND IS THERE ANYTHING ELSE THAT AS YOU SIT HERE TODAY THAT YOU CAN REMEMBER THAT YOU WERE TRAINED ABOUT BY TASER INTERNATIONAL CONCERNING THE POTENTIAL HEALTH RISKS OF THE USE OF THE TASER?

A NO.

Q AND CERTAINLY, OFFICER FAIRBANKS, WOULD IT BE FAIR TO SAY THAT YOU WERE NEVER TOLD AT ANY TIME DURING YOUR TASER TRAINING, GIVEN BY TASER INTERNATIONAL, THAT A PERSON COULD DIE AS A RESULT OF BEING SUBJECTED TO A TASER DISCHARGE? IS THAT A FAIR STATEMENT?

A SOLELY BY A TASER DISCHARGE?

Q YES.

A THAT WOULD BE A FAIR STATEMENT.

Q THANK YOU. DO YOU RECALL EVER BEING TOLD DURING YOUR TRAINING THAT NO ONE HAS EVER DIED AS A RESULT OF BEING SUBJECTED TO A TASER DISCHARGE?

A SOLELY BY TASER?

Q I'M SORRY?

A IT WAS SAID THAT NO ONE HAS EVER DIED DIRECTLY OR SOLELY BY THE USE OF TASER ALONE.

Q OKAY. AND IN TERMS OF POTENTIAL HEALTH RISKS ASSOCIATED WITH THE TASER DISCHARGE, WOULD IT BE FAIR TO SAY ALSO THAT YOU NEVER TOLD THAT THERE MIGHT BE RISKS ASSOCIATED WITH DURATIONS LONGER THAN FIVE SECONDS? WOULD THAT BE FAIR TO SAY?

A THAT WOULD BE FAIR TO SAY.

Q IS IT TRUE, SIR, THAT THE TASER WILL CONTINUE TO DISCHARGE SO LONG AS THERE'S BATTERY -- SO LONG AS THERE IS ELECTRICITY IN THE BATTERY, IF YOU HOLD DOWN THE TRIGGER?

A YOU'RE SAYING IT WILL CONTINUE TO CYCLE?

Q SO LONG AS THERE IS ELECTRICITY IN THE BATTERIES?

A YES.

Q AND DO YOU HAVE ANY ESTIMATION OF HOW LONG A PERSON -- LET'S ASSUME A FULLY CHARGED BATTERY IN THE TASER DEVICE. DO YOU HAVE ANY ESTIMATION OF HOW LONG A TASER WOULD CONTINUE TO CYCLE IF YOU DEPRESSED THE TRIGGER AND HELD IT DOWN?

A NO.

Q DO YOU RECALL RECEIVING ANY TRAINING ABOUT THAT?

A NO.

Q OKAY. WE SPENT A LOT OF TIME TALKING ABOUT YOUR TRAINING AND NOW LET'S SHIFT GEARS A LITTLE BIT AND TALK ABOUT --

OH, MY COUNSEL TELLS ME PERHAPS THIS WOULD BE A GOOD TIME TO BREAK.

THE COURT: WELL, I NORMALLY FIND A PERIOD OF TIME.

HOW MUCH LONGER DO HAVE WITH THE WITNESS?

MR. WILLIAMSON: I HAVE QUITE A WHILE. MAYBE THE REST OF THE AFTERNOON.

THE COURT: ALL RIGHT. THEN WE MIGHT AS WELL TAKE A BREAK IN THE ACTION. IT'S 20 TO THE HOUR. LET'S TAKE ABOUT A TEN-MINUTE BREAK OR SO AND SEE IF WE CAN GET BACK AT ABOUT FIVE OR TEN MINUTES TO THE HOUR.

(WHEREUPON, A RECESS WAS TAKEN.)

THE COURT: PLEASE BE SEATED. YOU MAY RESUME YOUR EXAMINATION.

MR. WILLIAMSON: THANK YOU, YOUR HONOR.

Q OKAY. OFFICER FAIRBANKS, LET'S TALK ABOUT THIS INCIDENT A LITTLE BIT.

FIRST OF ALL, IT'S TRUE BEFORE THIS INCIDENT THAT YOU NEVER HAD ANY CONTACT WITH ROBERT C. HESTON; CORRECT?

A WELL THE FIRST CALL.

Q I'M TALKING ABOUT BEFORE THE DATE OF THIS INCIDENT.
A BEFORE THE DATE, THAT'S CORRECT.
Q OKAY. AND, IN FACT, YOU NEVER HAD BEEN TO THE HESTON HOME AT ANY TIME PRIOR TO THIS PARTICULAR INCIDENT; THAT'S TRUE ALSO, ISN'T IT?
A THAT'S TRUE.
Q AND WOULD IT BE FAIR TO SAY THAT YOU KNEW NOTHING ABOUT ROBERT C. HESTON'S HISTORY PRIOR TO THE DAY OF THIS INCIDENT?
A THAT'S TRUE.
Q AND WHEN YOU ARRIVED AT THE SCENE THE FIRST TIME, THERE WERE OTHER OFFICERS ALREADY AT THIS SCENE ENGAGED WITH MR. HESTON; CORRECT?
A THAT'S CORRECT.
Q AND LET'S BE CLEAR ABOUT SOMETHING. THERE WERE TWO DIFFERENT INCIDENTS THAT DAY. THE FIRST TIME WHEN YOU ARRIVED, WHEN YOU LEFT AND THE SECOND TIME WHEN YOU ARRIVED AND OTHER THINGS HAPPENED.
DO YOU HAVE THAT CLEAR IN YOUR MIND, THOSE TWO DISTINCT INCIDENTS?
A YES.
Q OKAY. NOW, WHEN YOU ARRIVED THE FIRST TIME, ONE OF THE OFFICERS THAT WAS THERE WAS SERGEANT DOMINICI; CORRECT?

A CORRECT.
Q AND YOU CERTAINLY RECOGNIZED HIM AS ONE OF YOUR SUPERIOR OFFICERS?
A HE WAS PRESENT. I BELIEVE MAYBE I WAS THERE PRIOR TO HIM AND THEN HE SHOWED UP, BUT HE WAS THERE, IF THAT WAS THE QUESTION.
Q AND AS I UNDERSTAND IT, THERE WAS A CONVERSATION THAT TRANSPIRED BETWEEN ROBERT HESTON, THE SON, AND ONE OF THE OTHER OFFICERS; CORRECT?
A CORRECT.
Q BUT YOU DIDN'T PARTICIPATE IN THAT CONVERSATION; RIGHT?
A THAT'S RIGHT.
Q AND YOU STOOD BACK AND OBSERVED; RIGHT?
A CORRECT.
Q AND BASED ON YOUR OBSERVATIONS OF WHAT YOU SAW WITH ROBERT HESTON, YOU CAME TO THE CONCLUSION THAT HE WAS UNDER THE INFLUENCE OF DRUGS, DIDN'T YOU?
A YES.
Q AND BEING UNDER THE INFLUENCE OF DRUGS, WHETHER HE WAS ON PAROLE OR NOT, IS A CRIME, IS IT NOT?
A THAT'S CORRECT.
Q AND THEREFORE, BASED ON YOUR SUSPICION THAT MR. HESTON WAS UNDER THE INFLUENCE OF DRUGS, YOU,

YOU COULD HAVE TAKEN HIM INTO CUSTODY RIGHT AT THAT MOMENT, COULDN'T YOU?

A SURE.

Q NOW, AT SOME POINT DURING THAT FIRST ENCOUNTER YOU LEARNED, THAT, IN FACT, MR. HESTON WAS ON PAROLE; RIGHT?

A I REMEMBER IT BEING TALKED ABOUT.

Q AND, IN FACT, YOU MADE AN ATTEMPT -- STRIKE THAT.

DO YOU RECALL THE DATE OF THE WEEK THIS INCIDENT OCCURRED?

A I DON'T KNOW THE SPECIFIC DAY OF THE CALENDAR.

Q I'M SORRY?

A NOT THE DAY OF THE WEEK.

Q AND DOES A SATURDAY REFRESH YOUR RECOLLECTION?

A YES.

Q AND, IN FACT, WHEN YOU LEARNED THAT MR. HESTON WAS ON PAROLE, YOU MADE ATTEMPTS TO TRY AND CONTACT HIS PAROLE OFFICER; RIGHT?

A YEAH, I THINK I MADE AN UNSUCCESSFUL PHONE CALL.

Q AND HOW DID YOU DO THAT? DID YOU DO THAT THROUGH YOUR DISPATCHER?

A I DON'T RECALL.

Q NOW, ISN'T IT TRUE THAT AT SOME POINT DURING

THIS ENCOUNTER WITH MR. HESTON, SERGEANT DOMINICI MADE THE DECISION TO -- FOR ALL OF THE OFFICERS PRESENT TO LEAVE THE SCENE?

A YES.

Q AND HE DID THAT AS THE -- AS ESSENTIALLY THE COMMANDING OFFICER AT THE SCENE; IS THAT RIGHT?

A YES.

Q AND I SAY "COMMANDING OFFICER." HE WAS THE SUPERVISING OFFICER AT THE SCENE; RIGHT?

A YES.

Q NOW, A SHORT -- WELL, STRIKE THAT.

I UNDERSTAND THAT AFTER YOU LEFT THE SCENE YOU DROVE TO A LOCATION NOT FAR AWAY AND, IN FACT, PULLED OFF NEXT TO SERGEANT DOMINICI'S CAR AND THE TWO OF YOU HAD SOME CONVERSATION; RIGHT?

A THAT'S RIGHT.

Q AND WHILE YOU WERE HAVING THAT CONVERSATION, YOU RECEIVED A SECOND PHONE CALL OR A SECOND DISPATCH CALL I SHOULD SAY, ALERTING YOU TO THE FACT THAT YOU NEEDED TO GO BACK TO THE HESTON RESIDENCE; IS THAT RIGHT?

A THAT'S RIGHT.

Q AND WHEN YOU GOT THAT CALL, I PRESUME YOU IMMEDIATELY WENT BACK TO THE HESTON HOUSE?

A THAT'S RIGHT.

Q AND YOU AND SERGEANT DOMINICI WERE IN SEPARATE VEHICLES; RIGHT?
A RIGHT.
Q AND WHEN YOU ARRIVED BACK IN THE VICINITY OF THE HESTON RESIDENCE, DID YOU MAKE ANY OBSERVATIONS AT THAT TIME?
A YES.
Q AND WHAT DID YOU SEE?
A I SAW NUMEROUS ARTICLES OUT ON THE FRONT LAWN AREA, THINGS BEING THROWN.
Q OKAY. DO YOU REMEMBER SEEING MR. HESTON, THE SON?
A YES.
Q AND WHERE WAS HE LOCATED WHEN YOU FIRST OBSERVED HIM?
A WHEN I FIRST OBSERVED HIM? STEPPING OUT OF THE THRESHOLD IN MY VIEW WOULD HAVE BEEN.
Q AND WHEN YOU SAY THE THRESHOLD, DO YOU MEAN THE THRESHOLD OF THE FRONT DOOR OF THE HOUSE?
A YES.
Q UP UNTIL THE POINT WHERE YOU SAW ROBERT HESTON, THE SON, HAD YOU SEEN HIS FATHER?
A NO.
Q SO AT THAT POINT YOU HAD NO IDEA WHERE HE WAS?
A THAT'S CORRECT.

Q AND NOW, AS YOU GOT CLOSER ON FOOT TO THE HESTON RESIDENCE, DID YOU CONTINUE TO OBSERVE MR. HESTON THROWING THINGS OUTSIDE OF THE HOUSE?
A YES.
Q ONE OF THE OBJECTS HE THREW WAS A PIECE OF WOOD; CORRECT?
A YES.
Q AND DID YOU SEE THAT PIECE OF WOOD STRIKE SERGEANT DOMINICI?
A YES.
Q AND DO YOU KNOW WHERE IT STRUCK HIM?
A THE CENTER OF HIS CHEST.
Q SERGEANT DOMINICI WASN'T HURT BY THAT, WAS HE?
A HE DIDN'T APPEAR SO.
Q IN FACT, HE DIDN'T RETREAT FROM HIS POSITION WHEN THAT PIECE OF WOOD STRUCK HIM? HE CONTINUED TO MAINTAIN HIS POSITION; RIGHT?
A YES.
Q NOW, AFTER -- AFTER -- WELL, FIRST OF ALL, WAS THAT THE ONLY OBJECT THAT YOU SAW THAT WAS THROWN BY MR. HESTON TOWARDS SERGEANT DOMINICI?
A NO.
Q DID YOU SEE OTHER PIECES OF WOOD THROWN?
A NOT IN PARTICULAR, NO.
Q OKAY. OTHER OBJECTS?

A YES.
Q BUT NOTHING ELSE HIT SERGEANT DOMINICI; WOULD YOU AGREE WITH THAT?
A I WOULD AGREE.
Q DID IT APPEAR TO YOU THAT MR. HESTON WAS FOCUSED ON A PARTICULAR POINT OUTSIDE OF HIS HOUSE, OR WAS HE JUST MOVING AROUND IN KIND OF A HAPHAZARD MANNER?
A WAS HE MOVING AROUND IN HIS HOUSE IN A HAPHAZARD MANNER?
Q EITHER IN HIS HOUSE OR OUTSIDE ON THE FRONT PORCH; WAS HE MOVING IN A HAPHAZARD MANNER?
A WHEN HE RETREATED BACK INTO THE RESIDENCE HE WOULD GO TO THE SAME AREA SO --
Q WHAT I'M TRYING TO GET AT, WAS HE FOCUSED AT SERGEANT DOMINICI OR WAS HE EVEN FOCUSED ON YOU STANDING OUTSIDE OF THE HOUSE?
A AT TIMES YES, AT TIMES NO.
Q NOW, AFTER SERGEANT DOMINICI WAS STRUCK BY THE PIECE OF WOOD, WOULD IT BE FAIR TO SAY THAT HE FIRED HIS TASER SECONDS LATER?
A YES.
Q AND, IN FACT, YOU FIRED YOUR TASER WITHIN APPROXIMATELY A SECOND THEREAFTER, AFTER SERGEANT DOMINICI FIRED; ISN'T THAT TRUE?

A NO.
Q YOU DIDN'T FIRE YOUR TASER ALMOST SIMULTANEOUSLY WITH SERGEANT DOMINICI?
A I DON'T BELIEVE SO.
Q HOW LONG WOULD YOU ESTIMATE THE TIME PASSED BETWEEN THE TIME THAT SERGEANT DOMINICI FIRED HIS TASER AND YOU FIRED YOUR TASER?
A WITHIN FIVE SECONDS.
Q NOW, ISN'T IT TRUE THAT ONLY ABOUT 10 TO 15 SECONDS PASSED BETWEEN THE TIME THAT YOU GOT OUT OF YOUR CAR AND SERGEANT DOMINICI FIRED HIS TASER?
A PROBABLY.
Q NOW, YOU WERE INTERVIEWED AFTER THIS INCIDENT BY YOUR DEPARTMENT; CORRECT?
A CORRECT.
Q AND THAT WAS VIDEOTAPED, RIGHT, AND IT WAS ALSO RECORDED, THE AUDIO WAS RECORDED?
A YES.
Q HAVE YOU HAD A CHANCE TO LOOK AT THAT TAPE?
A NO, I HAVEN'T LOOKED AT THE TAPE.
Q DID YOU EVER LOOK AT THE TAPE?
A NO.
Q AND ISN'T IT TRUE, SIR, THAT YOU TOLD THE INVESTIGATING OFFICERS FROM YOUR OWN DEPARTMENT THAT YOU FIRED YOUR TASER ABOUT TWO SECONDS AFTER

SERGEANT DOMINICI?

A IT COULD HAVE BEEN, YES.

Q AND WOULD IT BE FAIR TO SAY THAT YOUR MEMORY OF THIS INCIDENT WAS BETTER THE DAY THAT IT HAPPENED AS OPPOSED TO TODAY, FOR EXAMPLE?

A MY MEMORY, PROBABLY.

Q NOW, INITIALLY YOU THOUGHT SERGEANT DOMINICI'S TASERS -- THE TASER PROBES HIT MR. HESTON; CORRECT?

A YES.

Q THAT WAS YOUR INITIAL IMPRESSION?

A INITIALLY, YES.

Q AND THEN IT APPEARED THAT HE -- HE HAD SOME EFFECT FROM THAT TASER?

A THAT HE MOVED BACKWARDS.

Q OKAY. AND WHEN HE MOVED BACKWARDS WAS THAT CONSISTENT WITH YOUR TRAINING AS TO -- AS TO THE TYPE OF REACTION A PERSON HAS WHEN THEY GET SHOT WITH THE TASER?

A YES.

Q AND THEN THERE WAS A POINT IN TIME SECONDS LATER, WHEN IT APPEARED THAT MR. HESTON WAS NOT REACTING TO THE TASER; CORRECT?

A CORRECT.

Q AND THAT'S WHEN YOU MADE YOUR DECISION TO FIRE YOURS; RIGHT?

A RIGHT.
Q AND AFTER YOU FIRED YOUR TASER, IT SEEMED TO HAVE THE DESIRED EFFECT ON MR. HESTON, DIDN'T IT?
A MOMENTARILY, YES.
Q AND, IN FACT, HE BECAME RIGID WHEN YOU -- WHEN YOU SHOT HIM WITH YOUR TASER; RIGHT?
A YES.
Q AND THAT WOULD BE CONSISTENT WITH THE EFFECTS OF THE TASER THAT YOU LEARNED IN YOUR TRAINING; RIGHT?
A YES.
Q BUT HE DIDN'T GO DOWN; CORRECT?
A HE WENT OUT OF MY SIGHT. I DON'T BELIEVE HE WENT DOWN. HE WENT OUT OF MY SIGHT.
Q NOW, ISN'T IT TRUE, OFFICER FAIRBANKS, THAT YOU GAVE AN ESTIMATE OF THE AMOUNT OF FEET THAT YOU WERE FROM MR. HESTON WHEN YOU FIRST FIRED YOUR TASER AND YOU ESTIMATED THAT HE WAS 19 TO 20 FEET AWAY FROM YOU; RIGHT?
A I BELIEVE THAT WAS MY STATEMENT, YES.
Q I'M SORRY?
A DID I GIVE THAT STATEMENT? IS THAT WHAT YOUR --
Q YES.
A I BELIEVE SO.

Q AND SO EARLIER WHEN YOU TESTIFIED ABOUT THE OPTIMUM RANGE OF THE TASER, IN FACT, MR. HESTON WAS ALREADY EXCEEDING THE OPTIMUM RANGE; RIGHT?

A AT OR NEAR THAT, YES.

Q OKAY. AND WHEN MR. HESTON -- BECAUSE HE WAS SOMEWHERE ABOUT 19 OR 20 FEET AWAY, IT WOULD BE, IT WOULD BE LOGICAL TO EXPECT THAT WHEN HE WENT BACKWARDS IN RESPONSE TO THE TASER EFFECT, EITHER THE WIRES BROKE OR THE PROBES CAME OUT; RIGHT?

A IF, IN FACT, THAT WAS AT THAT DISTANCE, YES.

Q AND WOULD YOU AGREE THAT ONE OF THE EXPLANATIONS FOR THE -- FOR THE FACT THAT MR. HESTON STOPPED REACTING TO THE TASER WAS THAT AS HE BACKED UP HE EXCEEDED THE 21-FOOT LENGTH OF THE WIRES?

A IT COULD HAVE BEEN ONE OF THE REASONS.

Q NOW, AT SOME POINT AFTER YOU FIRED YOUR TASER, SERGEANT RUIZ AND OTHER BACK-UP OFFICERS ARRIVED; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND THEY ARRIVED LESS THAN A MINUTE AFTER YOU FIRED YOUR TASER THE FIRST TIME; RIGHT?

A RIGHT.

Q BY THE WAY, LET'S BE CLEAR ABOUT SOMETHING. I DON'T WANT TO CONFUSE ANYBODY. YOU ONLY FIRED YOUR

TASER ONE TIME; RIGHT?

A RIGHT.

Q AND YOU DIDN'T HAVE A SECOND CARTRIDGE IN YOUR BELT TO RELOAD; RIGHT?

A RIGHT.

Q SO AND SERGEANT DOMINICI DIDN'T HAVE A BACK-UP CARTRIDGE EITHER, DID HE?

A I DON'T BELIEVE SO.

Q SO YOU HAD TO WAIT FOR OTHER OFFICERS TO ARRIVE IN ORDER TO DEPLOY THEIR TASERS?

A YES.

MR. WILLIAMSON: COULD I HAVE A MOMENT, YOUR HONOR?

THE COURT: YES.

(PAUSE IN PROCEEDINGS.)

BY MR. WILLIAMSON:

Q LET ME CLARIFY SOMETHING WITH YOU, OFFICER FAIRBANKS. AT SOME POINT AFTER YOU DEPLOYED YOUR TASER DID YOU OBSERVE MR. HESTON TO BE PULLING THE PROBES OUT?

A AT SOME POINT WHEN I -- WHEN HE CAME BACK FROM INSIDE, BACK IN MY VIEW HE MADE A MOTION THAT APPEARS AS IF HE WAS SWIPING DOWN HIS BODY, AS IF HE WAS GRABBING SOMETHING AND THEN WHATEVER IT WAS, I ASSUMED AT THE TIME IT TO BE PROBES, WERE THROWN

AT ME OR IN MY GENERAL DIRECTION. THAT WAS THE MOTION.

Q OKAY. DID YOU HAVE ANY IDEA WHERE YOUR PROBES HAD STRUCK MR. HESTON?

A DID I KNOW EXACTLY WHERE ON HIS BODY?

Q WELL, NO, BUT GENERALLY. DID YOU HIT HIS CHEST? DID YOU HIT HIS ARMS? IF YOU KNOW.

A IT APPEARS THAT THE AREA THAT WAS EXPOSED WAS THE LEFT UPPER TORSO.

Q OKAY. AND WAS THAT THE AREA THAT HE WAS SWIPING WITH HIS ARM?

A YES.

Q AND, OF COURSE, AT THE POINT WHEN HE WAS SWIPING AT HIS ARM YOU DIDN'T KNOW WHETHER THE WIRES WERE BROKEN OR NOT; CORRECT?

A I BELIEVED THAT THEY WERE BECAUSE THE TASER WASN'T HAVING ANY EFFECT.

Q OKAY. NOW, WE WERE TALKING ABOUT THIS APPROXIMATELY -- I'M SORRY.

OFFICER FAIRBANKS, THAT, IN FACT, WAS THE ONLY TIME THAT YOU EVER SAW MR. HESTON SWIPING IT TO REMOVE PROBES FROM HIS BODY; CORRECT?

A YES.

Q NOW, WE WERE TALKING ABOUT THIS APPROXIMATELY MINUTE OF TIME THAT ELAPSED BETWEEN THE TIME THAT

YOU FIRED YOUR TASER AND OFFICER RUIZ AND THE OTHER OFFICERS ARRIVED AS BACK UP. OKAY.

DURING THAT PERIOD OF TIME MR. HESTON CAME OUT OF THE HOUSE AND STOOD ON THE FRONT PORCH, DIDN'T HE?

A AT TIMES, YES.

Q AND HE WAS STARTING TO THROW MORE OBJECTS OUT OF THE HOUSE; RIGHT?

A YES.

Q AND AT SOME POINT HE KNOCKED DOWN A GRANDFATHER CLOCK; RIGHT?

A RIGHT.

Q AND HE NEVER THREW THE GRANDFATHER CLOCK OUT OF THE HOUSE, DID HE?

A IN ITS ENTIRETY, NO.

Q AND, IN FACT, THE GRANDFATHER CLOCK WAS IN THE DOORWAY, WAS IT NOT?

A IT WAS INSIDE OF THE THRESHOLD.

Q NOW, DURING THIS LESS THAN A MINUTE OF TIME BETWEEN THE TIME THAT YOU FIRED YOUR TASER AND THE BACK-UP OFFICERS ARRIVED, YOU HADN'T SEEN ROBERT HESTON'S FATHER, HAD YOU?

A NO.

Q DO YOU HAVE ANY IDEA WHERE HE WAS?

A NO.

Q DID YOU EVEN HAVE AN IDEA THAT HE WAS IN THE HOUSE?

A I BELIEVE HE WAS.

Q NOW, AS MR. HESTON WAS THROWING OBJECTS OUT OF THE HOUSE, WOULD IT BE FAIR TO SAY THAT HE APPEARED IRRATIONAL?

A YES.

Q AND THEN DID YOU OBSERVE SERGEANT RUIZ TO DEPLOY HIS TASER?

A YES.

Q WOULD IT BE FAIR TO SAY THAT MR. HESTON WAS IN AND OUT THE DOORWAY WHEN SERGEANT RUIZ DEPLOYED HIS TASER?

THE COURT: IN OR OUT?

MR. WILLIAMSON: IN AND OUT I SHOULD HAVE SAID.

THE WITNESS: AT THE MOMENT I BELIEVE HE WAS OUTSIDE OF THE DOORWAY --

I SAID HE WOULD HAVE HAD TO HAVE BEEN OUTSIDE OF THE DOORWAY IN MY ESTIMATION WHEN HE DEPLOYED HIS TASER.

BY MR. WILLIAMSON:

Q AND DO YOU RECALL HIM KIND OF DARTING IN AND OUT OF THE DOORWAY AT THE TIME THAT SERGEANT RUIZ DEPLOYED HIS TASER?

A AS HE WAS APPROACHING, YES.
Q ISN'T IT TRUE, OFFICER FAIRBANKS, THAT WHEN SERGEANT RUIZ DEPLOYED HIS TASER, IT WAS EFFECTIVE IN THAT MR. HESTON BEGAN TO MOVE BACKWARDS INTO THE HOUSE?
A IT APPEARED SO.
Q AND IT WAS EFFECTIVE, IN YOUR OBSERVATION, BECAUSE MR. HESTON BECAME RIGID AND MOVED BACKWARDS; CORRECT?
A RIGHT. AND THEN OUT OF MY VIEW.
Q OKAY. NOW, AND AFTER SERGEANT RUIZ FIRED HIS TASER, YOU SAW VARIOUS OTHER OFFICERS MOVE TOWARDS THE FRONT DOOR OF THE HOUSE; CORRECT?
A CORRECT.
Q AND WHEN THE OTHER OFFICERS MOVED TOWARDS THE FRONT DOOR, YOU DIDN'T SEE ROBERT HESTON, THE SON, ANY LONGER, DID YOU?
A NO.
Q DID YOU MAKE THE ASSUMPTION AT THAT POINT THAT MR. HESTON HAD FALLEN DOWN OR NOT -- OR BEEN KNOCKED DOWN BY THE TASER?
A DID I MAKE AN ASSUMPTION AS TO THAT HAPPENING?
Q I'M SORRY. LET ME BACKTRACK A SECOND.
WHEN YOU SAW MR. HESTON DISAPPEAR INSIDE OF THE HOUSE, DIDN'T YOU ASSUME THAT HE HAD BEEN

KNOCKED DOWN BY THE TASER?

A YES.

Q AND, IN FACT, THE NEXT TIME THAT YOU SAW MR. HESTON, HE WAS LYING ON THE FLOOR OF THE LIVING ROOM OF THE HESTON HOUSE; ISN'T THAT TRUE?

A THAT'S TRUE.

Q AND ISN'T IT TRUE THAT AT ABOUT FIVE SECONDS PASSED BETWEEN THE TIME THAT YOU LAST SAW ROBERT HESTON, THE SON, AND THOUGHT HE HAD FALLEN AND THE TIME THAT YOU ACTUALLY SAW HIM LYING ON THE GROUND?

A THAT'S TRUE.

THE COURT: THE GROUND OR THE FLOOR?

MR. WILLIAMSON: THANK YOU, YOUR HONOR.

Q ON THE FLOOR, THE LIVING ROOM FLOOR?

A YES.

Q YOU, IN FACT, WENT INTO THE HOUSE BEHIND SERGEANT RUIZ AND THE OTHER OFFICERS WITH HIM; ISN'T THAT TRUE?

A THAT'S TRUE.

Q AND BEFORE GOING INTO THE HOUSE, YOU MOVED THE GRANDFATHER CLOCK ONTO THE WALKWAY IN FRONT OF THE HOUSE; RIGHT?

A THAT'S RIGHT.

Q ARE YOU FAMILIAR WITH PHOTOGRAPHS THAT WERE TAKEN AFTER THIS INCIDENT? HAVE YOU HAD A CHANCE

TO LOOK AT THOSE?

A YES.

Q AND DO YOU RECALL SEEING A PHOTOGRAPH OF A GRANDFATHER CLOCK THAT WAS ON THE FRONT LAWN OF THE HOUSE?

A YES.

Q AND, IN FACT, YOU PLACED THE GRANDFATHER CLOCK FROM THE WALKWAY ONTO THAT FRONT LAWN, DIDN'T YOU?

A YES.

Q AND IT WAS NEVER THROWN THERE BY MR. HESTON, WAS IT?

A NO.

Q AND THE REASON WHY YOU MOVED THE GRANDFATHER CLOCK OUT OF THE WAY WAS BECAUSE YOU WANTED TO CLEAR THE PATH TO GET INTO THE HOUSE; TRUE?

A THE FIRST TIME I MOVED IT? YES.

Q WELL, IN FACT, THE REASON YOU MOVED IT A SECOND TIME WAS THAT YOU WANT TODAY CLEAR THE PATH FOR THE EMT'S THAT YOU HAD CALLED; RIGHT?

A RIGHT.

Q NOW, WHEN YOU GOT INSIDE OF THE LIVING ROOM ABOUT FIVE SECONDS AFTER SERGEANT RUIZ ENTERED, YOU SAW MR. HESTON IN A PRONE FACE-DOWN POSITION, WITH HIS ARMS UNDERNEATH HIM; CORRECT?

A CORRECT.

Q AND YOU RECOGNIZED THAT POSITION THAT MR. HESTON WAS IN, LYING FACE DOWN WITH HIS ARMS UNDERNEATH HIM, AS ONE THAT YOU SAW IN YOUR TRAINING; RIGHT?

A YES.

Q AND, IN FACT, THE POSITION THAT MR. HESTON WAS IN, WITH HIM LYING FACE DOWN WITH HIS ARMS TUCKED UNDERNEATH HIM WAS CONSISTENT WITH YOUR TRAINING EXPERIENCE, WASN'T IT?

WHAT I MEAN BY CONSISTENT, CONSISTENT WITH SOMEONE WHO HAS BEEN SUBJECTED TO A TASER DISCHARGE?

A YES.

Q YOU WOULD AGREE, WOULD YOU NOT, THAT WHEN YOU FIRST OBSERVED MR. HESTON, HE WAS IN A RIGID POSITION ON THE FLOOR, ON THE FLOOR OF THE LIVING ROOM?

A HE APPEARED.

Q NOW, WHEN YOU GOT INTO THE LIVING ROOM, ABOUT FIVE SECONDS BEHIND SERGEANT RUIZ, YOU MOVED OVER TO A POSITION NEXT TO MR. HESTON'S RIGHT ARM; CORRECT?

A CORRECT.

Q AND THERE WERE OTHER OFFICERS IN THE LIVING ROOM, CORRECT, APART FROM OFFICER RUIZ AND

YOURSELF?
A YES.
Q AND DO YOU REMEMBER WHO THOSE OFFICERS WERE?
A I RECOGNIZED OFFICER GODWIN BEING THERE, OFFICER -- OR SERGEANT RUIZ OBVIOUSLY AND OFFICER SIMPSON WERE THE ONLY THREE THAT I KNEW THEIR IDENTITY.
Q OKAY.
A OR I RECOGNIZED THEM BEING THERE IS WHAT I'M TRYING TO SAY.
Q I KNOW AS I GET OLDER MY HEARING IS GOING BUT YOUR VOICE IS KIND OF TRAILING OFF SO I WOULD ASK YOU TO KEEP YOUR VOICE UP SO I COULD HEAR YOU.
A OKAY.
Q DO YOU REMEMBER SEEING OFFICER LIVINGSTON?
A I DON'T. I DIDN'T RECALL SEEING HIM AT THE TIME.
Q OKAY. AND WHEN YOU MOVED OVER TO THE RIGHT ARM OF MR. HESTON, THAT WAS CONSISTENT WITH YOUR TRAINING THAT AS AN -- AS AN APPREHENSION OR PART OF AN APPREHENSION TEAM, YOU WERE TRYING TO GET INTO A POSITION OF ADVANTAGE TO SECURE MR. HESTON; CORRECT?
A CORRECT.
Q AND ULTIMATELY HANDCUFF HIM; CORRECT?

A YES.
Q AND YOU HEARD OFFICERS GIVING COMMANDS TO MR. HESTON TO SHOW HIS HANDS; CORRECT?
A CORRECT.
Q AND BASED ON YOUR TRAINING, IT WOULD HAVE BEEN NEARLY IMPOSSIBLE FOR MR. HESTON TO HAVE PRODUCED HIS ARMS WHILE HE WAS BEING SUBJECTED TO THE TASER DISCHARGE; ISN'T THAT TRUE?
A WHILE HE WAS BEING SUBJECTED, THAT'S TRUE.
Q ISN'T IT TRUE THAT THE REASON WHY IT WAS IMPOSSIBLE -- WELL, STRIKE THAT.

DID YOU GRAB MR. HESTON'S ARM?

A YES.
Q AND HIS ARM APPEARED TO BE RIGID TO YOU OR FELT RIGID TO YOU, DIDN'T IT?
A YES.
Q AND DID YOU MAKE ATTEMPTS TO TRY TO REMOVE HIS ARMS?
A YES.
Q AND ISN'T IT TRUE THAT THE REASON WHY IT WASN'T POSSIBLE FOR YOU TO HAVE TAKEN HIS RIGHT HAND AND PULLED IT OUT FROM UNDERNEATH HIM WAS BECAUSE HE WAS BEING TASED AND HIS ARM WAS TOO RIGID?
A NO.

Q SO IF HE WAS BEING TASED AT THE TIME -- WELL, STRIKE THAT.

LET ME ASK YOU THIS QUESTION: IF HE WAS BEING TASED AT THE TIME, MR. HESTON THAT IS, WOULD IT BE -- WOULD IT HAVE BEEN POSSIBLE FOR YOU TO HAVE TAKEN HIS RIGHT ARM OUT AND PUT IT BEHIND HIM IN A HANDCUFFING POSITION, OR WOULD IT HAVE BEEN TOO RIGID?

A AT THE TIME THAT I PULLED ON HIM IT APPEARED -- IT FELT TOO RIGID TO PUT BEHIND HIM.

Q OKAY. THAT WASN'T QUITE MY QUESTION. LET ME TRY TO ASK IT ONE MORE TIME.

IF MR. HESTON WAS BEING SUBJECTED TO A TASER DISCHARGE AT THE TIME, WOULD IT HAVE BEEN POSSIBLE FOR YOU TO HAVE TAKEN HIS RIGHT ARM OUT FROM UNDERNEATH HIM AND PUT IT BEHIND HIM IN ORDER TO HANDCUFF HIM?

A I -- AT THE TIME I MADE THE ASSESSMENT THAT IT WAS TOO RIGID.

Q OKAY.

THE COURT: YOU'RE BEING ASKED A HYPOTHETICAL QUESTION IT SEEMS TO ME. IN OTHER WORDS, BASED ON YOUR TRAINING, IF YOU TRIED TO REMOVE SOMEONE'S ARM AND TO HANDCUFF THEM WHILE THEY'RE BEING TASED, IS THE EFFECT OF THE TASER

SUCH THAT YOU CANNOT MOVE THE ARM?

YOU'RE NOT BEING ASKED ABOUT THIS SITUATION, ALTHOUGH YOU'RE USING MR. HESTON IN YOUR HYPOTHETICAL --

MR. WILLIAMSON: THAT'S RIGHT.

THE COURT: YOU'RE BEING ASKED HAVE YOU ENCOUNTERED A SITUATION SO YOU CAN TELL US, IN YOUR OPINION IF YOU CAN MOVE AN ARM OR A HAND AND HANDCUFF WHILE TASER IS BEING CYCLED?

THE WITNESS: FOR THE MOST PART HE FELT RIGID. DOES THAT -- DOES THAT ANSWER THE QUESTION?

MR. WILLIAMSON: NO. WE'RE ASKING A HYPOTHETICAL QUESTION.

Q LET'S FORGET MR. HESTON, WE'RE HAVING SOMEONE REMOVE AN ARM FROM A PERSON WHO IS BEING TASED. DON'T YOU THINK IT WOULD BE HARD TO REMOVE THAT ARM WHILE THE TASER IS FLOWING INTO THE BODY.

A I WOULD SAY IT'S IMPOSSIBLE TO ANSWER THE QUESTION. SAYING IT'S IMPOSSIBLE TO MANIPULATE APPENDAGE WOULD NOT BE 100 PERCENT CORRECT.

Q IF YOU DON'T AGREE IT'S IMPOSSIBLE, WOULD YOU SAY IT'S EXTREMELY DIFFICULT TO DO THAT?

A I WOULD SAY EXTREMELY DIFFICULT.

Q OKAY. THANK YOU.

NOW, ISN'T IT TRUE THAT WHILE YOU WERE AT

A CERTAIN POINT AT THE RIGHT SIDE OF MR. HESTON AND HE WAS FACE DOWN ON THE FLOOR OF THE LIVING ROOM WITH HIS ARMS UNDERNEATH HIM, THAT YOU SAW OFFICER GODWIN FIRE HIS TASER, THE PROBES, INTO THE BACK OF MR. HESTON WHILE HE WAS LYING ON THE FLOOR?

A YES.

Q AND ISN'T IT TRUE THAT WHEN OFFICER GODWIN FIRED HIS TASER INTO MR. HESTON'S BACK, IT CYCLED FOR A FULL FIVE SECONDS?

A YES.

Q AND IMMEDIATELY AFTER THOSE FIVE SECONDS, YOU FELT MR. HESTON'S ARMS BECOME -- RELAX?

A AT THE END OF THE CYCLE, YES, SOMEWHAT.

Q OKAY. AND AT THAT POINT AS HIS ARMS RELAXED, AFTER THAT FULL FIVE-SECOND DISCHARGE FROM OFFICER GODWIN'S TASER, YOU WERE THEN ABLE TO PULL OUT HIS ARM AND BEGIN THE HANDCUFFING PROCESS; CORRECT?

A CORRECT.

Q SO THERE WAS A DEFINITE PERIOD OF TIME WHEN YOU FELT MR. HESTON'S ARM RIGID AND THEN IT RELAXED?

A YES.

Q WHEN -- AT THE MOMENT IN TIME WHEN MR. HESTON'S ARM BEGAN TO RELAX, YOU WERE AWARE THAT OFFICER GODWIN HAD COMPLETED HIS FIVE-SECOND

CYCLE OF THE TASER; ISN'T THAT TRUE?
A THAT'S TRUE.
Q AND THIS EFFECT FROM THE TASER WOULD BE CONSISTENT WITH, WITH YOUR TRAINING, CORRECT, THAT AS SOON AS THE CYCLE IS COMPLETE, THE PERSON'S BODY WOULD BECOME LIMP, ESSENTIALLY OR RELAX, NOT LIMP BUT RELAX?
A YES.
Q AND IMMEDIATELY AFTER THE HANDCUFFS -- DID YOU -- WERE YOU ACTUALLY INVOLVED IN THE HANDCUFFING PROCESS?
A PUTTING THE HANDCUFFS ON HIM?
Q YES.
A NO.
Q AND DO YOU RECALL WHO THAT WAS?
A I BELIEVE IT WAS OFFICER SIMPSON.
Q ALL RIGHT. WE HAVE TALKED ABOUT A NUMBER OF DIFFERENT OFFICERS.

DO YOU REMEMBER WHEN OFFICER SIMPSON ARRIVED IN THE LIVING ROOM OF THE HESTON HOUSE?
A NO.
Q BUT YOU WERE AWARE SUDDENLY AS YOU WERE PULLING MR. HESTON'S ARM OUT, HIS RIGHT ARM OUT FROM UNDER HIS BODY THAT OFFICER SIMPSON WAS THERE?
A YES.

Q AND IMMEDIATELY AFTER THE HANDCUFFS WERE PLACED ON MR. HESTON, YOU GOT UP AND WALKED OUT OF THE HOUSE; CORRECT?

A CORRECT.

Q AND WHEN YOU WALKED OUT OF THE HOUSE YOU IMMEDIATELY CALLED FOR PARAMEDICS; IS THAT TRUE?

A THAT'S TRUE.

Q AND AT THIS POINT I'D LIKE TO SHOW YOU WHAT HAS BEEN MARKED AS PLAINTIFF'S 128-B, AND IT'S ACTUALLY PAGE 2 OF 128-B.

MR. BURTON: THIS IS ADMISSIBLE BY STIPULATION, YOUR HONOR, WITH THE OTHER SIDE.

MR. HURLEY: RIGHT.

THE COURT: VERY WELL. WHAT IS IT?

MR. WILLIAMSON: IT'S AN ACTUAL ITEMIZED CAD OF THE DISPATCH CALLS AND THE RADIO CALLS FROM THE OFFICERS.

THE COURT: AN ITEMIZED CAD.

MR. WILLIAMSON: A CAD, A CALL HISTORY ESSENTIALLY.

THE COURT: ALL RIGHT. 128-B IS IN EVIDENCE, AN ITEMIZED CALL.

(WHEREUPON, PLAINTIFFS' EXHIBIT NUMBER 128 HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WAS ADMITTED INTO

EVIDENCE.)

MR. WILLIAMSON: IT'S COMING UP THERE.

Q OFFICER FAIRBANKS, HAVE YOU EVER SEEN THIS CALL HISTORY BEFORE?

A YES.

Q AND YOU RECOGNIZE THIS DOCUMENT AS A DATE AND TIME STAMP OF CALLS THAT WERE BEING EXCHANGED AT THE TIME OF THIS INCIDENT BETWEEN THE POLICE OFFICERS THAT WERE PRESENT AND YOUR RADIO DISPATCHER; RIGHT?

A RIGHT.

Q OKAY. I HAVE A PARTICULAR SECTION, AND I KNOW IT'S HARD. WE'RE GOING TO MAGNIFY THIS IN A SECOND. BUT I HAVE A YELLOWED PORTION THAT PERTAINS TO A CALL THAT YOU MADE.

WE'RE GOING TO DO A NIFTY THING HERE AND TRY AND MAGNIFY SO WE CAN SEE IT, IF MR. BURTON CAN HANDLE THE TECHNOLOGY.

THE COURT: YOU NEED TO SELECT THE TOOL THAT MAGNIFIES IT, THAT MADE IT SMALLER.

THE WITNESS: I SAID I'M ABLE TO READ IT IF THAT'S --

THE COURT: WELL, NO, WE ALL WANT TO BE ABLE TO SEE IT.

THE WITNESS: OKAY.

THE COURT: SO LET'S GIVE COUNSEL A CHANCE.

BY MR. WILLIAMSON:

Q OFFICER FAIRBANKS, IS THAT BIG ENOUGH FOR YOU TO READ NOW?

A YES.

Q OKAY. I WANT TO SPECIFICALLY DIRECT YOUR ATTENTION TO THE TIME 14:26:47 SECONDS; DO YOU SEE THAT?

A YES.

Q AND JUST TO BE CLEAR THIS IS MILITARY TIME. 14:26 IS 2:26 P.M.?

A YES.

Q AND SO THIS WOULD BE 14:26 WOULD BE 2:26 P.M.?

A RIGHT.

Q AND WHAT WAS THE CODE YOU USED ON THE DATE OF THIS INCIDENT?

A F2.

Q AND DO YOU SEE ON THE PARTICULAR LINE OF THAT ENTRY F2?

A YES.

Q AND DOES THAT DESIGNATE THAT'S A CALL THAT YOU MADE?

A YES.

Q AND WAS THIS A TIME -- STRIKE THAT.

THIS WAS A DISPATCHER REPORTING OVER RADIO COMMUNICATION THAT YOU HAD REQUESTED CODE 3, FIRE/AMR; IS THAT RIGHT?

A RIGHT.

Q AND FIRE/AMR REFERS TO PARAMEDICS?

A AMR WAS THE PARAMEDICS SERVICE AT THE TIME.

Q AND WOULD IT BE FAIR TO SAY THAT THE RADIO DISPATCHER WOULD HAVE SENT THIS BROADCAST OUT ON THE RADIO WITHIN SECONDS AFTER YOU PLACED THE CALL TO THAT DISPATCHER?

A WOULD THEY HAVE CONTACTED AND --

Q NO, NO, NO, NO, NO.

THIS REFERENCE IS TO THE DISPATCHER, NOTING THAT YOU HAVE REQUESTED CODE 3; RIGHT?

A RIGHT.

Q WHAT I'M TRYING TO GET AT IS WHAT IS THE TIME GAP THAT YOU CALL YOUR DISPATCHER AND YOU SAY I NEED CODE 3 BACK UP AT THIS LOCATION, OR CODE 3 FIRE/AMR AT THIS LOCATION AND THE TIME THAT THE DISPATCHER REPORTS THAT?

A SO YOU'RE SAYING ESTIMATE THE TIME THAT ONCE I MAKE THIS CALL HOW LONG IT TOOK THEM TO -- TO CONTACT --

Q TO BROADCAST YOUR REQUEST, NOT HOW LONG IT TOOK THEM TO CONTACT.

A THEY WOULDN'T REBROADCAST MY REQUEST.
Q OKAY. SO LET ME ASK YOU A DIFFERENT WAY BECAUSE NOW I'M A LITTLE CONFUSED.
IS THIS YOUR CALL TO YOUR DISPATCHER REQUESTING CODE 3, FIRE?
A A RECORD OF WHAT I TOLD THEM?
Q RIGHT.
A YES.
Q OKAY. WHAT I'M TRYING TO GET AT IS IN TERMS OF THE TIME STAMP.
A UH-HUH.
Q WHEN IS THIS RECORD CREATED IN RELATION TO WHEN YOU MADE THE REQUEST? ISN'T IT JUST SECONDS AFTER YOU MADE THE REQUEST?
MR. HURLEY: OBJECTION. IT CALLS FOR SPECULATION AND OUTSIDE OF THE SCOPE OF THIS WITNESS. IT'S NOT A SALINAS POLICE DEPARTMENT RECORD.
THE COURT: WELL, PERHAPS IT IS OR NOT OUTSIDE OF THE SCOPE. I'LL SUSTAIN THE OBJECTION FOR LACK OF FOUNDATION.
MR. WILLIAMSON: OKAY.
Q DO YOU KNOW THE PROCESS BY WHICH THE DISPATCHER MAKES THE RECORD OF YOUR BROADCAST FOR THE CODE 3 FIRE/AMR?

A THAT THEY DOCUMENT IT, I DON'T KNOW HOW LONG IT TAKES THEM.

Q OKAY. DOES THIS REFLECT A BROADCAST OVER POLICE RADIO BY THE DISPATCHER THAT THE REQUEST HAS BEEN MADE?

A YES.

Q AND DO YOU RECALL HEARING THE DISPATCHER COMMUNICATE YOUR REQUEST OVER THE, OVER YOUR RADIO FOR FIRE AND AMBULANCE?

A THEY'RE ON THE ENTIRELY DIFFERENT CHANNEL SO THIS WOULDN'T HAVE COME ACROSS --

Q OKAY.

A -- OUR RADIO.

Q MAY I HAVE A SECOND?

(PAUSE IN PROCEEDINGS.)

BY MR. WILLIAMSON:

Q OKAY. I JUST HAVE A COUPLE MORE QUESTIONS FOR YOU, OFFICER FAIRBANKS.

WOULD IT BE FAIR TO SAY THAT ONLY A FEW SECONDS PASSED BETWEEN THE TIME THAT THE HANDCUFFS WERE PLACED ON MR. HESTON AND YOU BROADCAST FOR A FIRE AND AMBULANCE?

A YES.

Q AND ISN'T IT TRUE THAT YOU COULD NOT POSITIVELY SAY ONE WAY OR THE OTHER WHETHER THERE

WAS EVER A PERIOD OF TIME WHEN MR. HESTON WAS DEFINITELY NOT BEING TASED FROM THE POINT THAT YOU FIRST SAW HIM ON THE FLOOR UNTIL THE POINT WHEN OFFICER GODWIN SHOT HIM IN THE BACK WITH HIS TASER; ISN'T THAT TRUE?

A CAN YOU REPEAT THE QUESTION?

Q ISN'T IT TRUE THAT YOU CAN'T POSITIVELY SAY ONE WAY OR THE OTHER WHETHER THERE WAS EVER A PERIOD OF TIME WHEN MR. HESTON DEFINITELY WAS NOT BEING TASED, FROM THE POINT IN TIME WHEN YOU FIRST ENTERED THE LIVING ROOM AND FIRST SAW HIM ON THE FLOOR TO THE POINT WHEN YOU SAW OFFICER GODWIN FIRE HIS TASER INTO THE BACK OF MR. HESTON? ISN'T THAT TRUE?

A THAT'S NOT TRUE.

Q I'D LIKE TO READ FROM THE WITNESS'S DEPOSITION, PAGE 80, LINES 18 TO 23. AND I THINK, YOUR HONOR, WE ALREADY LODGED THE ORIGINAL TRANSCRIPT WITH THE COURT.

THE COURT: IS THIS A PARTY?

MR. WILLIAMSON: NO, YOUR HONOR.

THE COURT: YOU NEED TO GIVE HIM AN OPPORTUNITY TO READ IT.

MR. WILLIAMSON: I THINK WE LODGED OUR COPY. OURS ARE ALL DIGITAL, YOUR HONOR. AND I

THINK --

THE COURT: DO THEY HAVE A SET OF DOCUMENTS THAT THEY GAVE YOU?

THE CLERK: WELL, IT WAS ALL SITTING HERE.

THE COURT: WELL, OKAY. CAN YOU GIVE IT.

BY MR. WILLIAMSON:

Q OFFICER, LET ME DIRECT YOU SPECIFICALLY TO PAGE 80, LINES 18 TO 23.

A AND YOUR QUESTION WAS IS THIS YOUR QUESTION?

Q MY QUESTION IS THAT NOW HAVING READ IT, DOES THAT REFRESH YOUR RECOLLECTION ABOUT HOW YOU RESPONDED TO THE QUESTION THAT I JUST POSED TO YOU A MINUTE AGO?

A YES.

Q AND DID YOU HAVE A DIFFERENT RESPONSE AT THE TIME OF YOUR DEPOSITION?

WELL, LET ME ASK YOU THIS, SIR: ISN'T IT TRUE THAT AT THE TIME OF YOUR DEPOSITION, YOU TESTIFIED UNDER OATH THAT YOU COULD NOT POSITIVELY SAY ONE WAY OR THE OTHER, IF WE TAKE THE TIMEFRAME FROM THE TIME THAT YOU FIRST ENTERED THE LIVING ROOM AND SAW MR. HESTON ON THE FLOOR TO THE POINT WHEN YOU SAW OFFICER GODWIN FIRE HIS TASER, THAT YOU CAN'T SAY POSITIVELY ONE WAY OR THE OTHER

WHETHER MR. HESTON WAS EVER NOT BEING TASED?

A COULD I SAY POSITIVELY? I WOULD SAY NO.

Q OKAY. THANK YOU.

ISN'T IT TRUE, SIR, THAT FROM THE POINT IN TIME WHEN YOU FIRST SAW MR. HESTON ON THE FLOOR IN THE LIVING ROOM ON THE FLOOR WITH HIS ARMS UNDERNEATH HIM TO THE POINT WHEN OFFICER GODWIN SHOT HIM ON THE BACK, THAT HE NEVER MOVED FROM THAT POSITION?

ISN'T THAT TRUE?

A THAT'S TRUE.

Q ISN'T IT ALSO TRUE THAT FROM THE POINT IN TIME WHEN YOU FIRST SAW MR. HESTON ON THE FLOOR IN THE LIVING ROOM WITH HIS ARMS UNDERNEATH HIM, TO THE POINT WHEN OFFICER GODWIN SHOT HIM IN THE BACK, THAT YOU NEVER HEARD MR. HESTON SAY ANYTHING; ISN'T THAT TRUE?

A THAT'S TRUE.

MR. WILLIAMSON: THANK YOU, YOUR HONOR. I HAVE NOTHING FURTHER. THANK YOU.

THE COURT: VERY WELL. DOES ANY OTHER PARTY WISH TO EXAMINE THE WITNESS AT THIS TIME?

MR. HURLEY: YES, YOUR HONOR.

THE COURT: THIS WOULD BE IN THE NATURE OF A DIRECT EXAMINATION.

DIRECT EXAMINATION

BY MR. HURLEY:

Q OFFICER FAIRBANKS, JUST A MOMENT AGO YOU WERE ASKED IF YOU COULD STATE POSITIVELY EXACTLY WHAT WAS OCCURRING WITH THE TASERS AT THE TIME THAT YOU SAW MR. HESTON ON THE FLOOR.

COULD YOU EXPLAIN YOUR ANSWER?

A WELL, AS TO THE WAY THE QUESTION WAS POSED TO ME AND BEING SPECIFICALLY CLEAR WITH ALL OF THE COMMOTION AND LOOKING BACK ON IT AND REVIEWING IT IN MY HEAD, THERE SEEMS TO BE A TIME WHERE I RECALL SPEAKING ABOUT THE INCIDENT. AND RECALLING IT IN MY HEAD AS I SIT HERE TODAY THAT I COULD SAY THAT I DID HEAR TASERS CYCLING AT ONE POINT IN TIME.

Q DID YOU EVER HEAR SIMPSON SAY TO GODWIN, "TASE HIM, WE CAN'T GET HIS ARMS OUT"?

A I RECALL WORDS TO THAT EFFECT.

Q AND WHAT WAS YOUR OBJECTIVE WHEN YOU GOT INTO THE HOUSE AND GOT TO THE SIDE OF ROBERT C. HESTON?

A TO ATTEMPT TO REMOVE HIS HAND FROM UNDERNEATH HIS BODY.

Q AND IS IT IMPOSSIBLE TO MOVE A PERSON'S ARMS WHEN A TASER IS OPERATING? IMPOSSIBLE?

A IT'S HARD TO SAY. DIFFERENT PEOPLE REACT DIFFERENTLY.

WE TRAIN WITH STANDARD WINDOW OF OPPORTUNITY TO GET IN THE POSITION WHEN THEY COME OUT WITH THAT EXTRA MUSCLE RIGIDNESS. IT IS EASIER TO STRUGGLE WITH THE PERSON AT THAT POINT.

Q AND ON THAT DAY AS FAR AS FOCUSING ON HIS ARMS, WHAT WAS YOUR OBJECTIVE AS TO MR. HESTON'S ARMS?

A TO MOVE THEM TO HIS BACK AND TO HANDCUFF HIM.

Q AND IN YOUR TRAINING AND EXPERIENCE -- WELL, FIRST OF ALL, IN YOUR TRAINING, WHEN YOU'RE TRAINING OFFICERS AND THEY HAVE BEEN TASED, DO YOU HAVE ANY EXPERIENCE WITH OFFICER'S ARMS BEING SUBJECT TO BEING MOVED?

A THEY'RE RIGID AND IN A LOT OF THE CASES AND SOME PACIFIC IN A PARTICULAR INSTANT WHERE I WAS TASED I COULD MOVE MY LEFT ARM.

SO THERE IS DIFFERENCES.

Q AND IN THE TRAINING THAT YOU GIVE TO THE OFFICERS AND THE TRAINING THAT WAS GIVEN TO THE OFFICERS IN 2003, DID THAT INCLUDE VIDEOS OF OFFICERS WHO WERE SUBJECT TO TASER GOING DOWN WITH THEIR ARMS IN VARIOUS POSITIONS?

A YES.

Q ALL RIGHT. I'M GOING TO BRING UP YOUR SALINAS POLICE DEPARTMENT TRAINING HERE.

THE COURT: DID YOU SWITCH THE INPUT ON THE SYSTEM?

MR. HURLEY: IT SHOULD COME UP IN A MINUTE.

(PAUSE IN PROCEEDINGS.)

BY MR. HURLEY:

Q WHILE WE'RE WAITING FOR THAT TO COME UP, LET'S GO BACK TO WHERE YOU WERE OUTSIDE OF THE HOUSE WHEN YOU WENT UP ALONG THE FRONT SIDE OF THE HOUSE. AND WE'LL LOOK AT SOME PICTURES TOMORROW, WHEN YOU WENT UP ALONG THE FRONT SIDE OF THE HOUSE, YOU WERE ON AN ANGLE LOOKING DOWN ALONG THE FRONT; IS THAT CORRECT?

A PRETTY MUCH PARALLEL. MY PATH WAS PARALLEL TO THE FRONT OF THE HOUSE.

Q AND COULD YOU SEE THAT THERE WAS A BROKEN FRONT WINDOW?

A THERE WAS.

Q AND HAVE YOU SINCE MEASURED WHERE YOU WERE WHEN YOU DEPLOYED YOUR TASER?

A YES.

Q YOU WERE QUESTIONED BY THE HESTON'S ATTORNEY ABOUT WHERE YOU WERE STANDING AT THE TIME OF YOUR DEPOSITION AND YOU HAVE NOT MEASURED IT; IS THAT CORRECT?

A THAT'S CORRECT.
Q AND SINCE THEN IN PREPARING TO TESTIFY IN THIS TRIAL, DID YOU GO OUT AND DO THAT?
A YES, I DID.
Q AND WHAT WAS THE DISTANCE YOU WERE STANDING FROM HESTON WHEN DEPLOYED?
A I WOULD SAY APPROXIMATELY 17 TO 18 FEET.
Q AND THEN AFTER HESTON WENT BACK INSIDE AND THIS MINUTE WENT ON BEFORE OTHER OFFICERS CAME, CAN YOU DESCRIBE FOR US WHAT HESTON WAS DOING?
A HE WAS MOVING ABOUT, IN AND OUT OF THE HOUSE. HE WAS -- HE WAS APPEARED LOOKING FOR MORE ARTICLES TO THROW AT US.

AFTER I HAD DEPLOYED MY TASER AND IT DIDN'T HAVE THE EFFECT, ONE OF THE ITEMS IMMEDIATELY THEREAFTER THAT HE, THAT HE CHOSE WAS THE OUTDOOR PORCH LIGHT FIXTURE THAT WAS SOMEWHERE IN THE VICINITY OF HIS -- OF HIS LEFT SHOULDER AREA I WOULD IMAGINE AND HE GRABBED THAT LIGHT FIXTURE AND RIPPED IT FROM THE WALL.

WHEN HE DID SO THERE WAS A -- I SAW THE ARC AS WE SPOKE ABOUT EARLIER AND SAW HIM CONVULSE FROM WHAT IT SEEMED TO ME TO BE AN ELECTRICAL SHOCK FROM THAT FIXTURE.

AND THEN HE TURNED AND THREW THAT IN THE

VICINITY OR AT SERGEANT DOMINICI AND THEN RETURNING BACK INSIDE OF THE HOUSE AT ONE POINT I COULDN'T SEE CLEARLY BECAUSE OF THE FRONT WINDOW AND THE WINDOW, OVER THE WINDOW SILL I COULD SEE HIM BEND OVER AS IF HE WAS LOOKING AT IT. IN HINDSIGHT, IT APPEARED TO BE ATTEMPTING TO BREAK OBJECTS WITHIN THE HOUSE TO GET ITEMS TO THROW AT US TO MANUFACTURE MORE ITEMS.

Q AND WHEN YOU SAY YOU WERE LOOKING AT IT IN HINDSIGHT, WHAT WERE YOU THINKING AT THE TIME?

A AT THE TIME, BECAUSE I HADN'T SEEN MR. HESTON SENIOR, THAT THE POSTURE THAT HE HAD APPEARED AS IF HE WAS, FOR LACK OF A BETTER WORD PUMMELING ANOTHER PERSON.

Q AND COULD YOU DESCRIBE WHAT HIS HANDS WERE DOING WHEN YOU SAY PUMMELING?

A I COULD SEE HIS HANDS, IF I REMEMBER IT CLEARLY HIS -- IT WAS HIS UPPER BODY AND ELBOW AREA MAKING JUST PUMPING MOTIONS AS IF HE WAS GIVING CPR OR SOMETHING, IF THAT MAKES IT CLEAR.

Q AND HOW LONG DID HE CONTINUE DOING THAT?

A I WOULD SAY JUST A COUPLE SECONDS.

Q AND THEN AFTER HE WAS DOING THAT, WHAT DID HE DO NEXT?

A HE RETURNED TO THE DOOR, THROWING ITEMS.

Q DID YOU EVER HEAR HIM SAYING ANYTHING DURING THIS PROCESS WHEN HE WAS GOING BACK AND FORTH IN AND OUT OF THE HOUSE?
A HE WAS -- ONE OF THE THINGS THAT I REMEMBER WAS HE WAS SPEAKING OF SOMEONE WHO WAS IN THE ATTIC WITH THE .22 HE REFERRED TO A .22. HE WAS URGING US TO COME IN AND GET HIM, ALL THE WHILE THROWING THINGS AT US.
Q AND WHEN HE'S REFERRING TO A .22, WHAT DOES THAT MEAN TO YOU?
A THAT WOULD MEAN THAT THERE WAS A FIREARM, HE WAS REFERRING TO A FIREARM.
Q DID YOU EVER SEE HIM DO ANYTHING WITH THE CEILING?
A NOT THAT I RECALL.
Q AND THEN WHEN SERGEANT RUIZ ARRIVED, DID YOU SEE SERGEANT RUIZ STARTING TO WALK UP?
A YES.
Q AND PRIOR TO SERGEANT RUIZ ARRIVING, HAD YOU GONE TO ANOTHER WEAPON BESIDES THE TASER?
A I HAD. I HAD DRAWN MY PISTOL.
Q AND WHY DID YOU DO THAT?
A AT THE TIME I FELT THAT WE MAY HAVE TO RESORT TO A LETHAL FORCE SITUATION.
Q NOW, WHEN IT WAS JUST YOU AND SERGEANT

DOMINICI THERE, DID YOU EVER THINK ABOUT RUNNING AROUND TO THE BACK AND TRYING TO GUARD THE BACK-DOOR TO KEEP HIM FROM GETTING OUT?

A NO.

Q AND WHY NOT?

A I FELT THAT THE THREAT LEVEL AND IN FRONT OF US, HE WAS GOING TO THE BACK. THERE WERE TOO MANY UNKNOWN THINGS IN THE BACK. THIS NEVER OCCURRED TO ME TO GO AROUND TO THE BACK AND IT DIDN'T SEEM LIKE A SAFE THING TO DO AT THE TIME.

Q HAVE YOU SEEN SAFE PEOPLE ON A RAMPAGE WITH METHAMPHETAMINE BEFORE?

A I WOULD SAY NO.

Q HAD YOU EVER SEEN ANYBODY ACTING LIKE THIS BEFORE IN YOUR EXPERIENCE AS A POLICE OFFICER?

A PRIOR TO THAT? NO.

Q AND AT THE TIME THAT YOU APPROACHED THE HOUSE, I TAKE IT THAT YOU WERE CARRYING -- YOU WERE WEARING A DUTY BELT WHICH HAD EQUIPMENT ON IT; CORRECT?

A CORRECT.

Q AND COULD YOU EXPLAIN FOR US WHAT EQUIPMENT YOU HAD ON YOUR DUTY BELT?

A I HAD HANDCUFFS. I HAD A GLOCK 45-CALIBER PISTOL, AN EXTENDABLE BATON, OC OR PEPPER SPRAY,

AND MY TASER.
Q DESCRIBE -- YOU SAID AN EXPANDIBLE BATON. COULD YOU DESCRIBE FOR US WHAT THAT IS?
A WELL, EXPANDED IT'S BASICALLY A NIGHT STICK OR THREE SECTION EXPANDIBLE STEEL STICK.
Q AND IT HAS A BALL ON THE END?
A YES.
Q AND WHAT IS IT MADE OUT OF?
A I BELIEVE IT'S MADE OUT OF ALUMINUM.
Q AND THAT IS THE VERSION OF A BATON OR A NIGHT STICK THAT THE SALINAS POLICE DEPARTMENT CARRIES; CORRECT?
A CORRECT.
Q AND YOU RECEIVED TRAINING ON HOW TO USE THAT DEVICE?
A YES.
Q AND WHEN YOU USED THAT DEVICE, DO YOU HAVE ANY EXPECTATION THAT YOU'RE GOING TO CAUSE INJURY?
A EXPECTATION? NO.
Q WHAT KIND OF INJURIES CAN THAT DEVICE CAUSE?
A JUST A BLUNT FORCE INJURY ON THE MUSCLE MASS AND BROKEN BONES BEING CAUSED BY IT.
Q AND IN THIS CASE DID YOU CONSIDER RUNNING UP TO MR. HESTON AND USING YOUR BATON ON HIM?
A ABSOLUTELY NOT.

Q AND WHY NOT?
A HE'S THROWING ITEMS AT US. THE INSIDE OF THE HOUSE WAS FILLED WITH DEBRIS. IT -- THERE WAS NO CONSIDERATION THAT REMAINED ON MY PART IN ENGAGING IN THAT CLOSE PROXIMITY WITH HIM AT THAT TIME.
Q AND WHEN YOU GOT INSIDE OF THE HOUSE AND HESTON WAS ON THE GROUND, DID YOU CONSIDER YOURSELF USING THE BATON --
THE COURT: THE FLOOR.
MR. HURLEY: THANK YOU.
Q WHEN HESTON WAS ON THE FLOOR, DID YOU CONSIDER USING YOUR BATON ON HIM TO FORCE HIM TO PULL HIS ARMS OUT?
A NO.
Q WHY NOT?
A JUST IT WOULD BE AN EASIER SITUATION WITH THE TASER WITHOUT HAVING TO INFLICT THOSE TYPES OF INJURIES.
Q AND BY "THOSE TYPES OF INJURIES," WHAT DO YOU MEAN?
A POSSIBLY BREAKING A BONE. MY EXPERIENCE WITH THE TASER HAS NEVER HAD ANY ISSUES TO IT. PEOPLE HAVE REBOUNDED QUITE RAPIDLY. IT WAS A SITUATION WHERE THAT WAS OUR BEST AVAILABLE TOOL. GOING INTO A SITUATION AND SWINGING AROUND BATONS WITH A

NUMBER OF OTHER OFFICERS AND IN A CLUTTERED ROOM.
Q LIKEWISE YOU HAD THE PEPPER SPRAY. DID YOU CONSIDER HAVING TO USE YOUR PEPPER SPRAY TO MAKE HIM PULL HIS ARMS OUT?
A NO.
Q AND WHY IS THAT?
A WITH THE PEPPER SPRAY THERE'S ALWAYS A CONSIDERATION OF CROSS CONTAMINATION, WHERE I SPRAY MY PEPPER SPRAY IT'S GOING TO MISS OR REFLECT OFF THE INTENDED TARGET AND WOULD PROBABLY MOST OF THE PEOPLE THERE WOULD HAVE BEEN AFFECTED BY.
Q AND YOU WOULD HIT THE OTHER OFFICERS?
A IT WOULD HIT THE OTHER OFFICERS.
Q NOW, YOU'RE 6 FEET 9 AND YOU WEIGH 260 POUNDS, SO IF YOU HAD SAT ON HIM, IT WOULD HAVE BEEN HARD FOR HIM TO PUSH YOU OFF; CORRECT?
A I THINK IT WOULD --
MR. WILLIAMSON: OBJECTION, YOUR HONOR. IT CALLS FOR SPECULATION.
THE COURT: WELL, AS PHRASED I'LL SUSTAIN THE OBJECTION.
BY MR. HURLEY:
Q IN YOUR EXPERIENCE AS A POLICE OFFICER, WOULD YOU HAVE SAT ON MR. HESTON BEING '6 "9 AND BEING 240 OR WHATEVER YOU SAID, 250?

A 250.
Q 250.
A NO, I WOULDN'T.
Q AND WHY NOT?
A IN SITUATIONS LIKE THIS THERE'S ALWAYS THE SITUATION OF POSITIONAL ASPHYXIA SITUATION AND WE WOULDN'T WANT TO AFFECT THE BREATHING. IT'S ALREADY A PERSON WHO HAS EXPENDED A LOT OF ENERGY, SO TO DISRUPT HIS BREATHING WOULD HAVE BEEN IN ERROR.
Q AND YOU MENTIONED THE WORDS POSITIONAL ASPHYXIA AND THE POLICE DEPARTMENT TRAINS ABOUT POSITIONAL ASPHYXIA; CORRECT?
A CORRECT.
Q AND IT DID IN 2003 AND 2004; CORRECT?
A CORRECT.
Q ALL RIGHT. COULD YOU EXPLAIN TO US WHAT OFFICERS ARE TAUGHT ABOUT POSITIONAL ASPHYXIA?
A WE'RE TAUGHT THE FIRST AND FOREMOST THING AFTER TAKING A PERSON INTO CUSTODY IS TO TAKE A PERSON ON THEIR SIDE SO THEY'RE NOT RESTING THEIR WEIGHT ON THE DIAGRAM OR THEIR CHEST.
WE'RE NOT TO WEIGH DOWN PEOPLE OR BASICALLY DOG PILE ON SOMEONE BASICALLY BECAUSE OF A SITUATION WHERE WE COULD AFFECT THE BREATHING AND

POSSIBLY CAUSE A MEDICAL PROBLEM WITH THE SUSPECT.

Q AND YOU USED THE REFERENCE TO DOG PILE. COULD YOU DESCRIBE WHAT A DOG PILE IS?

A WELL, IT WOULD BE ALL OF THE OFFICERS JUMPING ON HIM AND HOLING HIM DOWN WHEN EVERYBODY IS TRYING TO GRAB A WRIST OR A HANDCUFF.

Q HAVE YOU EVER HEARD THE TERM SWARM?

A NEVER.

Q AND YOU WERE NEVER TRAINED WITH THAT TERM?

A NO.

Q CAN YOU THINK OF ANY OTHER ALTERNATIVE YOU HAD IF YOU WERE GOING TO USE SOME KIND OF METHOD TO TRY AND KEEP HIM UNDER CONTROL? WAS THERE ANY OTHER CONTROL YOU HAD EITHER ON YOUR BELT OR TRAINING THAT YOU COULD USE?

A AT WHAT POINT?

Q AT THE POINT THAT YOU WERE DOWN NEXT TO MR. HESTON AND WANTED TO GET HIS ARMS OUT.

A I WOULD NOT HAVE RESORTED TO ANY OTHER FORCE.

Q NOW, WE TALKED ABOUT HEARING TASERS.

WAS THERE A POINT WHEN YOU WERE PULLING ON MR. HESTON'S ARMS THAT YOU FELT THAT HE WAS NOT BEING AFFECTED BY A TASER BUT WAS BEING RESISTIVE?

A THERE WAS.

Q AND COULD YOU DESCRIBE THAT FOR US?

A THE TIME -- THE POINT IN TIME WHERE IT BECAME A, I GUESS A STATIC SITUATION. IT APPEARED TO ME FROM PULLING THAT THERE WAS SOME RESISTANCE IN THE RIGHT ARM OF MR. HESTON.

AT THAT POINT I REMEMBER OFFICER GODWIN RELOADED HIS TASER AND AFTER FAILING TO PULL THE ARMS FROM BENEATH MR. HESTON, HE ANNOUNCED THAT HE WAS GOING TO TASE HIM AGAIN.

Q NOW, ARE YOU TRAINED ABOUT BEING CONCERNED FOR A PERSON ROLLING UP -- A PERSON WHO IS ON THE FLOOR ROLLING UP AND WITH OFFICERS AROUND THE PERSON?

A RIGHT.

Q NOW, BY THE TIME SIMPSON GOT THERE I THINK THERE WERE SEVEN OFFICERS THERE; CORRECT?

A I DON'T KNOW EXACTLY.

Q YOU DON'T RECALL, BUT FOR ALL OF THOSE OFFICERS THERE, THEY'RE ALL TRAINED THE SAME ABOUT NOT GETTING ON TOP OF HIM; CORRECT?

A CORRECT.

Q AND SO EVEN THOUGH THERE ARE SEVEN OFFICERS THERE, IN YOUR TRAINING IS THERE ANY DANGER IF A PERSON ROLLS UP AND COMES UP FROM A PRONE POSITION?

A PARTICULARLY AND IN THE POSITIONING WAS WITH HIS HANDS UNDER HIM TO PRESS UP WITH HIS HANDS. THAT WOULD HAVE, THE POSITION OF HIS HANDS WOULD

HAVE FACILITATED HIM GETTING UP OR BENT.
Q AND WHEN YOU WENT INTO THE HOUSE, DID YOU OBSERVE WHAT WAS -- ABOUT THE FLOOR OF THE HOUSE THAT YOU ENTERED INTO?
A THERE WAS GLASS, THERE WAS BROKEN PIECES OF WOOD. THERE WERE A NUMBER OF DIFFERENT THINGS.
Q NOW, YOU SAW HESTON THROW A PIECE OF WOOD AT SERGEANT DOMINICI; CORRECT?
A CORRECT.
Q AND AFTER WHEN YOU WENT OUTSIDE THERE WAS A LONG PIECE OF WOOD LAYING AT THE SPOT WHERE DOMINICI HAD BEEN STANDING WHEN HE HAD BEEN STRUCK; CORRECT?
A CORRECT.
Q AND I'M SHOWING YOU ITEM 249, WHICH IS A PIECE OF WOOD FROM FURNITURE. IS THIS THE WOOD THAT WAS LAYING OUT IN FRONT OF THE HOUSE AFTER YOU SAW A PIECE OF WOOD THROWN AT SERGEANT DOMINICI?
A I COULDN'T EXACTLY SAY.
Q RIGHT. DOES IT LOOK SIMILAR TO THE OBJECT THAT YOU SAW --
A YES.
Q -- COME OUT OF THE HOUSE?
A YES.
Q AND DID YOU SEE ANYTHING THROWN AT SERGEANT

RUIZ WHEN SERGEANT RUIZ STARTED UP THE PATH?
A YES.
Q AND I'M SHOWING YOU AN ITEM WHICH IS 27, A GRANDFATHER CLOCK WEIGHT.
DOES THIS APPEAR TO --
THE COURT: YOU NEED TO ASK THAT AS A DIRECT QUESTION.
BY MR. HURLEY:
Q DID -- CAN YOU DESCRIBE FOR US -- LET ME GO BACK.
WHEN YOU SAW SOMETHING THROWN AT SERGEANT RUIZ, DESCRIBE WHAT YOU HAD SAW?
A I SAW A GOLD METALLIC ITEM THROWN AT SERGEANT RUIZ.
Q DID YOU SEE MORE THAN ONE OF THOSE GOLD METALLIC ITEMS THROWN OUT OF THE HOUSE?
A I ONLY RECALL SEEING ONE.
Q AND I'M HOLDING 207, THE GRANDFATHER CLOCK WEIGHT. DOES THIS APPEAR TO BE THE ITEM THAT YOU SAW THROWN OUT OF THE HOUSE?
A IT DOES.
Q AND WHERE WAS SERGEANT RUIZ STANDING WHEN YOU SAW THIS ITEM THROWN OUT OF THE HOUSE THAT LOOKS LIKE 207?
A I BELIEVE HE WAS APPROACHING ON OR NEAR UP TO

THE FRONT DOOR, PROBABLY IN THE AREA OF THE SIDEWALK.

Q NOW, WHEN YOU WERE ASKED ABOUT MOVING THE GRANDFATHER CLOCK, AND YOU TALKED ABOUT MOVING THE GRANDFATHER CLOCK TWICE, IF I UNDERSTOOD THE TESTIMONY. DO YOU RECALL MOVING IT TWICE OR ONCE?

A I MOVED IT TWICE.

Q THE FIRST TIME YOU MOVED THE GRANDFATHER CLOCK, WHERE WAS IT LAYING WHEN YOU FIRST FOUND IT?

A IT WAS IN THE AREA OF THE THRESHOLD OF THE FRONT DOOR.

Q AND WAS IT SOMETHING THAT YOU WOULD STEP OVER TO GET INTO THE HOUSE?

A YOU WOULD HAVE TO, YEAH.

Q AND WHEN YOU MOVED THE GRANDFATHER CLOCK THE FIRST TIME, WHERE DID YOU MOVE IT TO?

A DOWN TO THE AREA DOWN AT THE BOTTOM. I BELIEVE THERE'S ONE OR TWO STAIRS TO THE FRONT THE PORCH.

Q AND THE SECOND TIME YOU MOVED THE GRANDFATHER CLOCK, WHERE DID YOU MOVE IT TO?

A OFF TO THE LAWN ON THE RIGHT SIDE LOOKING UP.

Q AFTER THE FIRST TIME THAT YOU MOVED THE GRANDFATHER CLOCK, WHEN YOU WERE GOING TO GO IN THE DOOR INTO THE LIVING ROOM, DO YOU RECALL AN OFFICER

COMING IN BEHIND YOU?

A I DON'T RECALL WHO WAS BEHIND ME.

Q DO YOU EVER RECALL, IN YOUR MEMORY OF THE EVENT, OFFICER PAREDEZ COMING INTO THE HOUSE?

A I REMEMBER HIM BEING THERE AT THE END, BUT I DON'T REMEMBER HIM COMING INTO THE HOUSE.

MR. HURLEY: YOUR HONOR, IF THIS IS A GOOD TIME TO RECESS FOR THE AFTERNOON, I COULD THEN GO TO THE PHOTOGRAPHS AND FIX THE TECHNOLOGY.

THE COURT: VERY WELL.

MEMBERS OF THE JURY, IT'S ABOUT 4:00 SO WE'LL RECESS FOR THE DAY. LET ME CHECK OUR SCHEDULE.

WE COME BACK TO THIS MATTER TOMORROW MORNING AT 9:00. I'LL SEE YOU THEN. REMEMBER MY ADMONITIONS.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE HELD OUT OF THE PRESENCE OF THE JURY:)

THE COURT: VERY WELL.

YOU MAY STEP DOWN. WE'RE OUT OF THE PRESENCE OF THE JURY. I WAS ADVISED THAT YOU NEEDED TO TAKE UP SOME MATTER HAVING TO DO WITH A WITNESS?

MR. BURTON: YOUR HONOR, IT ACTUALLY HAS TO DO WITH A MOTION IN LIMINE AND I BELIEVE IT'S

SALINAS MOTION IN LIMINE NUMBER 4, WHICH THE COURT GRANTED OVER NO OPPOSITION, BUT THE EXPLANATION OF THE NO OPPOSITION WAS CONDITIONAL.

IF I COULD GIVE JUST A QUICK DESCRIPTION OF WHAT HAPPENED HERE.

DR. HADDIX WAS THE MEDICAL EXAMINER WHO DID THE AUTOPSY OF ROBERT HESTON AND THEN TURNED IN HER REPORT TO THE COUNTY CORONER, WHO IS ALSO THE SHERIFF AND GAVE, AS A PRIMARY CAUSE OF DEATH, TASER APPLICATIONS AND AGITATED STATE METHAMPHETAMINE INTOXICATION.

AFTER THAT THE SHERIFF, SOMEBODY FROM THE SHERIFF'S OFFICE, A COMMANDER CLARK, AND THEN THE SHERIFF HIMSELF, CORONER, CALLED DR. HADDIX AND SUGGESTED THAT SHE CHANGE HER OPINION. SHE DECLINED TO DO SO.

SUBSEQUENTLY HER AUTOPSY REPORT WAS REVIEWED BY TWO OTHER MEDICAL EXAMINERS, DR. HAIN AND DR. KARCH WHO ISSUED -- THEY DID NOT DO AUTOPSIES, BUT THEY ISSUED REPORTS SAYING THAT WE WOULD FIND THE TASER TO BE A CONTRIBUTORY CAUSE OF DEATH BUT NOT PUT IT IN THE SAME PLACE THAT DR. HADDIX DID.

WHEN THE CITY OF SALINAS BROUGHT THE MOTION TO EXCLUDE THE CALLS FROM COMMANDER CLARK

AND THE CORONER WHOSE NAME I DON'T WANT TO MESS UP, KANALAKIS WE SAID WE DON'T OPPOSE THIS MOTION. IT'S IRRELEVANT SO LONG AS THE SUBSEQUENT AUTOPSIES OF DR. HAIN AND DR. KARCH ARE NOT BROUGHT UP OR THE SUBSEQUENT REVIEWS OF HER AUTOPSY.

BUT IF THOSE ARE BROUGHT UP, THEN THAT MIGHT MAKE THAT RELEVANT.

AND I LOOKED AT THE WITNESS LIST THAT EXISTED AT THAT TIME ON THE PRETRIAL CONFERENCE AND SAW NEITHER DR. HAIN NOR DR. KARCH LISTED AS A WITNESS AND REFERRED TO THAT.

SO I'VE TOLD THE OTHER SIDE, I SAID I DON'T THINK IT'S ADMISSIBLE UNLESS YOU OPEN THE DOOR AND THAT'S WHAT I TOLD THE COURT IN THE MOTION TO THE OPPOSITION IN LIMINE.

IN COUNSEL'S TASER OPENING STATEMENT, YOU KNOW, THAT DR. HADDIX'S FINDINGS WERE CRITICIZED BY THE CORONER'S OFFICE AND THERE WERE THESE TWO OTHER REVIEWS, I THINK THAT -- IF WE'RE GOING TO GO DOWN THAT PATH, IT'S GOING TO OPEN THE DOOR.

THE COURT: TO WHAT?

MR. BURTON: TO HAVING HER TESTIFY THAT AFTER SHE ISSUED THE REPORT, SHE WAS CALLED BY THE CORONER'S OFFICE AND ASKED TO CHANGE HER OPINION AND SHE REFUSED TO DO SO.

AND SHE'S GOING TO BE HERE TOMORROW MORNING AND WE DON'T WANT TO CALL HER BACK AND SO IF -- WE WOULD ASK THAT, THAT IF THEY'RE GOING TO DO THAT SHE BE ALLOWED TO TESTIFY AS TO THE WHOLE SEQUENCE AS TO HOW THOSE TWO SUBSEQUENT REVIEWS CAME ALONG.

THANK YOU.

THE COURT: ALL RIGHT. SO IS THERE ANY OBJECTION -- SO YOU WANT TO MAKE CERTAIN THAT BASED ON THE OPENING STATEMENT YOU'RE ABLE TO ASK DR. HADDIX ABOUT THE CALL THAT WAS MADE TO HER BY THE MONTEREY COUNTY SHERIFF OFFICIALS, WHAT THEY SAID, AND WHAT SHE SAID BACK.

MR. BURTON: YES.

THE COURT: ANY OBJECTION?

MR. HURLEY: YES, YOUR HONOR. IT'S COMPLETE HEARSAY. THEY'RE NOT PARTIES. THEY'RE NOT RELATED TO THIS CASE IN ANY WAY OTHER THAN -- I MEAN, IT'S JUST GOING TO OPEN A CAN OF WORMS.

SHE HAD AN OUTBURST. THEY HAD VEHEMENT DISAGREEMENTS OVER HER CONDUCT, NOTHING TO DO WITH HER OPINION. SHE WAS NEVER CALLED BACK.

WE'RE GOING TO GET INTO THIS.

THE COURT: I'M SORRY, YOU'RE WAY AHEAD OF ME.

MR. HURLEY: OKAY.

THE COURT: YOU STARTED TALKING ABOUT OUTBURSTS.

MR. HURLEY: DR. HAIN, AND WE HAVE NO INTENTION OF ASKING DR. HAIN ABOUT IT. DR. HAIN HAS NOT ASKED HER TO COME BACK BECAUSE DR. HADDIX HAD SOME KIND OF PERSONALITY OUTBURSTS WITH EMPLOYEES OF THE MONTEREY COUNTY SHERIFF'S OFFICE. THEY'RE TOTALLY UNRELATED TO US.

SHE SAYS THAT THEY ASKED HER TO CHANGE HER TESTIMONY. NOBODY HAS DEPOSED THEM. NOBODY HAS ASKED THEM. SHE SAYS SHE WASN'T CALLED BACK TO EVER WORK FOR THEM AGAIN.

SHE IMPLIES THAT IT MAY BE BECAUSE OF HER OPINION BUT DR. HAIN TESTIFIED THAT IT WAS BECAUSE OF HER CONDUCT.

NOBODY --

THE COURT: OKAY. I THINK I'M STARTING TO GET A FLAVOR FOR THIS.

WHAT WAS SAID DURING THE OPENING STATEMENT THAT YOU BELIEVE BRINGS THIS INTO RELEVANCE?

MR. BURTON: THE FACT THAT DR. HADDIX, WHO WAS A MEDICAL EXAMINER WHO PERFORMED THE AUTOPSY, THAT IT WAS SUBSEQUENTLY REVIEWED. WELL,

THERE WERE TWO OTHER AUTOPSIES BY DR. KARCH AND DR. HAIN THAT CAME TO A COMPLETELY OPPOSITE RESULT.

IN FACT, THE FINDINGS OF THOSE TWO REPORTS WERE MISREPRESENTED DURING THE OPENING STATEMENT, BECAUSE THEY BOTH DID FIND THAT THE TASER WAS A CONTRIBUTING CAUSE AND NEITHER OF THOSE DOCTORS PERFORMED AN AUTOPSY.

BOTH OF THEM REVIEWED THE CASE AND REVIEWED DR. HADDIX'S AUTOPSY AND SAID THAT WE WOULD HAVE PHRASED IT A LITTLE DIFFERENTLY.

IN BETWEEN THERE'S A CALL FROM COMMANDER CLARK AND A CALL FROM THE SHERIFF CORONER WHICH HAD NOTHING TO DO WITH THIS ALLEGED PERSONALITY DISPUTE THAT SAID THAT WE THINK YOUR CONCLUSION REGARDING THE CAUSE OF DEATH IN THIS CASE IS WRONG, WE WANT TO CHANGE IT FROM TASER APPLICATIONS TO A METHAMPHETAMINE OVERDOSE. SHE SAID I ABSOLUTELY REFUSE TO DO THAT.

AFTER THAT THEN THEY SENT IT TO THESE TWO OTHER MEDICAL EXAMINERS FOR REVIEW.

IF THEY'RE GOING TO BRING UP THE TWO OTHER MEDICAL EXAMINERS FOR REVIEW, IT SEEMS TO ME THAT THE JURY NEEDS TO HAVE THE WHOLE SEQUENCE. WE AGREE IT'S A CAN OF WORMS AND WE THINK THE WHOLE THING SHOULD BE KEPT OUT.

WE THOUGHT IT WAS GOING TO BE KEPT OUT. THAT'S THE POINT OF OUR POSITION ON MOTION IN LIMINE NUMBER 4 AND THEN ALL OF A SUDDEN TASER'S COUNSEL RAISES IT DURING --

THE COURT: RAISES IT? WHAT WAS THE "IT" THAT WAS RAISED?

MR. BURTON: THE FACT THAT THERE WERE THESE TWO --

THE COURT: EVERY TIME I ASK A QUESTION YOU NEED TO ANSWER MY QUESTION. YOU START TO ARGUE AND TELL ME MORE THAT I NEED TO KNOW. BECAUSE I'LL COME BACK AND LET YOU ARGUE MORE BUT IT SEEMS TO ME YOU NEED TO SAY WHAT STATEMENT WAS MADE DURING THE OPENING STATEMENT WHICH YOU NOW BELIEVE OPENS THE DOOR TO YOU GETTING INTO THIS MATTER THAT I HAVE ALREADY RULED ON.

MR. BURTON: THAT AFTER DR. HADDIX --

THE COURT: THIS IS THE STATEMENT THAT WAS MADE?

MR. BURTON: RIGHT. THAT AFTER DR. HADDIX, THE MEDICAL EXAMINER, PERFORMED THE AUTOPSY AND DETERMINED THAT THE TASER WAS A CAUSE OF DEATH, THE FINDING WAS REJECTED BY THE SHERIFF CORONER WHO THEN HAD TWO OTHER AUTOPSIES PERFORMED BY DR. HAIN AND DR. KARCH, EACH OF WHOM CONCLUDED

THAT THE DEATH WAS DUE TO METHAMPHETAMINE INTOXICATION.

THE COURT: THAT WAS THE STATEMENT.

AND YOU BELIEVED THAT YOU NEED NOW TO BRING IN THE EVIDENCE ABOUT SOMETHING ELSE TO PUT THAT STATEMENT INTO CONTEXT.

MR. BURTON: YES.

THE COURT: ALL RIGHT. DO YOU AGREE THAT THAT WAS THE STATEMENT THAT WAS MADE?

MS. O'LINN: IT'S NOT QUITE ALL THE STATEMENT, NO, YOUR HONOR. I SAID THAT ALL OF THEM LISTED TASER AS A CONTRIBUTOR IN THE TEMPORAL, ALONG WITH THE POLICE STRUGGLE. THAT'S WHAT I SAID IN THE OPENING.

HOWEVER, YOUR HONOR, I DIDN'T SAY ANYTHING ABOUT DR. HADDIX NOT BEING INVITED BACK TO EVER WORK FOR THE COUNTY. I DIDN'T --

THE COURT: HE DIDN'T INCLUDE THAT IN THE STATEMENT.

MS. O'LINN: IT GOES TO THE CREDIBILITY --

THE COURT: EXCUSE ME.

MS. O'LINN: PARDON ME.

THE COURT: YOU DO ACKNOWLEDGE IN YOUR OPENING STATEMENT YOU DISCUSS DR. HADDIX AND SAID

THAT AFTER SHE HAD DONE AN AUTOPSY AND CAME TO A CONCLUSION THAT WAS LATER REJECTED AND OTHERS DID AN AUTOPSY AND THEY CAME TO A DIFFERENT CONCLUSION.

MS. O'LINN: I'M NOT SURE I USED THE WORD "REJECTED" YOUR HONOR. I SAID THERE WERE TWO MORE MEDICAL EXAMINERS THAT DID REPORTS.

IT GOES TO HER OPINION, YOUR HONOR, AND I APOLOGIZE FOR INTERRUPTING YOU.

THE COURT: THE HEARSAY IS HER STATEMENT ABOUT WHAT THESE COUNTY OFFICIALS SAID TO HER?

MR. HURLEY: YES.

THE COURT: AND YOU'RE OBJECTING ON HEARSAY GROUNDS BECAUSE THE STATEMENTS ARE BEING OFFERED FOR THE TRUTH OF THE STATEMENT, OR ARE THEY OFFERED TO EXPLAIN WHAT SHE DID OR SOMETHING?

I GUESS THE ONLY RELEVANCE IS THE TRUTH THAT SOMEHOW IS CONVEYING THAT HER AUTOPSY IS INCORRECT IN SOME WAY.

MR. HURLEY: SHE DIDN'T DO ANYTHING OR CHANGE ANYTHING IN ANY WAY. AND, YOU KNOW, THOSE WITNESSES WOULD THEN HAVE TO BE CALLED, I PRESUME, TO SAY WHAT THEY SAID.

REMEMBER, ONE CONTEXT HERE, AND I DON'T WANT TO GET INTO THE SCIENCE AGAIN, IS THAT SHE SAID THAT VENTRICULAR FIBRILLATION WAS THE LAST

EFFECT ON THE HEART.

EVERYBODY HAS SAID THAT'S NOT CORRECT. I CAN SURMISE THAT THE SHERIFF'S OFFICIALS, HAVING READ THINGS LIKE THAT HAVE SAID, YOU KNOW, WE DON'T AGREE WITH YOUR POSITION, THE SHERIFF BEING THE CORONER AND THE PERSON WHO IS AUTHORIZED TO SUPERVISE A MEDICAL EXAMINER.

BUT HE HAS NOTHING TO DO WITH US. IF IT'S PERMITTED IN IN ANY WAY, NOT ONLY IS IT HEARSAY BUT IT'S EXTREMELY PREJUDICIAL TO THE LAW ENFORCEMENT OFFICIALS TO HAVE THIS DOCTOR CLAIMING THAT A LAW ENFORCEMENT OFFICER TRIED TO GET HER TO CHANGE HER REPORT. THAT WOULD BE EXTREMELY PREJUDICIAL.

THE COURT: IS THAT THE REASON THAT YOU'RE OFFERING IT IS TO SUGGEST THAT THERE WAS SOME EFFORT TO COVER UP OR TO GET HER TO CHANGE HER REPORT FOR SOME REASON OTHER THAN MEDICAL?

MR. BURTON: YES, AND THAT'S WHY THERE WERE THE TWO SUBSEQUENT AUTOPSIES. MY RECOMMENDATION HERE, YOUR HONOR, IS THAT WE SIMPLY DON'T DISCUSS THE REVIEW OF THE CASE BY DRS. HAINS AND DR. KARCH IS KIND OF WHAT I THOUGHT THE PLAYING FIELD WAS GOING TO BE WHEN I FILED THE OPPOSITE TO THE IN LIMINE MOTION.

THE COURT: WELL, NO. LET ME -- I'LL TAKE THOSE AS SEPARATE ISSUES. IF YOU BELIEVE THAT THERE IS SOME MOTIVE ON THE PART OF ANYONE TO ASK DR. HADDIX TO CHANGE HER MEDICAL CONCLUSION FOR REASONS OTHER THAN MEDICAL REASONS --

MR. BURTON: YES.

THE COURT: -- THEN I WILL SUSTAIN THE OBJECTION TO ALLOWING YOU TO DO IT BY NOT CALLING THOSE WITNESSES WHO MADE THOSE STATEMENTS.

BECAUSE THAT -- THE OPPOSING PARTY NEEDS TO BE ABLE TO EXAMINE THAT PARTY BECAUSE IT COULD BE THAT THOSE MONTEREY COUNTY OFFICIALS WOULD EXPLAIN WHY THEY MADE THE REQUEST.

I WON'T PERMIT YOU TO PUT ON AN OUT-OF-COURT STATEMENT TO SUGGEST THAT INDEED THERE WAS SOME NEFARIOUS MOTIVE FOR THOSE STATEMENTS WITHOUT HAVING THOSE WITNESSES AVAILABLE.

IT SURPRISES ME THAT YOU HAVEN'T ALL DEPOSED THOSE PEOPLE AND YOU KNOW EXACTLY WHAT THEY WOULD SAY ABOUT THAT.

NOW, IF, AS I UNDERSTAND IT, THERE WAS -- THERE WAS SOME OTHER MEDICAL EXAMINATION BY THESE OTHER PEOPLE, HAIN AND WHAT IS THE OTHER NAME?

MS. O'LINN: KARCH.

THE COURT: AND NOW, WHAT IS IT THAT THEY

DID AND WHAT DO THEY SAY?

MS. O'LINN: THEIR OPINIONS ARE IN SOME --

THE COURT: WHAT DID THEY DO FIRST? DID THEY CONDUCT AN AUTOPSY?

MS. O'LINN: NO, THEY DID NOT. THEY WROTE MEDICAL EXAMINATION REPORTS AND GAVE AN OPINION ABOUT THE CAUSE OF DEATH.

THE COURT: FROM WHAT? FROM READING DR. HADDIX'S REPORT?

MS. O'LINN: AND HER PHYSICAL ASSESSMENTS AND THEN COMING TO THEIR OWN CONCLUSIONS BASED ON THE -- ON THE RECORDED EVIDENCE SHE PROVIDED VIA HER AUTOPSY.

THE COURT: WHY DO I HAVE TWO? WHY DO I HAVE HAIN AND KARCH?

MS. O'LINN: HAIN WAS THE ONE THAT WAS ON VACATION. HE'S THE MEDICAL EXAMINER FOR THE COUNTY. HE DID A REPORT WHEN HE CAME BACK AND THEN, BECAUSE HIS OPINION WAS DIFFERENT THAN HADDIX'S, THEY HAD A THIRD OPINION RENDERED.

AND, YOUR HONOR, WE WOULD AGREE, WE DON'T HAVE ANY INTENTION OF PUTTING HAIN OR KARCH ON AT THIS POINT. HAIN IS LISTED ON THE WITNESS LIST THAT WAS LASTLY PROVIDED TO THE COURT, THE FINAL

ONE THAT WAS PROVIDED WITH THE 50 WITNESSES; HOWEVER, OUR EXPERTS HAVE CERTAINLY REVIEWED ALL THREE MEDICAL EXAMINER REPORTS AND, QUITE FRANKLY, TO JUST TELL THE JURY THAT THERE WAS ONLY ONE MEDICAL EXAMINER REPORT DONE IN THIS CASE WAS NOT THE TRUTH AND WHETHER WE AGREED NOT TO EXPLORE THOSE AND PUT THOSE WITNESSES ON IS -- THAT'S SIMPLY NOT THE CASE. THAT THERE WAS ONE OPINION RENDERED AND THAT OPINION CARRIES GREAT WEIGHT WAS THE IMPLICATION OF JUST TELLING THEM ABOUT ONE MEDICAL EXAMINER REPORT.

THE COURT: AND THE REASON I'M DIVIDING THE QUESTION IS THAT IT DOES SEEM TO ME THAT IF AS A MATTER OF FACT THERE WERE THREE REPORTS AND THE JURY NEEDS TO UNDERSTAND THE CAUSE OF DEATH HERE, BOTH IN TERMS OF THE CARDIAC ARREST AND THE ULTIMATE DEATH. I WOULDN'T DEPRIVE THE JURY OF UNDERSTANDING THAT INFORMATION.

BUT IF YOU'RE TRYING TO PROVE THAT TWO DOCTORS OR THROUGH SOME INTERMEDIARY WERE TRYING TO INFLUENCE THE REPORT TO BE OTHER THAN WHAT WAS MEDICALLY CORRECT, THAT'S A DIFFERENT MATTER AND I NEED TO HAVE THAT EXPLORED DIRECTLY. I WON'T ALLOW YOU TO DO IT INDIRECTLY BY INFERENCE OR SUGGESTION.

IF THAT IS A CLAIM THAT YOU'RE MAKING YOU

NEED TO PRODUCE THOSE WITNESSES AND HAVE THEM EXAMINED AND THAT DOES MEAN IF WE'RE AT A POINT WE'RE IN THE MIDDLE OF TRIAL AND THAT'S COMING OUT, I WOULD SUSTAIN THE OBJECTION AND EXCLUDE THE TESTIMONY UNDER THESE CIRCUMSTANCES, UNLESS THE PLAINTIFF CLAIMS SOME PREJUDICE FROM THE THREE REPORTS HAVING BEEN EXAMINED.

YOU'RE ABLE TO SEE THE FIRST REPORT BY DR. HADDIX AND YOU HAD IT AND THE OTHER TWO REPORTS AND YOU CAN HAVE AN EXPERT EXAMINE ALL OF THAT AND COME TO YET A DIFFERENT CONCLUSION.

MS. O'LINN: WHICH IS WHAT HAPPENED.

MR. BURTON: RIGHT. BUT WE THINK WE NEED NOW TO EXPLAIN TO THE JURY WHY ARE THERE TWO OTHER DOCTORS BEING CALLED IN TO, YOU KNOW, SHOPPING FOR THIS OPINION TO CRITICIZE DR. HADDIX. AND THE REASON THAT THERE IS TWO NON DOCTORS.

THE COURT: WHY WERE THEY CALLED IN?

MR. BURTON: RIGHT. AND THE REASON IS THAT BECAUSE TWO NON DOCTORS, TWO OFFICIALS OF THE SHERIFF'S DEPARTMENT AND MONTEREY, COMMANDER CLARK AND THE SHERIFF CALLED DR. HADDIX.

NOW, THIS IS NOT HEARSAY BECAUSE IT'S NOT BEING OFFERED FOR THE TRUTH.

DR. HADDIX WILL SAY I ANSWERED THE PHONE

AND COMMANDER CLARK SAID THAT WE WANT YOU TO CHANGE YOUR OPINION. YOU HAVE WRITTEN THAT IT WAS DUE TO TASER AND WE ALL KNOW IT WAS A METHAMPHETAMINE OVERDOSE.

SHE SAID, NO, I'M NOT CHANGING MY OPINION. TWO WEEKS LATER SHE GETS A SIMILAR TELEPHONE CALL FROM THE SHERIFF HIMSELF. SHE SAYS THE SAME THING. SHE DOCUMENTS IT.

SHE WAS DEPOSED. SHE DESCRIBED THESE CONVERSATIONS IN DETAIL AND ACTUALLY PRODUCED CONTEMPORANEOUS NOTES OF ONE AT HER DEPOSITION.

THEY MADE THE MOTION TO EXCLUDE THAT TESTIMONY. WE SAID WE WON'T OPPOSE IT SO LONG AS THE SUBSEQUENT REVIEWS OF DR. HAIN AND DR. KARCH, NEITHER OF WHOM ARE ON THE WITNESS LIST AT THAT TIME, ARE NOT BEING INTRODUCED AS, YOU KNOW, TO SUGGEST THAT THE SHERIFF DIDN'T TRUST DR. HADDIX'S OPINION AND THEREFORE, WAS GETTING TWO OTHER OPINIONS. SO THAT'S THE STATE OF THE RECORD.

THE COURT: WELL, IS THAT THE ISSUE? IN OTHER WORDS, IT'S BECAUSE THERE IS A SUGGESTION THAT THEY DIDN'T TRUST DR. HADDIX'S OPINION THAT THEY GOT THE OTHER TWO OPINIONS? IS THAT WHAT YOU BELIEVE OPENS THE DOOR?

MR. BURTON: YES. OR THAT THEY WERE --

NOT THAT THEY DIDN'T TRUST IT, BUT THEY DIDN'T LIKE IT BECAUSE IT PLACED RESPONSIBILITY ON TASER.

THE COURT: TASER, IN THE OPENING STATEMENT, SAID THAT THAT WAS BECAUSE THEY DIDN'T LIKE IT?

MS. O'LINN: NO, YOUR HONOR. ABSOLUTELY NOT.

THE COURT: HERE'S MY CONCERN. I'LL SAY IT AGAIN. YOU CAN TRY THIS CASE AND IF YOU HAVE EVIDENCE THAT CLARK OR THE SHERIFF WERE ATTEMPTING TO PROTECT OTHER LAW ENFORCEMENT OFFICERS BY TRYING TO GET A DOCTOR TO CHANGE THEIR OPINION, THAT'S A PERMISSIBLE THING TO TRY AND PROVE TO THE JURY, BUT YOU NEED TO HAVE THOSE WITNESSES HERE FOR CROSS-EXAMINATION.

YOU CAN'T HAVE A WITNESS HEARSAY CLARK SAID THIS TO ME AND I CAN'T CROSS-EXAMINE CLARK, AND THE SHERIFF SAID THIS TO ME, WITHOUT THE SHERIFF BEING HERE TO BE EXAMINED, BECAUSE IF I ASKED CLARK OR THE SHERIFF THAT AND THEY SAY NO, I DIDN'T SAY IT BECAUSE IT'S REALLY THE MEANING OF THE EVENT, NOT THE STATEMENTS NECESSARILY THAT YOU'RE AFTER.

MR. BURTON: I'LL MOVE ON, YOUR HONOR, BUT I'D LIKE TO MAKE ONE POINT. I DON'T THINK IT'S

HEARSAY, FOR EXAMPLE, WHAT COMMANDER CLARK SAID, "WE ALL KNOW HE DIED OF A METHAMPHETAMINE OVERDOSE." NOW, WE'RE CERTAINLY NOT OFFERING THAT STATEMENT FOR THE TRUTH WHICH WOULD MAKE IT HEARSAY. OUR TESTIMONY IS DIRECT TESTIMONY.

THE COURT: BUT IT IS FOR THE TRUTH IN THE SENSE THAT WHAT YOU'RE SUGGESTING IS THAT WE ALL KNOW IS WHAT HE'S REALLY SAYING IS THAT WE ALL KNOW IT WAS NOT THAT, BUT WE WANTED TO SAY THAT. THAT'S WHY YOU'RE OFFERING.

MR. BURTON: THAT'S WHAT A JURY IS FOR.

THE COURT: I KNOW, BUT THAT'S A STATEMENT. YOU'RE OFFERING IT FOR THE TRUTH OF THE IMPLIED STATEMENT. AND WITHOUT THAT PERSON HERE TO EXAM, TO CROSS-EXAMINATION ABOUT THE TRUTH OF THAT PROFFERED IMPLIED STATEMENT, THE OLD BOY'S NETWORK KIND OF THING, WE ALL KNOW IT'S METHAMPHETAMINE, WINK WINK, THEN THE OTHER SIDE IS DEPRIVED OF THE OPPORTUNITY TO CROSS-EXAMINE.

THAT'S A PERMISSIBLE THING FOR YOU TO ATTACK IF THAT'S GOING ON, BUT YOU CAN'T DO IT WITHOUT THE PERSON BEING SUBJECTED TO CROSS-EXAMINATION.

IN OTHER WORDS, YOU OUGHT TO BE CALLING THAT PERSON AS PART OF YOUR CASE, IF THAT'S WHAT

YOU'RE REALLY TRYING TO PROVE; THAT THE EXAMINATION WAS CHANGED. YOU CAN'T CALL THE DOCTOR AND LEAVE IT AT THAT AND SAY THAT THIS PERSON CALLED ME AND TOLD ME TO PHONY UP MY REPORT.

MR. BURTON: WELL, ALL RIGHT. I MEAN, THAT'S NOT THE WAY I SEE THE RULES OF EVIDENCE BUT I'M NOT WEARING THE BLACK ROBE SO I'LL, YOU KNOW. AND YOU'VE BEEN DOING THIS LONGER THAN I HAVE.

THE COURT: IT'S NOT THE QUESTION OF WHETHER I'M THE JUDGE. THAT'S NOT THE QUESTION.

BUT IT'S A QUESTION OF WHAT YOUR MOTIVE IS. YOU'RE TRYING TO PROVE THAT THERE WAS A CONVERSATION WHERE THE SHERIFF TOLD THE MEDICAL EXAMINER TO MAKE A FALSE REPORT. AND YOU'RE TRYING TO DO THAT THROUGH THE STATEMENT OF THE DOCTOR WITHOUT HAVING THE PERSON WHO ACTUALLY MADE THE STATEMENT ON THE WITNESS STAND.

MR. BURTON: RIGHT. WE'RE TRYING TO PROVE IT THROUGH THE WITNESS WHO MADE THE STATEMENT.

THE COURT: BUT THAT'S AN OUT-OF-COURT STATEMENT BEING OFFERED TO PROVE THE TRUTH THAT THE PERSON WAS TRYING TO GET HER TO PHONY THE EXAM.

MR. BURTON: WELL, YOU KNOW, THAT'S WHERE I DIFFER, AND I UNDERSTAND WHY THEY WOULD SAY

PREJUDICE BECAUSE IT'S A DIFFERENT LAW ENFORCEMENT AGENCY AND EVEN IF THEY HAVE LUNCH TOGETHER OR WHATEVER, THEY'RE ENTITLED TO THAT.

BUT WHEN THEY START BRINGING IN THESE SECOND REPORTS, SAYING DR. HADDIX'S REPORT WAS EVEN RELIED UPON BY THE MONTEREY SHERIFF'S CORONER'S OFFICE, BECAUSE THAT'S WHERE SHE DID IT, BECAUSE THEY HAVE THESE TWO OTHER REPORTS PHRASING THE CAUSE OF DEATH.

THE COURT: I'M SAYING YOU CAN'T GET INTO THAT ISSUE. MAYBE WE'RE NOT COMMUNICATING.

IT SEEMS TO ME YOU NEED TO GO AT IT IN A DIFFERENT WAY. ARE CLARK AND THE SHERIFF WITNESSES?

MR. BURTON: NO, WE DON'T THINK -- I MEAN, WE DIDN'T UNDERSTAND THE DOOR WAS GOING TO BE OPENED THIS WAY.

THE COURT: I'M NOT SURE I UNDERSTAND THE DOOR OPENING ISSUE, BUT I'M SAYING THIS IS PERFECTLY PERMISSIBLE FOR A PLAINTIFF TO PROVE THAT A CAUSE OF DEATH THAT IS BEING PROFFERED BY ONE SIDE WAS NOT TRUTHFUL AND THAT LAW ENFORCEMENT OFFICIALS TRIED TO GET IT DONE IN A WAY THAT IS NOT TRUTHFUL TO COVER UP.

I'M NOT SAYING THAT'S TRUTHFULLY WHAT

HAPPENED, BUT IF THAT'S YOUR THEORY, YOU OUGHT TO BE ABLE TO TRY AND PROVE THAT.

BUT YOU CAN'T DO IT BY HAVING AN OUT-OF-COURT STATEMENT PUT IN FRONT OF THE JURY THAT CAN'T BE CROSS-EXAMINED. THE PERSON WHO MADE THE STATEMENT IS NOT HERE.

MR. BURTON: WELL, NO, THE PERSON WHO IT WAS TOLD TO WAS SUBJECT TO CROSS-EXAMINATION.

THE COURT: WELL, I'M NOT SURE THERE'S AN EXCEPTION TO THE HEARSAY RULE THAT SAYS THAT I CAN GET THE OUT-OF-COURT STATEMENT IN AS LONG AS I HEAR THE OUT-OF-COURT STATEMENT. I DON'T KNOW THE EXCEPTION THAT GETS YOU THERE.

MS. O'LINN: AND I DON'T UNDERSTAND THE FACT THAT WE WOULD BE ALLOWED TO DEAL WITH THE FACT THAT THERE WAS EVIDENCE OVER DIFFERENT OPINIONS, MEDICAL EXPERT OPINIONS ABOUT THE CAUSE OF DEATH. AND OUR EXPERTS MAY FEEL THAT THAT IS PART OF THE BASIS FOR THEIR OPINION.

THE COURT: I'LL CONTINUE TO LISTEN TO THE EVIDENCE TO MAKE SURE THAT YOU'RE PUTTING IT IN A WAY THAT THEY CAN UNDERSTAND THAT.

IT DOES SEEM TO ME THAT A GENUINE DISAGREEMENT IS ONE THING, BUT A SUGGESTION THAT AN AUTOPSY REPORT BE CHANGED TO COVER UP IS A MUCH

DIFFERENT MATTER.

AND IF THAT'S WHAT YOU'RE ATTEMPTING TO PROVE, YOU HAVE TO GO AT IT, YOU'RE PERMITTED TO GO AT IT IF THAT'S YOUR CASE, BUT YOU HAVE TO DO IT BY NOT HAVING SOMEONE -- FOR ME IT'S THE SAME AS HAVING ANY PERSON COME IN AND SAY I HEARD THE SHERIFF SAY THAT THESE POLICE OFFICERS ARE TRYING TO COVER UP THEIR BAD ACTS AGAINST MR. HADDIX.

THE PERSON HEARD. THEY'RE NOT TESTIFYING ABOUT IT, BUT THE STATEMENT IS FROM THE PERSON YOU NEED ON THE WITNESS STAND TESTIFYING ABOUT.

DO YOU UNDERSTAND?

MR. BURTON: MAY I DEFER TO MR. WILLIAMSON?

MR. WILLIAMSON: NO, I JUST WANT TO WEIGH IN ON ANOTHER POINT ACTUALLY AND THEN IF YOU WANT TO FINISH.

THE COURT: I HAVE A MEETING TO GO TO.

MR. WILLIAMSON: YOUR HONOR, LET ME -- I'M GOING TO BE THE ONE EXAMINING DR. HADDIX TOMORROW AND I WANT A POINT OF CLARIFICATION, IN LIGHT OF WHAT HAS BEEN SAID HERE THIS AFTERNOON.

WE HAD NOT ORIGINALLY INTENDED TO USE DR. HADDIX TO DISCUSS THE REPORTS OF DRS. HAIN AND KARCH BECAUSE WE THOUGHT THAT WAS OUT OF BOUNDS.

THE COURT: DID THEY HAVE ANYTHING TO DO WITH THOSE?

MR. WILLIAMSON: ABSOLUTELY. SHE CONSIDERED THOSE AS PART OF HER EXPERT OPINION.

MR. BURTON: SHE DIDN'T KNOW ABOUT THEM AFTER.

MS. O'LINN: NO.

MR. WILLIAMSON: ULTIMATELY SHE DID. NO, AT THE TIME SHE DIDN'T. BUT ULTIMATELY SHE DID AND SHE'S REVIEWED THOSE REPORTS AND I THINK NOW, IN LIGHT OF MS. O'LINN'S COMMENTS IN OPENING STATEMENT, THAT'S FAIR GAME FOR US TO GET INTO WITH DR. HADDIX, THE FACT THAT OTHER CORONERS REVIEWED HER REPORTS AND CAME TO EITHER SIMILAR OR DIFFERENT OPINIONS, WHATEVER SHE MIGHT SAY ABOUT THAT. SO I THINK THAT'S FAIR GAME.

THE COURT: I HAVEN'T SAID ANYTHING ABOUT EXAMINING HER, ABOUT HER REPORT, DISAGREEING WITH OTHER DOCTORS AND THOSE. IT'S THE SUGGESTION THAT SOMEONE ON LAW ENFORCEMENT SIDE TRIED TO GET HER TO PHONY UP HER REPORT IS WHAT I'M RESPONDING TO.

BUT UNLESS THERE'S AN OBJECTION HAVING TO DO WITH THE DISCLOSURE OF WHAT SHE WOULD TESTIFY ABOUT, YOU'RE PERMITTED TO TESTIFY ABOUT HER CONCLUSIONS, HER REPORT, WHAT SHE KNOWS ABOUT OTHER

DOCTORS LOOKING AT THE SAME THING AND WHAT THEY -- HOW HER CONCLUSIONS DIFFER FROM THEIRS.

MR. WILLIAMSON: I WANT TO MAKE ONE POINT, AND THAT IS WITH ALL DUE RESPECT TO MS. O'LINN, SHE DID SAY IN HER OPENING STATEMENT THAT THE OTHER CORONERS REJECTED THE OPINION OF DR. HADDIX, AND THEREFORE, THE INSINUATION IS THAT SOMEHOW DR. HADDIX WAS INCOMPETENT AND THEREFORE, THE COUNTY NEEDED TO BRING IN ADDITIONAL DOCTORS TO REVIEW THAT.

THE COURT: WELL, I'M NOT SURE ABOUT INCOMPETENCY, BUT DOCTORS DISAGREE. AND SO WHAT IS YOUR QUESTION?

MR. WILLIAMSON: I'M JUST CLARIFYING THAT POINT; THAT THAT INSINUATION HAS BEEN MADE AND THEREFORE, NOW WE'RE IN A POSITION WHERE WE NEED TO EXPLORE THESE OTHER REPORTS AND THESE OTHER OPINIONS THAT WERE PUT FORTH BY THE OTHER TWO DOCTORS AND THAT'S ALL I WANT TO SAY ABOUT THAT.

THE COURT: YES.

MS. O'LINN: ONE POINT OF CLARIFICATION AND THIS WILL TAKE US BACK TO OUR PRETRIAL CONFERENCE.

THIS WHOLE ISSUE, DR. HADDIX HAD AN OPINION ABOUT THE VF AS WE DISCUSSED AND WE'RE

WAITING TO SEE WHAT HAPPENS WITH THE VF.

BUT PLAINTIFF'S CASE IS COMPLETELY BASED NOW WITH MEYERS ON THIS ACIDOSIS THEORY.

WE DON'T EXPECT THERE TO BE -- THEY'RE GOING TO RELY ON HADDIX'S OPINION PER SE WITH REGARD TO -- WITH REGARD TO THAT POSITION, BUT I DON'T KNOW UNTIL THEY PUT HER ON.

AND THE FACT IS THAT THE EVIDENCE IS THAT THERE WERE THREE REPORTS DONE.

SO I -- I MENTIONED THAT IN MY OPENING. I DON'T UNDERSTAND WHY THAT WOULD BE A SURPRISE THAT THERE WERE THREE REPORTS DONE. THERE WAS NEVER ANY AGREEMENT THAT WE WOULDN'T ADDRESS THE FACT THAT THERE WERE THREE MEDICAL EXAMINER REPORTS.

THE COURT: AS I SAID, I'LL LISTEN TO THE TESTIMONY. IF YOU FEEL THAT YOU HAVE A RIGHT TO EXAMINE FURTHER ON THE QUESTION OF WHY THE REPORTS WERE DONE, AND IT DOESN'T SEEM TO ME THAT I HAVE A CLEAR PATH FROM A REJECTION OF HER OPINION AND TWO OTHER PEOPLE GIVING A REPORT TO THE REASON FOR THAT WAS TO COVER UP.

IT JUST SEEMS TO ME THAT IT COULD JUST AS EASILY BE DIFFERING OPINIONS ABOUT THE CAUSE OF DEATH.

BUT IF YOU PROFFER THAT SOMEONE TRIED TO GET HER TO CHANGE HER OPINION IN SOME IMPROPER WAY, THAT'S SOMETHING THAT YOU'RE PERMITTED TO PROVE BUT YOU HAVE TO SATISFY ME THAT YOU'RE GOING TO DO IT IN A FASHION WHICH WOULD ALLOW THE DEFENDANTS TO CROSS-EXAMINE THOSE DEFENDANT WHOSE STATEMENTS WERE MADE TO -- WERE MADE TO THE DOCTOR WHICH SHE INTERPRETED.

I TAKE IT THAT SHE SAID THAT I THOUGHT THEY WERE TRYING TO GET ME TO CHANGE MY REPORT IMPROPERLY.

MR. WILLIAMSON: ABSOLUTELY. AND, IN FACT, THAT IS THE REASON WHY THE EXPLANATION WHY TWO ADDITIONAL DOCTORS WERE CONTACTED.

WHEN DR. HAIN WAS CONTACTED AND HE WROTE A REPORT AND HE CAME TO THE SAME CONCLUSION THAT SHE DID THAT THE TASER WAS A CONTRIBUTING FACTOR, THEY WEREN'T SATISFIED THEN. THEY WENT TO A THIRD DOCTOR AND GOT A THIRD OPINION.

THE COURT: WHO?

MR. BURTON: MONTEREY COUNTY.

THE COURT: AND WHY AREN'T THEY PARTIES TO THE LAWSUIT WITH THE SPOLIATION TORT?

MR. WILLIAMSON: WELL, THEY DIDN'T --

THE COURT: WELL, BUT IT'S A TORT. IF

THEY'RE NOT A PARTY TO THIS CASE, THE OTHER CONCERN I HAVE IS THAT YOU NEED TO CONNECT WHAT THE MONTEREY COUNTY SHERIFF'S OFFICE DID. AND WHAT I HEAR FROM THE PARTIES IS THEY MAY WELL HAVE TRIED TO DO IT GRATUITOUSLY BUT IT'S GOING TO FURTHER SUGGEST TO THE JURY THAT THEY'RE DOING IT FOR US.

MR. WILLIAMSON: YOUR HONOR, WE AGREE WITH YOU. WE DON'T DISAGREE WITH THAT.

THE FACT OF THE MATTER IS THAT ONCE THESE STATEMENTS WERE MADE THIS MORNING, THAT GAVE THIS INSINUATION THAT SOMEHOW THE REASON FOR THE SHOPPING OF THE OTHER CORONERS WAS THAT SHE WAS INCOMPETENT. THAT'S NOT THE REAL REASON.

THE COURT: I DIDN'T HEAR THE WORD "INCOMPETENT" AND I DIDN'T HEAR THE WORD "SHOPPING," BUT IF YOU GET THE TRANSCRIPT AND YOU SATISFY ME THAT THERE WERE SUGGESTIONS THAT SOMEHOW SHE WAS INCOMPETENT, I WILL RECONSIDER THIS.

IT SEEMS TO ME THAT AS LONG AS I HAVE IT ON THE FOOTING THAT SHE WAS MENTIONED, THAT THERE ARE MULTIPLE REPORTS AND OUT OF THIS ALL THE JURY IS GOING TO HAVE TO JUDGE WHICH OPINION TO ACCEPT AS MORE COMPETENT THAN THE OTHERS, THEN WE DON'T GET INTO THIS MATTER HAVING TO DO WITH BAD FAITH.

AND IF YOU -- IF YOU SATISFY ME THAT BAD

FAITH IS NOW AN ISSUE FOR SOME OTHER METHOD, THEN YOU HAVE MY DIRECTIONS ON THAT.

I'M AFRAID I DO HAVE TO GO.

MR. BURTON: THANK YOU, YOUR HONOR.

MR. WILLIAMSON: THANK YOU, YOUR HONOR.

MS. O'LINN: THANK YOU.

(WHEREUPON, THE EVENING RECESS WAS TAKEN.)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY LOU HESTON and ROBERT H. HESTON, individually, and MISTY KASTNER, as the personal representative of ROBERT C. HESTON, deceased,

Plaintiffs,

v.

CITY OF SALINAS, SALINAS POLICE DEPARTMENT, MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON, JUAN RUIZ and TASER INTERNATIONAL, INC.,

Defendants.

Case No. C 05-03658 JW (RS)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS IN LIMINE TO LIMIT TESTIMONY OF THEIR EXPERT WITNESSES AND TERRI L. HADDIX, M.D.:

SALINAS DEFENDANTS' MOTIONS IN LIMINE NOS. 1-2

TASER'S MOTIONS IN LIMINE NOS. 1-3

Pretrial Conference:

Date: April 29, 2008
Time: 1:00 p.m.
Courtroom: 8

Trial:

Date: May 13, 2008
Time: 9:00 a.m.
Courtroom: 8

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I. INTRODUCTION

Defendants filed four motions in limine challenging testimony by three of the four expert witnesses plaintiff retained, police practices expert Roger Clark, Electrical Control Device (ECD) expert Ernest Burwell, and cardiology expert Mark Myers, M.D. Salinas Motions in Limine Nos. 1-2 and TASER Motions in Limine Nos. 1 and 3. Defendant TASER International has also challenged an independent expert, Terri L. Haddix, M.D., the forensic pathologist hired by the County of Monterey Sheriff-Coroner to autopsy Robert C. Heston and to determine his cause of death. TASER Motion in Limine No. 2.

The challenges range from barring the experts' explanations for the bases of their opinions to barring the experts altogether. Defendants' substantive challenges to these four experts can be generally grouped into the following three categories:

1. Testimony that relies on facts which defendants dispute;

2. Testimony based on expertise the expert witness allegedly lacks; and

3. Testimony based on science or methodology that does not meet the standards for Rule 702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 592, 113 S.Ct. 2786, 2796 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149, 119 S.Ct. 1167, 1174-75 (1999).

Much of what the defendants raise, however, fall into none of these categories, and goes solely to the weight the jury should give the experts' opinions rather than their admissibility. These issues are not subject to resolution on motions in limine.

The defendants' bulky motions have deliberately created an unwieldy and convoluted mass of contentions and arguments that in places run far afield from the narrow issues presented. There is no practical way plaintiffs could possibly answer all defendants' myriad contentions without bogging everyone down in hopeless detail. The Court should instead slice this Gordian Knot by fashioning reasonable guidelines to apply to *all* the expert witnesses in this case, setting forth clearly what each expert can opine about, rather than trying to pick through the parties' assertions one-by-one.

The first category is easily addressed. An expert should be allowed to explain to the jury the basis of the opinions being rendered. That at times requires reference to controverted facts and testimony, which the expert might accept or discount.

For example, one expert might credit Sgt. Ruiz's testimony that he did not pull his ECD's trigger after Mr. Heston hit the floor in his parents' living room. Another might base an opinion on the fact that Ruiz's dataport information shows he pulled the trigger five more times. Such disputed facts relate to the grounds for the expert's opinion. The jury will ultimately decide those facts, and weigh the experts' opinions accordingly. That is how the jury system is designed to operate. The integrity of the jury can be protected by the Court's reading an instruction at the beginning of the evidence explaining that determinations regarding the credibility of witnesses, and ultimately the facts of the case, are solely within its province, and that jurors are free to reject expert testimony based on facts they conclude are not supported by the evidence.

Plaintiffs will submit such a proposed instruction before the pretrial conference.

The second two categories obviously present more complex matters that require the Court to consider the specific issues presented by this case, the expertise of the witness, and the methodologies underlying their opinions.

The specific issues, as relates to the challenged experts, are the following:

1. Whether the repeated shocks defendants Ruiz, Livingston and Godwin administered to the decedent after he hit the living room floor served no law enforcement purpose and therefore violated the Fourth Amendment's prohibition of excessive force. Plaintiffs are offering Mr. Clark and Mr. Burwell to opine in this area.

2. Whether the supervisory defendants, Dominici and Ruiz, failed to control their subordinates, causing the foregoing constitutional violation to occur. Plaintiffs are offering Mr. Clark and Mr. Burwell to opine in this area.

3. Whether the entity defendants, the City of Salinas and the Salinas Police Department, adequately trained or supervised their police officers in the use of ECD's. Plaintiffs are offering Mr. Clark and Mr. Burwell to opine in this area.

4. Whether repeated exposures to ECD shocks caused dangerous increases in blood acid (metabolic acidosis) that triggered decedent's cardiac arrest. Plaintiffs' are offering Dr. Myers and Dr. Haddix to opine on this issue.

5. Whether defendant TASER adequately tested the risks of acidosis from repeated exposures before marketing its ECD's. Plaintiffs intend to prove this issue through TASER's CEO (and its designated expert) Rick Smith.

6. Whether defendant TASER adequately warned users about the risks of repeated ECD exposures. Plaintiffs are offering Dr. Myers, Mr. Clark and Mr. Burwell on this subject, as well as numerous defendants.

As explained below, plaintiffs' retained experts and Dr. Haddix have specialized opinion testimony within their recognized areas of expertise. Their opinions rest on reliable foundations, sound methodology and are relevant to the issues. Accordingly, they should be allowed to present them to the jury. Defendants are free to attack the testimony within the Federal Rules of Evidence, but it should not be excluded.

II. PRINCIPLES APPLICABLE TO THE CASE IN GENERAL.

A. The Applicable Law.

The touchstone for opinion testimony is, of course, Fed. R. Evid. 702, which provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court has broad discretion in admitting and excluding expert testimony. Appellate courts routinely sustain the trial court's action unless it is manifestly erroneous. *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 1122,

8 L.Ed2d 313 (1962); *Reno-West Coast Distribution Co. v. Mead Corp.*, 613 F.2d 722, 726 (9th Cir.), *cert. denied,* 444 U.S. 927, 100 S. Ct. 267, 62 L. Ed.2d 183 (1979).

B. The Claims Against the Salinas Defendants

Fundamental to all plaintiffs' claims against the various Salinas defendants is their contention that the decedent was subjected to excessive force in violation of *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Court, as it indicated at the last hearing, is familiar with these issues from the extensive briefing on the motions for summary judgment and reconsideration.

Briefly stated, plaintiff contends that the Fourth Amendment was violated when defendants Ruiz, Livingston and Godwin continued to shock their son repeatedly after he collapsed to the livingroom floor. Those 22 five-second shocks were objectively unreasonable and, in fact, counterproductive. The two supervisors, Dominici and Ruiz, share liability for that excessive force because they allowed the officers under their command to shock the decedent repeatedly, without formulating an appropriate tactical plan or directing them to stop shocking him. The City of Salinas and its police department are liable because they chose not to by the necessary software ($150.00) to monitor their officers' ECD use, and failed to keep abreast of safety warnings.

Plaintiffs contend that the Salinas defendants' repeated application of electrical current from three M26's was a substantial factor in causing Mr. Heston's February 19, 2005 cardiac arrest, the consequent irreversible brain damage, and his death on February 20, 2005.

C. The Claims Against TASER.

Plaintiffs do not contend that Mr. Heston died due to direct electrical stimulation of the heart – commonly known as electrocution – which induces a potential lethal arrhythmia known as ventricular fibrillation (VF). They contend, rather, that defendants' multiple and repeated ECD cycles induced severe, involuntary muscle contractions, which in turn discharged lactic acid (lactate) into his blood stream, causing a precipitous increase in his blood acid level (measured as a decline in pH), and

resulting in a deadly condition known as metabolic acidosis, which alone is known to cause cardiac arrest.

Like plaintiffs' cardiologist, Mark Myers, M.D., all but one of TASER's medical experts attribute Mr. Heston's cardiac arrest to metabolic acidosis. The dispute for jury determination is whether that metabolic acidosis was generated solely by the decedent's agitated behavior (defendants call this purported cause of death "excited delirium" or "excited delirium syndrome"), or whether the ECD shocks contributed to Mr. Heston's metabolic acidosis as well.

III. POLICE PRACTICES EXPERT ROGER CLARK

(Salinas Motion in Limine No. 1 and Taser Motion in Limine No. 3)

Defendants filed 30 pages of argument challenging plaintiffs' police practices expert Roger Clark. Neither defense motion seeks to exclude his testimony in its entirety, only to limit him from opining on certain matters. Salinas's objections to Mr. Clark's testimony fall into the following categories: (a) statements about qualifications and expertise; (b) opinions offered about the manufacture, operation, use or effect of TASER (the sole basis for TASER's Motion in Limine No. 3 to Exclude Clark's Testimony); (c) the methodology used in preparing a chart documenting TASER discharges; (d) opinions concerning the physical, medical or mental condition of Heston or the physical effects of TASER discharges on him; (e) opinions concerning Heston's cause of death; (f) opinions concerning the credibility of certain witnesses; (g) opinions concerning the "systemic culture" of the police department; (h) opinions concerning TASER efficiency during the police encounter with Heston; (i) opinions about Heston's intentions or what he was thinking; and (j) opinions about clicking noises on the 911 recordings. Many of the categories listed above can be dealt with quite easily by offering an explanation of what Mr. Clark will testify to rather than what he will not testify to.

First, there is no question that Mr. Clark is highly qualified as a police practices expert. He has testified hundreds of times and has been accepted as an expert witness

in state and federal courts throughout the United States. Nonetheless, the Salinas defendants suggest that he is not qualified by claiming incorrectly that Mr. Clark falsely testified that he has never been excluded as an expert witness.

While it is true that certain trial courts have, from time to time, entered orders *limiting* his testimony to certain matters, as happens not infrequently to all expert witnesses (all parties are asking the Court to limit experts in this case), no court has ever excluded Mr. Clark as an expert witness.

One case cited by the Salinas defendants, *Morales v. County of Ventura*, 2003 U.S. App. LEXIS 27561 (C.D. Cal. July 14, 2003), is particularly illustrative. Counsel for the plaintiffs herein know something about it inasmuch as they represented the plaintiff, Anthony Morales. While Magistrate Judge Patrick Walsh did limit Mr. Clark's testimony to certain issues, he was permitted to testify at great length regarding the police tactics used in that non-fatal shooting incident. Mr. Clark's testimony was deemed highly persuasive by the jury, which returned a verdict for plaintiff in the sum of $2.1 million dollars. Plaintiffs' counsel intend to elicit the same sort of testimony from Mr. Clark in this case. The defense will have the full opportunity to cross-examine Mr. Clark regarding his qualifications. If he testifies untruthfully, defense counsel can impeach him. Motions in limine are not intended for such fine-tuning of expert testimony.

Given his expert qualifications, Mr. Clark should be permitted to offer his opinions concerning the tactics and procedures employed by the individual defendant officers and their supervisors during their encounter with Mr. Heston. The fact that the officers specifically employed TASER ECD's during this incident is somewhat tangential to the thrust of Mr. Clark's opinions, which do not necessarily hinge on the particular tool or device used. For example, Mr. Clark's opinions would not be any different if baton blows or kicks had been employed against Mr. Heston while he lay helpless on the floor, rather than shocks from three ECD's.

Likewise, Mr. Clark should be permitted to tell the jury about his understanding of the TASER dataport, its general purpose and why the Salinas Police Department's failure to purchase the dataport software in order to keep records of TASER discharges prevented the department from monitoring and taking action, if necessary, to stop abuses of the device. This opinion supports plaintiffs' claim that the Salinas Police Department was deliberately indifference to the civil rights of people with whom it comes into contact.

And, finally, Mr. Clark should be permitted to testify from the viewpoint of a law enforcement supervisor regarding the general administrative procedures by which equipment warnings, such as those associated with the health risk of repeated TASER ECD shocks on persons in excited delirium, are disseminated from manufactures such as TASER to line officers in the field, and the duty of departments to make sure its officers understand the dangers of their tools.

Both TASER and the Salinas defendants primarily seek to preclude Mr. Clark from expert opinions on the characteristics of the TASER Model M26 ECD. It is a fact that Mr. Clark retired from law enforcement seven years before the Model M26 was first marketed. He does not claim to be an expert as to its specific characteristics such as electrical output, or its precise mannerof operation. It is for this reason that plaintiffs designated Ernest Burwell, a TASER certified instructor who, prior to his recent retirement, trained Los Angeles County Sheriff's Department deputies in the use of the device. However, Mr. Clark has sufficiently familiarized himself with the TASER training materials, use instructions and the device itself to render opinions regarding police tactics used in this matter and whether such tactics were reasonable and appropriate.

Mr. Clark's opinions go to the overall police tactics, supervision and control in this case. He is basing those opinions in significant part on the published materials available regarding TASER ECD's, including materials produced by TASER itself, and his familiarity, generally, with the intended effects (knocking a subject to the ground),

range and dataport tracking software. This information is not subject to dispute. If, in the course of his expert testimony, Mr. Clark misstates such information, defendants can impeach him.

The Salinas defendants also seek to exclude any reference made by Mr. Clark to a chart that he helped prepare along with plaintiffs' counsel. They argue that the "purpose of admitting the chart is to support his opinion that electricity was delivered to Heston for approximately 74-seconds." (Salinas MIL No. 1, P. 8, ll. 21-22) (actually it was more current than that, but over a 74-second period.) The chart referenced by defendants does not illustrate "opinions." Rather, it graphically depicts "facts" established by TASER's expert witness, Dr. Adam Aleksander, and Salinas Police Sergeant Michael Groves, who both independently analyzed the dataport information downloaded from the M26's used during this incident. They both independently determined the number of trigger pulls recorded on the M26's of each officer involved. The chart simply illustrates the number and duration of the trigger pulls in relation to each other. This information is fact, not expert opinion as claimed by defendants.

Defendants further argue that Mr. Clark should not be permitted to offer any opinions to the effect that Sgt. Dominici violated Heston's Fourth Amendment rights by allowing multiple M26's from firing at the same time or in sequence (Salinas Opposition MIL No. 1, P. 9, ll. 24-27). Insofar as these opinions relate to the failure of Sgt. Dominici to employ reasonable and appropriate tactics and to properly supervise the officers under his command during their encounter with Heston, it is clearly appropriate for Mr. Clark to offer such opinions.

Defendants next seek exclusion of a number of opinions offered by Mr. Clark at his deposition that relate to the medical issues involved in this case including such things as the physical, medical or mental conditions of Mr. Heston, the cause of Mr. Heston's death, and the physical effects of the TASER. Plaintiffs agree that Mr. Clark should not opine at trial on the medical consequences of TASER ECD shocks, or on the cause of Mr. Heston's death. Those opinions should be left to physician experts

such as Mark Myers, M.D., and Terri L. Haddix, M.D., and defendants' seven designated medical doctors. Plaintiffs would request that this exclusion be made mutual and apply to all non-physician witnesses.

However, without rendering a medical opinion, Mr. Clark should be permitted to discuss the objective factors that should have formed the basis for the officers' decision regarding force. One of those factors is their physical observations of Mr. Heston and his demeanor at the time of the encounter. All of the defendant officers believed that Mr. Heston was either under the influence of drugs or suffering from mental illness or both. This was plainly apparent to everyone at the scene. Mr. Clark may offer opinions concerning the specific public safety tactics to be employed when encountering someone in Mr. Heston's state of mind. He is certainly well qualified to do so. But such opinions will be offered from the perspective of an officer and not delve into the medical aspects of Mr. Heston's physical or mental condition.

Finally, defendants seek to exclude a number of opinions purportedly offered by Mr. Clark including the credibility of witnesses, the credibility of the City of Salinas and the Salinas Police Department, the systemic culture of the Salinas Police Department, what Heston was thinking and intending, and about clicking noises on the 911 recordings. All of these issues can be dealt with in short shrift — Mr. Clark will not be offering opinions on any of these issues at the time of trial.

To reiterate, the Court should issue an omnibus ruling concerning opinions as to Heston's cause of death and the medical effects of TASER discharges that applies to all experts. Like all the other non-medical doctor witnesses, Mr. Clark should not be allowed to testify on these issues, but should stick to areas within his expertise.

IV. POLICE PRACTICES EXPERT ERNEST BURWELL

(Salinas Motion in Limine No. 2)

The Salinas defendants filed another rambling 12 pages of argument challenging plaintiffs' ECD expert, Ernest Burwell. Once again, defendants' motion does not seek to exclude his testimony in its entirety, but, only to limit him from opining on certain matters. Defendants commence their argument by launching into a personal attack of Mr. Burwell and his qualifications to serve as an expert. Yet, their motion does not seek to exclude him as an expert because he is unqualified. The reason is obvious — Mr. Burwell was an approved training instructor in the Los Angeles County Sheriff's Department. Mr. Burwell's training to be a TASER instructor is the same or more than Salinas' designated experts Sergeants Groves and Gibson received (it is interesting to note that Sgt. Gibson received his initial training at the Los Angeles County Sheriff's Department, the department that Mr. Burwell was assigned as an ECD instructor).

Mr. Burwell served not only as a TASER instructor but also downloaded data from the dataport of each TASER used in his unit. Because of this assignment, he became intimately familiar with the TASER dataport and its download features. He is also intimately familiar with the types of data produced by the dataport.

The Salinas defendant's objections to Mr. Burwell's testimony fall into the following categories: (a) opinions offered about the mechanics, operation, or use of TASER; (b) opinions concerning the physical, medical or mental condition of Heston or the physical effects of TASER discharges on him; and (c) opinions about Heston's intentions or what he was thinking; Many of the categories listed above can be dealt with quite easily by offering an explanation of what Mr. Burwell will testify to rather than what he will not testify to.

Mr. Burwell has been designated by plaintiffs as an ECD expert in order to offer opinions including, but not limited to, TASER training, the deployment criteria for TASER's, the purpose of TASER deployments, tactics and strategies to be utilized during TASER deployments, the expected effects from TASER discharges and

generally how the discharges incapacitate the subject, and the existence of, or lack thereof, of warnings concerning TASER use.

Mr. Burwell should be permitted to offer opinions regarding proper use of the TASER. If he is not qualified to render opinions about usage of this device, it is doubtful that anyone else is qualified.

Mr. Burwell will not be asked to offer opinions concerning the physical, medical or mental condition of Heston or the physical effects of TASER discharges on him.

Mr. Burwell will also not be asked to offer any opinions about Heston's intentions or what he was thinking. Plaintiffs agree that speculative opinions about Heston's intentions are improper and should be excluded from the testimony of all witnesses. Nor will Mr. Burwell offer any opinions about Mr. Heston's cause of death. As previously mentioned, only physician experts should be permitted to opine on cause of death and there should be such an order applying to all non-medical experts in this case.

It should be noted that many of the arguments that defendants make to exclude Mr. Burwell's opinions center on his recitation of facts that have been established by the defendants' own experts. For example, defendant seek to exclude comments by Burwell that Officer Godwin "fired and cycled his TASER a total of five times." (Salinas MIL No. 2 at 8:9-20) Defendants confuse facts with opinions. An expert is entitled to rely on the opinions of any other expert in the case in formulating his own opinions. The "fact" that Officer Godwin fired and cycled his TASER a total of five times is not mere conjecture on Mr. Burwell's part but rather was established by the testimony of TASER's expert, Dr. Adam Aleksander, who independently tested and analyzed the ECD's used during this incident and their dataports. Mr. Burwell merely relies on Dr. Aleksander's conclusions in opining about Officer Godwin's number of TASER discharges. Another example of defendants' mis-characterizing opinions offered by Mr. Burwell is his reference to the fact that Livingston's dataport "indicates repeated trigger pulls and lengthy discharges with the trigger being held down."

(Salinas MIL No. 2 at 8:23-24) Once again, this testimony is based on Dr. Aleksander's inspection and analysis.

Finally, Mr. Burwell will not offer any opinions concerning Heston's physical condition before or during this incident. However, such an exclusion should apply to all witnesses, including those of the defendant officers and any other experts who have no personal knowledge or expertise as to Heston's physical condition prior to this incident.

V. MARK MYERS, M.D., SHOULD BE ALLOWED TO TESTIFY ON THE CAUSE OF MR. HESTON'S CARDIAC ARREST

Based principally on a declaration by Mark Kroll, a TASER advisor and stockholder, who is an electrical engineer with no medical education, TASER contends that plaintiffs' retained expert cardiologist, Mark Myers, M.D., should be barred from testifying. The motion lacks merit.[1]

There is no question that Dr. Myers is an eminently qualified physician. He has been board certified for more than two decades in internal medicine and cardiology, and is a recognized expert in electro-physiology (the medical specialty addressing the heart's electrical system). He has published extensively. Opining on the cause of Mr. Heston's cardiac arrest – the cessation of the heartbeat – falls squarely within Dr. Myers' professional expertise.[2]

There is also no competent challenge to his methodology. TASER designated two cardiology experts, Drs. Luceri and Ideker. Neither criticized Dr. Myers methodology, or used a method that contradicted his.

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[1]Indeed, Mark Kroll's criticisms of Dr. Myers do not meet themselves meet Rule 702 standards, as Kroll is an electrical engineer who lacks the education and training to criticize a cardiologist regarding the cause of a cardiac arrest. Plaintiffs have filed their own motion in limine urging the Court to issue an omnibus order limiting all the expert witnesses, including Kroll, to opinions within their own established areas of expertise.

[2]Dr. Myers' resume and expert reports are attached as exhibits to TASER's moving papers. They establish he is qualified to opine on the cause of Mr. Heston's cardiac arrest. Any purported deficiency in his experience specifically with regards to TASER ECD's goes to the weight of his testimony, not its admissibility.

TASER incorrectly characterizes Dr. Myers' opinions. His initial Rule 26 reports states his opinion on the cause of Mr. Heston's cardiac arrest as plaintiffs intend to argue it to the jury: "The likely mechanism of cardiac arrest due to TASER applications is its documented ability to cause respiratory arrest and severe metabolic (lactic) acidosis." He restated this opinion in his supplemental reports:

> Mr. Heston's cardiopulmonary arrest occurred after and/or during repeated and continuous applications of TASER by multiple TASER weapons. The fact that he was immediately cyanotic [turning blue from lack of oxygen] is indicative of TASER induced hypoxia for a significant period of time. It is true that physiologic recording devices were not attached to the decedent to prove the exact mechanisms TASER induced cardiopulmonary arrest, but reasonable inferences can be made and are supported by the objective clinical findings. As explained in my previous report, severe respiratory and metabolic acidosis were present and attributable to the use of TASER. Malignant ventricular arrhythmias may have been transiently present and need not have been due to direct electrical stimulation of the heart, but secondary to the adverse metabolic, hypoxic milieu.

Dr. Myers summed up, in his final report,

> I am persuaded however, that TASER application in the manner of Heston's case would cause metabolic acidosis, respiratory acidosis and hypoxia, a malignant vasosvagal reaction and the observed consequent asystolic cardiac arrest that led to his demise.

The question whether Dr. Myers' analysis, that Mr. Heston suffered an acidosis induced cardiac arrest, meets the standards of Fed. R. Evid. 702 should be answered in the affirmative.[3]

TASER characterizes Dr. Myers' views as follows:

> Myers' metabolic theory in lay terms is that the ECDs caused violent and prolonged muscle contractions in Mr. Heston which significantly raised the lactic acid levels in his blood; his body failed to correct for this, and the acidosis was allegedly so severe that it shut down his heart. Myers' theory of metabolic acidosis also is wrong, and is wholly lacking in scientific support and reliability.

[3]TASER's claim that Dr. Myers' opinions changed over time – a contention plaintiffs' dispute – goes to the weight the jury should give the opinions, not their admissibility under Rule 702.

TASER Memorandum in Support of Motion in Limine No. 1 at 15.[4] In fact, there is ample scientific support for Dr. Myers' opinion testimony to meet the Rule 702 "gatekeeping" standard, including two independent peer-reviewed studies directly on point, and admissions by TASER's CEO and designated spokesperson in this litigation, Rick Smith.

That metabolic acidosis triggers cardiac arrest is not disputed. *See* Hicks, et al., *Metabolic Acidosis in Restraint-Associated Cardiac Arrest: a Case Series* (1999).[5] In fact, one of TASER's own cause-of-death theories in this case is that "[e]xcited delirium brings on metabolic derangements – specifically acidosis – which often leads to a cardiac arrest." TASER Memorandum in Support of Motion in Limine No. 1 at 15. Thus, TASER cannot dispute Dr. Myers' opinion that acidosis caused Mr. Heston's cardiac arrest, only his opinion that the ECD applications were among the sources of the acidosis. That issue presents a matter of historical fact for the jury to determine, not an issue of law susceptible to disposition by way of an in limine motion.

That repeated TASER applications do cause dangerous levels of acidosis was established in an independent study financed by the US Air Force, Jauchem, et al., *Acidosis, Lactate, Electrolytes, Muscle Enzymes, and Other Factors in the Blood of* Sus Scrofa *Following Repeated TASER Applications* (2005).[6] The Jauchem study provided the basis for Dr. Myers' opinion that the ECD applications were the source of Mr.

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[4]TASER bases this argument in large part on its claim that the evidence will show a "total of 5-9 seconds of ECD application." TASER Memorandum in Support of Motion in Limine No. 1 at 15. Plaintiffs contend that the evidence will support a finding of almost two minutes of ECD application in this case.

[5] The medical literature to which plaintiffs refer in their Motions in Limine are attached as exhibits to the Declaration of John Burton re Exhibits in Support of Plaintiffs' Motions in Limine filed with plaintiffs' motions in limine two weeks ago.

[6]Although TASER attempts to distinguish the study because it used swine, CEO Rick Smith acknowledged that his company first tested the ECD "in 1996 . . . using an anesthetized pig." 1 Smith Depo. at 80-81. Obviously no human experiments can be conducted to determine the number of ECD applications necessary to induce lethal levels of acidosis. Comparisons of the human and swine studies for single ECD applications show that the two species have similar blood acid responses.

Heston's acidosis, and therefore, his cardiac arrest.

TASER CEO Rick Smith embraced this study at his deposition:

> Q. Now, the next paragraph is research done by the Air Force Research Laboratory. That's Dr. Jauchem's study?
>
> A. Yes.
>
> Q. Do you agree with the last sentence of that paragraph: We believe this study provides support for the proposition that police should, where possible, be minimizing multiple TASER applications?
>
> A. Yes.

2 Smith Depo. at 277:16-24.

Finally, a recent study published in the Journal of Trauma, Dennis, et al., *Acute Effects of TASER X26 Discharges in a Swine Model* (2007), issued after Dr. Myers wrote his Rule 26 reports and gave his deposition, confirms Dr. Jauchem's results and therefore Dr. Myers' opinion. Two 40-second ECD applications (still less current than Mr. Heston absorbed) induced severe metabolic acidosis in swine, and actually caused cardiac arrest in two test animals.

Of particular relevance to this motion is the fact that in response to questions about a US Department of Defense study questioning the safety of repeated or prolonged ECD exposures, TASER CEO Smith acknowledged the same scientific principles on which Dr. Myers' opinion relies:

> Q. I'd like to invite your attention to page 19, and there's a Section 3.3.2.8, which has several subsections I'm going to go through. The heading is Effects of Prolonged Muscle Contraction: Respiratory Impairment, Acidosis, Rhabdomyolysis, and Nervous System Effects. And do you have that?
>
> A. I do.
>
> Q. I'd like to invite your attention to the sentence, it's about two-thirds of the way through that first paragraph, or halfway through. It says: Field experience indicates that in most cases only one or a small number of five-second activations are needed to achieve and maintain control of the subject.
>
> Do you agree with that sentence?
>
> A. Yes. That's the general experience.

2 Smith Depo. at 202:16-203:6

> Q. Now, the next sentence: However, repeated or constant activation of the devices can deliver constant electrical output, which results in sustained muscle contraction with little or no muscle recovery period.
>
> Do you agree with that statement?
>
> A. Yes, assuming good contact, it can cause sustained muscle contractions.
>
> Q. With no – little or no muscle recovery period?
>
> A. In the case of constant activation, yeah, the muscle would continue to flex.

2 Smith Depo. at 207:9-18

> Q. Respiratory failure or muscle lactate production, or a combination of these, may induce acidosis.
>
> Do you see that?
>
> A. I do.
>
> Q. And is muscle – do muscles produce lactate when they're contracted?
>
> A. Yes.
>
> Q. And would that be true whether they're contracted voluntarily, let's say by the brain when you were weight-lifting this morning, or when they're contracted involuntarily by application of a TASER current?
>
> A. Yes.
>
> Q. And is it true as a general scientific principle, as your understanding, that the more the muscle is contracted, the more lactate it will produce?
>
> A. Generally my understanding would be the longer time duration it's contracted, the more lactate it would produce.

2 Smith Depo. at 218:4–23.[7]

> Q. The next sentence: Any acidosis from sustained muscle contraction will at first be localized to muscle, and would affect systemic pH only if lactate production were prolonged and massive, such as might occur with stimulus durations much greater than the five seconds, even without impaired respiration.
>
> Do you agree with that?

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[7]Human tests show that limited duration ECD exposures increase blood lactate levels similar to the effect of moderate exercise.

A. In general, yes.

2 Smith Depo. at 219:4–11.

> Q. Now, the next sentence: When acidosis becomes severe, confusion, irritability, or lethargy can occur, followed by -- I'll say "fainting" so I don't mispronounce -- and if unresolved, can be fatal.
>
> Do you agree with that as a scientific principle?
>
> A. Yes.

2 Smith Depo. at 223:24–224:5.

Here, TASER CEO and spokesman Rick Smith is acknowledging the very same scientific principles and methodology on which Dr. Myers bases his opinion, and which TASER now says is "wrong" and "wholly lacking in scientific support and reliability."

There remains an open question on the effect of ECD discharges on breathing. Impaired respirations can aggravate acidosis in two ways. First, the accumulation of carbon dioxide is a second source of blood acid, usually referred to as "respiratory acidosis." Second, respiration itself is the body's method of compensating for metabolic acidosis. Both swine studies found that the animals stopped breathing during prolonged ECD applications. Human tests, however, showed that under laboratory conditions police officer volunteers were able to breath through brief 5-15 second ECD applications.

The following testimony by Rick Smith illustrates that there are two sides to the issue of respiratory impairment:

> Q. Well, did the decision-makers at TASER International consider that it should warn its users that the potential consequences of extended stimulus periods are – that those consequences are not known at this time, and therefore, that long stimulus durations should be avoided when possible?
>
> A. Well, I think we were – we were already doing that. If you look at our Version 12 training from November of 2004, and I'll refer you to –
>
> Q. That's Exhibit 4.
>
> A. – the second page there, we have a slide in the training course for officers using the TASER. And I'll read it into the record. It says, quote, "Duration of Field Applications. The application of the TASER is a physically stressful event. Although there is no predetermined limit to the

> number of cycles that can be administered to the subject, officers should only apply the number of cycles reasonably necessary to allow them to safely approach and restrain the subject. Especially when dealing with persons in a health crisis such as excited delirium, it is advisable to minimize the physical and psychological stress to the subject to the greatest degree possible.
>
> "Further, TASER applications directly across the chest may cause sufficient muscle contractions to impair normal breathing patterns. While this is not a significant concern for short (five-second) exposure, it may be a more relevant concern for extended duration applications."

2 Smith Depo. at 264:25–266:1.[8]

Accordingly, the motion in limine as to Dr. Myers should be denied. Plaintiffs' cardiology expert should be allowed to opine on the cause of Mr. Heston's cardiac arrest, and its relationship to the repeated ECD exposures. Defendants' retained expert witness medical doctors (but not their non-physician witnesses such as Mark Kroll) should be allowed to opine on that subject as well. The jury then can be trusted to reach the correct decision based on all the evidence.

VI. THE MEDICAL EXAMINER WHO CONDUCTED THE AUTOPSY FOR MONTEREY COUNTY SHOULD BE ALLOWED TO TESTIFY.

TASER challenges Terri L. Haddix, M.D., as an expert witness to opine on Mr. Heston's cause of death. She is a board certified forensic pathologist who teaches medicine at Stanford University. Dr. Haddix was hired by the Monterey County Sheriff-Coroner to autopsy Mr. Heston and to determine his cause of death.

Dr. Haddix, the only truly independent medical expert in this case, opined that the multiple ECD applications caused Mr. Heston's cardiac arrest. TASER's challenge to Dr. Haddix credentials are similar to those levied against Dr. Myers, that neither has enough direct experience with TASER death cases to qualify as a cause-of-death expert in this case.

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[8] Although issued three months before this incident, this directly apposite warning apparently never made it to the defendant officers, plaintiffs contend due to the malfeasance of TASER, the Salinas Police Department, or both.

Disregarding the maxim that sauce for the goose is sauce for the gander, TASER is simultaneously urging that the Court allow seven *non-physicians* it has retained as expert witnesses to opine on cause of death.

Dr. Haddix testified that in addition to conducting an autopsy, she reviewed the medical records from Mr. Heston's final hospitalization, and she gathered as much information as possible from the Salinas Police Department. She also contacted TASER directly and corresponded with one of its employees, Mark Johnson, who provided her the same Department of Defense study that Rick Smith answered questions about. Finally, she did research and spoke to her colleagues before rendering her opinion. All this is referred to in her deposition testimony. The sheriff-coroner then submitted her report to two other forensic pathologists, Dr. Hain and Dr. Karch. They praised her thoroughness and concurred that the ECD shocks contributed to the death.

TASER, although it has designated three forensic pathologists, has submitted no evidence from any of them that Dr. Haddix did not follow correct methodology in conducting her examination or rendering her opinion. All indications are that she followed the established methodology for medical examiners to rule out various factors, and then make a finding for the local government on the cause of death. Absent competent evidence that she deviated from the methodology used by comparable medical examiners – not complaints from Mark Kroll about her "logic" – the testimony should be admitted.

Dr. Haddix issued her report before the publication of the critical Jauchem study. Nevertheless, without using the term "acidosis" – she referred to "additional stress" – Dr. Haddix came to essentially the same conclusion as Dr. Myers.

> Q. So if I understand you correctly, are you saying that the mechanism of injury from the TASER is electrocution?
>
> A. Well, in this case, what I'm worried about -- and this gets back to what you mentioned earlier. I'm worried about that there's a couple different ways in which this happened or in which TASER has a role in this. First, is along the lines what Dr. Hain said previously as well, that is, the additional -- the additional stress, the additional strain placed upon his heart, et cetera, related to that, related to the struggle, related to a

number of things going on.

But what I'm worried about is the induction of a cardiac rhythm, abnormal or fatal cardiac rhythm that happened with that last application. And I guess this also gets back to a couple other things that kind of muddy things to some degree. And that is, it is my understanding that while Mr. Heston was on the floor, there were barbs from several different TASERs still within his body and I'm not a hundred -- in contact with -- this point, I'm not clear how many TASERs were actually being cycled at that time as well, too.

. . . .

Q. Now, you indicated first of all you're concerned about the, as you put it, the same factor that Dr. Hain has expressed concern about is your understanding that there may have been additional stress and strain put on the heart by the application of the TASER as well as the police physical struggle with Mr. Heston in this case; is that correct?

A. As well as the effects of drugs as well, too. Yes. That's right.

. . . .

Q. Do you have any percentage of probability as far as these three different issues that you are concerned about with the TASER as to which one is your greater concern or more likely to have occurred than the other two?

A. Well, I think the first part, the addition of the strain and the stress, et cetera, it's my reading of some studies that they found indeed there's increased heart rate associated with the application of TASERs, et cetera. So, I think that is supported in that regard.

Haddix Depo, at 99-101.

Most of TASER's Memorandum in Support of Motion in Limine No. 2 might be relevant to cross examination, but not a Rule 702 determination. Much of their argument arises from facts which are disputed, such as whether Mr. Heston had a highly elevated temperature (hyperthermia). The paramedics measured his temperature at 97 degrees, which is not hyperthermic. Defendants can use such purported facts to attack Dr. Haddix's opinions at trial, but her testimony on cause of death is within the standard of her profession and should be expressed to the jury.

VII. CONCLUSION

For the foregoing reasons, defendants motion to limit or exclude plaintiffs' expert witnesses and Dr. Haddix should be denied.

DATED: April 15, 2008

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY LOU HESTON and ROBERT H. HESTON, individually, and MISTY KASTNER, as the personal representative of ROBERT C. HESTON, deceased,

Plaintiffs,

v.

CITY OF SALINAS, SALINAS POLICE DEPARTMENT, MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON, JUAN RUIZ and TASER INTERNATIONAL, INC.,

Defendants.

Case No. C 05-03658 JW

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TASER'S RENEWED AND SUPPLEMENTAL MOTION FOR JUDGMENT AS A MATTER OF LAW (JMOL) OR REDUCTION IN PUNITIVE DAMAGES

Trial:

Date Commenced: May 13, 2008

Date of Verdict: June 6, 2008

Post-Trial Telephonic Conference:

September 17, 2008 at 9:00 a.m.

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I. INTRODUCTION

After four weeks of hotly contested trial, the Court instructed the jury thoroughly, there were extended deliberations, and the jury returned a mixed verdict, finding against defendant TASER International, Inc., (TASER) for negligently failing to warn about the risks of its product, the M26 ECD, and against plaintiffs on all other claims. The jury awarded compensatory damages of $21,000.00 to the estate of Robert C. Heston, and $1,000,000.00 to his parents, Robert H. Heston and Betty Lou Heston, for their wrongful-death damages. The jury apportioned fault 85 % to the decedent and 15% to TASER. Finally, the jury assessed punitive damages of $5,200,000.00 against TASER.

TASER now renews and supplements its Rule 50 Motion for Judgment as a Matter of Law.[1] The motion asserts, essentially, that the jury lacked any basis for finding TASER liable for the death resulting from its unreasonable failure to warn about the risk of its product, or for the award of punitive damages for recklessly placing such a product into commerce under the motto, "Saving lives every day." TASER also contends that the Court should reduce or even vacate altogether the jury's award of punitive damages.

Plaintiffs acknowledge that because they prevailed only on a state-law theory, the general damages awarded to the estate do not survive and the compensatory damages should be reduced to $1,189.30, the amount of economic loss (burial expenses). That sum, and the compensatory damages awarded on the wrongful death claim, are subject to an 85% reduction based on the decedent's fault, bringing the estate's total compensatory damages to $178.43, and the parents' award to $150,000.00. For the following reasons, however, judgment should be entered in the full amount of $5.2 million for punitive damages, plus costs.

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[1] Plaintiffs' opposition to TASER's Rule 59 new trial motion, and the arguments raised therein, is set forth in a separate memorandum filed herewith. There is significant overlap between the two motions. This memorandum tracks TASER's JMOL Memorandum section by section.

The verdict against TASER was amply supported by the evidence, which showed the danger of acidosis from repeated or prolonged ECD applications was theorized in the literature prior to TASER's marketing the more powerful Model M26 ECD. The jury was properly instructed on the applicable law, which required them to determine, based on "clear and convincing evidence," whether TASER's failure to test and warn for acidosis constituted "a conscious disregard of the probability of injury to others."

The testimony of TASER CEO Patrick Smith demonstrated that TASER unreasonably failed to test its new product's effect on acidosis, and recklessly marketed the product to police agencies for use on human beings, including some suffering from mental illness or the acute effects of drug intoxication, without first gathering the "scientific knowledge" necessary to evaluate its grandiose claims of safety, regardless of the number or duration of applications.

TASER did not "act[] promptly to provide warnings to its customers of the scientific information that . . . repeated shocks by a TASER ECD might cause acidosis." But see TASER's Supplemental JMOL Memorandum at 4:6-8. The firm's overriding concern for sales over safety was demonstrated by its burying a potential life saving warning on a single slide in a power point presentation which the City of Salinas did not timely receive, and which failed to reach the involved officers before the Heston incident.

TASER's reckless marketing of the M26, in conscious disregard for the lives of persons shot by the device, is among the scenarios for which California law expressly authorizes punitive damages. The award is only about one-half the ratio to compensatory damages authorized under the Court's instructions. The award is less than the U.S. Government's statistical value of a human life (recently reduced to $6.9 million). The award is only five percent of TASER's 2007 annual revenues ($100.7 million), and 4.3 percent of its current net worth ($120.6 million).

JMOL should be denied, the verdict affirmed, and judgment entered.

II. THE EVIDENCE SUPPORTS THE JURY'S VERDICT

TASER's contention that "the jury's findings do not support its conclusions," TASER's Supplemental JMOL Memorandum at 5:21-6:5, is based solely on a three-paragraph argument that the punitive damages are purportedly disproportionate to the compensatory damages – but only after the Court makes the reduction for comparative fault.

The jury returned a general verdict on special questions, and made no "findings." The issue is whether the evidence supports the jury's verdict, not whether "findings," which do not exist, support the jury's "conclusions."

The record demonstrates that the jury followed the Court's instructions to a "T" regarding proportionality of punitive and compensatory damages. The jury was first instructed not to reduce the amount of compensatory damages by the percentage of fault, Closing Instructions at 19:18-20, and then was told that "punitive damages may be no more than 10 times the amount of compensatory damages, but can be as little in amount as the jury decides." Id. at 20:10-11.

Were the jury to have done what TASER now contends it should have done – reduced the compensatory damages by the percentage of decedent's fault before calculating punitive damages – it would have violated the Court's instructions.

TASER is seeking an end run around the rule that the jury's comparative fault determination does not reduce the punitive damages. See Anno., Effect of Plaintiff's Comparative Negligence in Reducing Punitive Damages Recoverable, 27 A.L.R.4th 318 (1984), and the cases cited therein. It should not be allowed to do so.

The jury awarded punitive damages equal to about five times the compensatory damages. That considered judgment of the jury, which was almost $5 million less than the maximum amount the Court's instructions authorized, should stand.

III. THE COURT SHOULD NOT VACATE OR REDUCE THE AMOUNT OF PUNITIVE DAMAGES; IT SHOULD ENTER JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST TASER ON THE NEGLIGENT PRODUCTS LIABILITY CLAIM.

TASER does not cite the applicable legal standard. A trial court can overturn the jury and grant a post-trial Rule 50 JMOL motion "only if, under the governing law, there can be but one reasonable conclusion as to the verdict. In other words, the motion should be granted only if 'there is no legally sufficient basis for a reasonable jury to find for that party on that issue.'" Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276, 1283 (9th Cir. 2001) (citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 149,(2000) and quoting Rule 50(a)).

> In ruling on a motion for JMOL, the court is not to make credibility determinations or weigh the evidence and should view all inferences in the light most favorable to the nonmoving party. Reeves, 530 U.S. at 150 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 255, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986)). "The court must accept the jury's credibility findings consistent with the verdict." Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1468 n. 8 (9th Cir. 1984). It "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves, 530 U.S. at 151. The court "may not substitute its view of the evidence for that of the jury." Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001).

Id. Missing from TASER's moving papers is any attempt to analyze the evidence or to demonstrate how, under these most stringent of legal standards, the jury could not have returned the verdict it did.

As explained in the following sections, there was ample evidence for the jury to conclude that TASER unreasonably failed to perform the necessary testing on the effect of repeated or prolonged shocks on blood acid before manufacturing and marketing its

new high powered ECDs to police agencies throughout California and the United States. Even after the necessary scientific knowledge was established by Dr. James Jauchem at the U.S. Air Force laboratory, his important results were buried in a training power point so as not to affect TASER's sales, which are based in large part on its exaggerated safety claims.

TASER also asserts it is entitled to the "reduc[tion of a] constitutionally excessive punitive damage award." TASER Supplemental JMOL Memorandum at 6:17-18. For reasons explained below, the award is not constitutionally excessive and should not be reduced on that basis.

Finally, although a trial court may have discretion to reduce a punitive damage award under appropriate circumstances, the "jury's award of punitive damages is not to be lightly disturbed. See Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 707 n.3 (9th Cir. 1990). Reflecting our general deference to jury verdicts, we have never required the district court to adjust a jury's punitive damages verdict so that it is proportional, in the court's view, to the defendant's wickedness. Such proportional adjustments are left to the jury itself." Caudle v. Bristow Optical Co., 224 F.3d 1014, 1028 (9th Cir. 2000) (footnote omitted).

TASER cites out-of-circuit authority, Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1331-32 (11th Cir. 1999), for the proposition that the Court may reduce the jury's award of punitive damages without "offering plaintiff the option of a new trial." TASER's Supplemental JMOL Memorandum at 6:18-19. The rule in the Ninth Circuit is different. Where a district court decides – after considering factors such as the need for deterrence and for compensation of the private attorneys who prosecute such actions – "that the award should be reduced a remittitur with the option of a new trial would be required." Boyle v. Lorimar Products, 13 F.3d 1357, 1361 (9th Cir. 1994) (citing Morgan v. Woessner, 997 F.2d 1244, 1258-59 (9th Cir. 1993)).

Regardless, the jury's award should be affirmed.

IV. THE AWARD OF PUNITIVE DAMAGES IS AMPLY SUPPORTED BY LAW AND FACT

A. Punitive Damages Are Available for Negligent Failure to Warn About the Risks of Products.

California courts have long held that punitive damages are recoverable in product-liability actions because of important public policy. The term "malice" as used in California Civil Code section 3294 is not limited to conduct undertaken with an intent to vex, annoy or injure, but also encompasses "conduct evincing callous and conscious disregard of public safety by those who manufacture and market mass produced articles." Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 810 (1981).

> In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce-related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than remedy the defect. . . . Deterrence of such "objectionable corporate policies" serves one of the principal purposes of Civil Code section 3294 . . . . Punitive damages [are] the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable.

Id.

Two "failure to warn" theories are recognized in product-liability actions — negligent failure to warn and strict liability failure to warn. To establish negligent failure to warn, plaintiff must prove that the manufacturer's conduct "fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." Strict liability, instead of looking to the defendant's conduct, focuses on "scientific and medical knowledge available at the time of

manufacture and distribution." Carlin v. Superior Court, 13 Cal.4th 1104, 1112 (1996). Here, the jury logically found TASER's failure to test for the danger of acidosis and warn against it to be unreasonable and "below the acceptable standard of care." The jury found no strict liability precisely because TASER's negligent failure to conduct pre-release testing of its product did not generate the "scientific and medical knowledge" necessary to assess accurately the risk of acidosis from repeated or prolonged ECD applications.

That knowledge was forthcoming only as the result of the Jauchem and Dennis independent testing performed long after the product was put on the market. TASER's warning based on those belated results was too little, too late to be of any help to Robert C. Heston.

TASER argues that a cause of action for negligent failure to warn cannot, as a matter of law, support an award of punitive damages. TASER's Supplemental JMOL Memorandum at 3:20-23, 7:1-8:5. TASER is incorrect. While evidence of simple negligence generally does not support punitive damages, a negligence cause of action justifies such an award where the evidence also shows malice, especially in products liability.

In Nolin v. National Convenience Stores, Inc., 95 Cal.App.3d 279 (1979), the plaintiff was severely injured when oil and gasoline on the ground near defendant's s gas pumps caused her to slip and fall. Plaintiff alleged negligence, but also sought to recover punitive damages on the ground that defendant's conduct was so egregious that it constituted a callous and conscious disregard for her safety. The jury awarded substantial compensatory and punitive damages, and the appellate court affirmed the judgment.

In a section of the appellate opinion entitled "The Right to Recover Punitive Damages in an Action Founded on Negligence," id., at 284, the court held that unintentional carelessness does not necessarily support an award of punitive damages, but that "a non-intentional tort can have the characteristics of an intentional tort to the

extent of embracing the concept of malice as used in Civil Code section 3294." Id., at 286. The Court of Appeal noted that such malice is established by proof of a conscious disregard for the rights or safety of others, and held the evidence in that case sufficient to justify the jury's finding of malice and to support its award of punitive damages. Id., at 286, 288.

The California Supreme Court addressed the same issue in Taylor v. Superior Court, 24 Cal.3d 890 (1979), a personal injury action arising from an automobile accident. The complaint alleged not only that the defendant was intoxicated, but also that he was an alcoholic; that he had previously caused a serious accident while driving drunk; that he had been arrested for and convicted of drunk driving on numerous prior occasions; that he had recently completed a period of probation after a drunk driving conviction; that at the time of the accident another criminal drunk driving charge was pending against him, and so forth. Based on these allegations, the plaintiff sought punitive damages. The defendant demurred, contending that punitive damages could not be assessed against a negligent driver, at least in the absence of an allegation that defendant actually intended to harm the plaintiff. The trial court sustained the demurrer as to punitive damages, but the state Supreme Court reversed, holding that the plaintiff's allegations were sufficient because a conscious disregard for the safety of others constitutes "malice" within the meaning of Civil Code section 3294. Id., at 895.

The foregoing rule – that a negligence cause of action will support an award of punitive damages if the plaintiff alleges and proves not just carelessness but a conscious disregard for the safety of other – was applied to products liability in Hilliard v. A.H. Robbins Co., 148 Cal.App.3d 374 (1983). The plaintiff sued the manufacturer of an intrauterine birth control device for injuries she suffered, asserting a variety of theories including negligence and strict liability. The trial court bifurcated the issue of punitive damages, and after a 19-week trial the jury returned a verdict awarding plaintiff $600,000 in compensatory damages. The trial court then granted the defendant's motion for a directed verdict on the issue of punitive damages, apparently in the belief

that evidence of defendant's disregard for the safety of its product could not establish malice. The appellate court reversed the directed verdict, citing Grimshaw and Taylor, holding specifically that punitive damages were recoverable on both the negligence and strict liability causes of action. Id., at 394-95.

TASER cites two cases to support its argument that punitive damages cannot be recovered in a negligent-failure-to-warn, products-liability case. The first is Ebaugh v. Rabkin, 22 Cal.App.3d 891 (1972), a 36-year-old medical malpractice decision not involving products liability or a failure to warn. Ebaugh states that for conduct to constitute malice under Civil Code section 3294 "[t]here must be an intent to vex, annoy or injure," Id., at 894 (emphasis in original), the very holding the California Supreme Court later rejected in Taylor.

In the second case, Carlin v. Superior Court, the issue was whether a plaintiff injured by a prescription drug can state a claim against the manufacturer for strict liability failure to warn, as opposed to negligent failure to warn. TASER relies on a single sentence in a concurring and dissenting opinion by Court of Appeal Justice Paul Turner (sitting by special assignment) stating that "a failure to warn of a knowable risk [in the prescription drug context] is subject to traditional negligence principles including the unavailability of punitive damages." Id., 13 Cal.4th at 1136 (quoted in TASER's Supplemental JMOL Memorandum, at 7:17-19). This statement, insofar as it refers to punitive damages, is dicta, as the case presented no such issue, and there is no other reference to punitive damages anywhere in the majority, concurring and dissenting, or dissenting opinions. The statement is made without citation to authority or analysis of any kind. It is accurate to the extent that punitive damages are unavailable in cases where the evidence shows only simple negligence without malice, but it is not authority that punitive damages are never available in negligence-based products-liability cases, given decisions specifically addressing the issue conclude otherwise.

In sum, TASER takes the elementary rule that simple negligence cannot support an award of punitive damages and attempts to convert it into a rule that a cause of

action grounded in negligence can never support an award of punitive damages, even where the evidence proves a defendant acted with conscious disregard for public health and safety. TASER's contention is particularly incorrect in a product-liability action, where California Supreme Court authority recognizes the public policy in favor of punitive damages.

B. Plaintiffs Proved by Clear and Convincing Evidence That TASER's Conduct Was Wilful, Intentional, and Done in Reckless Disregard of the Probability of Injury to Others.

(i) The Verdict was Based on Clear and Convincing Evidence.

TASER contends "that plaintiffs did not prove by clear and convincing evidence that TASER's conduct was willful, intentional, or done in reckless disregard of its possible results." TASER's Supplemental JMOL Memorandum at 8:12-16. TASER does not base its argument on the record, but on the contention that "although the 'clear and convincing' and 'conscious disregard' language were included in the Closing Instructions, the Court failed to include either standard" in its verdict form. Id. at 9:7-12.

TASER cites no authority for its proposition that the absence of these questions on the general verdict form constitutes a "defect," much less grounds "for vacating the punitive damages award." Id. at 8:16-17. A party requesting special findings by the jury must present the proposed questions of fact to the judge before submission to the jury. Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 891 (9th Cir. 1991) (citing Burgess v. Premier Corp., 727 F.2d 826, 831 (9th Cir. 1984). TASER's proposed verdict form, filed May 29, 2008, had no such questions.

Moreover, TASER had an obligation to object timely to the form submitted to the jury, and its failure to do so waived any objections. United States v. Parsons Corp., 1 F.3d 944, 945 (9th Cir. 1993). Even had a request by TASER for such questions on the verdict form been denied, or its objections to the form been made and overruled, the correct law stated in the instructions made any error harmless.

> Failure to give requested jury interrogatories may not be error, or if error may be harmless, where the jury verdict itself, viewed in the light of the jury instructions, and any interrogatories that were answered by the jury, indicate without doubt what the answers to the refused interrogatories would have been, or make the answers to the refused interrogatories irrelevant.

Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002).

Here, there can be no question that the jury gave considerable thought to the matter before finding a negligent failure to warn and assessing TASER with $5.2 million in punitive damages. There is no reason to believe the jury disregarded the correct instructions that it must do so on "clear and convincing" evidence that TASER acted with "conscious disregard."

Accordingly, the motion should be denied.

(ii) The Jury Had a Factual Basis for Awarding Punitive Damages.

What is absent from TASER's moving papers is any attempt to analyse the evidence in the light most favorable to the jury verdict.

Through their scientific expert, Mark D. Myers, M.D., plaintiffs established that muscle contractions cause increases in blood acid, measured as a decrease in blood pH, that a buildup of too much blood acid too quickly can cause a cardiac arrest, and that people in an agitated state, such as Mr. Heston, are already acidotic, and therefore more vulnerable to acidosis-induced cardiac arrests.

Dr. Myers then reviewed the results of three very important independent studies. The first by Dr. Jauchem for the U.S. Air Force established dramatic increases in the blood acid of pigs resulting from repeated TASER applications. The second by Dr. Dennis for Cook County Hospital, found similar results from prolonged TASER

applications.[2] The third, by Dr. Vilke for the University of California San Diego, found that the pH response to a single TASER shock in human beings was the same as that observed in pigs.

These test results, Dr. Myers explained to the jury, provided a firm scientific foundation for his medical opinion that the decedent suffered cardiac arrest from acidosis induced by repeated TASER applications. Unfortunately, this scientific knowledge did not exist at the time the M26s were manufactured and sold because TASER had unreasonably failed to perform the testing.

Essential to plaintiffs' negligent products-liability claim against TASER was the testimony of Patrick Smith, which was presented in their case in chief through his videotaped deposition.

Q. You've said things like this several times, I think: Primary risks associated with TASER use include fall-related injuries and injuries associated with strong muscle contractions, which are similar to strenuous athletic exertion.

Right?

A. Correct

Q. And has that been your view since the TASER M26 was put on the market?

A. Yes.

Q. And that's still your view today?

A. Yes.

. . . .

Q. And is muscle – do muscles produce lactate when they're contracted?

A. Yes.

---

[2] Patrick Smith testified incorrectly that the Dennis study was funded by a TASER competitor.

Q. And would that be true whether they're contracted voluntarily, let's say by the brain when you were weight-lifting this morning, or when they're contracted involuntarily by application of a TASER current?

A. Yes.

Q. And is it true as a general scientific principle, as your understanding, that the more the muscle is contracted, the more lactate it will produce?

A. Generally my understanding would be the longer time duration it's contracted, the more lactate it would produce.

. . . .

Q. Any acidosis from sustained muscle contraction will at first be localized to muscle, and would affect systemic pH only if lactate production were prolonged and massive, such as might occur with stimulus durations much greater than the five seconds, even without impaired respiration.

Do you agree with that?

A. In general, yes.

. . . .

Q. Now, the next sentence: When acidosis becomes severe, confusion, irritability, or lethargy can occur, followed by [syncope] and if unresolved, can be fatal.

Do you agree with that as a scientific principle?

A. Yes.

. . . .

Q. Did you test for changes in pH levels in pigs before you marketed the M26?

A. No.

Plaintiffs' counsel then took advantage of the Court's rule and addressed the jury on plaintiffs' views of the significance of this testimony.

> The important thing about this particular segment is that TASER acknowledged that when it put this device on the market it had no idea what the effect of these prolonged applications such as we've seen in this case are and although acidosis was brought to their attention, that they performed no test. They used anesthetized pigs to see whether or not the direct electrical stimulation from the device caused cardiac arrest, but they didn't measure the changes in pH that were caused by repeated applications.

R.T. May 22, 2008 at 1346. Plaintiffs also introduced into evidence, albeit somewhat later in the trial, Exhibit 151A, a peer-reviewed study that was done at Penn State in 1999 – before the M26 was first marketed and sold – which posited that extended duration shocks from ECDs would cause lethal levels of acidosis. The jury was free to disbelieve Mr. Smith's testimony that TASER was unaware of the study, especially as it came from TASER's own research compendium.

TASER's efforts to repair this damage during its defense only made matters worse, as often happens when a defendant tries to disprove something so logical and true as Dr. Myers' cause-of-death theory. Dr. Jeffrey Ho was exposed on the stand as a TASER functionary who flew around in the company's private jet espousing manipulated test results designed to camouflage dangerous propensities of TASER ECDs, a fact that came out most clearly when he was impeached by deposition testimony showing that he drew blood from his volunteers too soon after TASER ECD exposures to register the changes in pH.

Finally, the jury heard that TASER's motto was "saving lives every day." The company's exaggerated claims of product safety were directly linked to its marketing and sales, and explained its reticence to perform proper testing and issue proper warnings. That would affect TASER's fiscal bottom line by inhibiting use of its products.

With this showing, the jury was justified in concluding, based on clear and convincing evidence, that TASER's actions demonstrated "conscious disregard of the probability of injury to others," in other words, "that TASER International was aware of the probable dangerous consequences of its conduct and deliberately failed to avoid those consequences." Closing Instructions at 20:27-21:3.

V. THE PUNITIVE DAMAGE AWARD OF $5,200,000 IS NOT EXCESSIVE FOR A WRONGFUL DEATH CASE.

A. The Factors for Reviewing a Punitive Damages Award Demonstrate that the $5,200,000 Punitive Damages Award Is Not Excessive.

The United States Supreme Court has set forth three guideposts for determining if an award of punitive damages is excessive: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-75 (1996). California law required consideration of the first two factors long before Gore, together with a third – the wealth of the defendant. Neal v. Farmers Ins. Exchange, 21 Cal.3d 910, 928 (1978).

TASER makes no argument based on civil penalties in comparable cases, but it does contend that the punitive damage award is excessive and must be vacated or reduced because of: (1) the supposedly low degree of reprehensibility of its conduct; (2) the supposedly high ratio between the punitive-damage award and the harm suffered; and (3) plaintiffs' purported failure to offer sufficient evidence of TASER's financial condition. TASER further argues that these same factors demonstrate the punitive award to be the result of passion or prejudice. All of TASER's contentions are without merit.

B. TASER's Conduct Was Reprehensible.

The most important factor in assessing the reasonableness of a punitive damage award is the reprehensibility of the defendant's conduct. Gore, 517 U.S. at 575. Reprehensibility is determined "by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

TASER claims that all these factors operate in its favor, TASER's Supplemental JMOL Memorandum at 16:14-15, but the contention is incorrect. First, TASER misrepresents the first factor, construing it to mean that physical harm to a human being is less reprehensible than economic injury. Id. at 16:26 (arguing that the first factor operates in its favor because "the harm experienced was physical, not financial"). The mere making of such an argument alone reveals the TASER mind-set that got this company into so much hot water with the jury, which perhaps thought TASER's motto ought to be "profits before people" rather than "saving lives every day." The law is not so callous; causing economic injury is less reprehensible than injuring or killing someone. See, e.g., Simon v. San Paolo U.S. Holding Co., Inc., 35 Cal.4th 1159, 1180 (2005) (holding first factor operated in the defendant's favor because its tortious acts "caused only economic harm").

Regarding the second factor, TASER asserts that its negligent failure to warn of the risk of prolonged deployment of the TASER ECD did not evince an indifference to or a reckless disregard of the health or safety of others. The jurors concluded otherwise. They were properly instructed on the malice required for an award of punitive damages under California Civil Code section 3294, and they would not have made the large punitive award if they did not conclude that TASER acted with a willful and conscious disregard of the rights or safety of others.

The third factor, whether TASER targeted someone who was financially vulnerable, is irrelevant in the context of this case. It should be noted, however, that to a large extent TASER victims in the field are, like Mr. Heston, irrational and in the throes of a health crisis, rather than voluntary users of the product, as in other products-liability cases.

The fourth factor, whether the conduct involved repeated actions or was an isolated incident, also supports the damages awarded, as TASER continued to market and sell ECDs, even introducing a second model, the X26, without ever conducting the necessary testing on prolonged or multiple shocks. Even after Dr. Jauchem's Air Force study confirmed acidosis, TASER continued to market the device without an adequate warning.

Finally, with regard to the fifth factor, TASER's conduct may not have been "intentional," but it was malicious and certainly no accident.

C. The Ratio of Punitive Damages to the Harm Caused Is Not Excessive and Therefore Not Unconstitutional.

TASER compares the punitive and compensatory damages after the latter's reduction by the decedent's percentage of fault, and concludes that the punitive damage award is excessive because the ratio is much more than a single-digit. This analysis is fundamentally flawed in two ways. First, in determining the ratio between punitive and compensatory damages, the relevant figure is the amount determined by the jury, not the amount the plaintiff actually recovers after reduction for comparative fault. Second, the usual single-digit ratio rule does not apply in death cases because the uncompensated harm to the decedent (i.e., losing a life) and the need to punish malicious conduct causing death must be taken into account.

No California court has addressed the issue, but courts across the country uniformly conclude that comparative fault does not apply to punitive damages, that they are not reduced by the proportion of the plaintiff's comparative fault as are compensatory damages. See Anno., Effect of Plaintiff's Comparative Negligence in

Reducing Punitive Damages Recoverable, 27 A.L.R.4th 318 (1984), and the cases cited therein. TASER accepts that this is the law by not arguing to reduce punitive damages by the proportion of Robert Heston's fault. It seeks the same goal, however, by arguing comparison should be with the compensatory damages after reduction for comparative fault rather than, as the jury was instructed, before.

In I-Gotcha, Inc. v. McInnis, 903 S.W.2d 829 (Tex.App. 1995), the jury awarded $450,000 in actual damages and $1,500,000 in punitive damages. The actual damages were reduced by 49% based on comparative negligence. A statute capped punitive damages at four times the amount of actual damages. On appeal, the defendant argued that the punitive damages were excessive because they were more than four times the compensatory damages after reduction for comparative fault. The appellate court rejected the argument. It noted that punitive damages are not reduced under the doctrine of comparative fault because the main purpose of punitive damages is to punish the defendant, not to compensate the plaintiff. Following that reasoning, it concluded that for purposes of the statutory cap the punitive award should be compared to the compensatory award before reduction because "the public policy interests of using punitive damages as punishment rather than as compensation for the plaintiff are best served by having the punitive damages related to the total amount of harm that occurred as reflected by the damages awarded by the jury." Id., at 840. The same is true with respect to the constitutional limit on punitive damages set by the U. S. Supreme Court.

In the present case, when the proper figures are compared, the ratio between punitive and compensatory damages is not excessive. The jury awarded a total of $1,021,000 in compensatory damages and $5,200,000 in punitive damages, for a punitive-compensatory ratio of just greater than 5 to 1.

More importantly, however, this is a death case. In State Farm, the Supreme Court indicated that the amount of compensatory damages awarded is not always the proper figure for comparison with the punitive damages. It spoke of proportionality between punitive damages and the harm or "potential harm" suffered by the plaintiff.

The High Court referred to the relationship between punitive damages and "the amount of harm" as well as "the general damages recovered," recognizing that they are not always identical. In some cases compensatory damages are not the appropriate measure of harm because the injury is hard to detect or the non-economic loss difficult to value. State Farm, 538 U.S. at 424-26. Accordingly, many federal and state courts, in a variety of contexts, have considered uncompensated or potential harm when determining whether punitive damages are excessive. Simon, 35 Cal.4th at 1174 n.3 and accompanying text.

One such case is Romo v. Ford Motor Co., 113 Cal.App.4th 738 (2003). The Romo family was riding in a 1978 Ford Bronco when it rolled over. Three family members were killed, including both parents, and three others severely injured. The survivors brought a products-liability action against the manufacturer individually and on behalf of the estates of the decedents. A jury awarded a total of nearly $5 million in compensatory damages and $290 million in punitive damages. The judgment was affirmed by the Court of Appeal, and a petition for review by the California Supreme Court denied. The U. S. Supreme Court then granted a petition for certiorari, vacated the judgment, and remanded the case to the Court of Appeal for reconsideration of the punitive damages portion of the judgment in light of State Farm.

In considering the "reasonable relationship" factor, the Court of Appeal noted that a decedent loses something of extreme value when he or she loses life, and that there is no award for it in the verdict because such loss does not survive as compensatory damages for the estate. Id., at 760. It further noted, however, that compensation is not the issue because punitive damages are not intended to compensate but to punish and make an example of the defendant. Id., at 760-61.

> [P]ublic policy and legitimate interests of the state in the protection of its people require a mechanism to punish and deter conduct that kills people. It would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure

> a victim. [Citation] Thus, the state has an extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a "cheaper to kill them" mindset, while still maintaining limits on wrongful death compensation in cases of ordinary negligence. We do not perceive that due process considerations of proportionality between compensatory and punitive damages require a state to establish a system that inadequately punishes and deters malicious conduct that, with reasonable foreseeability, may cause death; we hold that death actions present an example of the type of extraordinary case contemplated by State Farm [citation] in which a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award.
>
> This is not to say that all standards are thrown out in cases brought by personal representatives of the estates of deceased victims. Even among instances of malicious conduct that causes death, some of such conduct will be more or less reprehensible than other instances. We conclude, however, that the proportionality factor has less weight in the context of malicious conduct causing death. Given the unique nature of the compensatory damages arising under [California Code of Civil Procedure] section 377.34, the proportionality inquiry must focus, in any event, on the relationship of punitive damages to the harm to the deceased victim, not merely to compensatory damages awarded.

Id., at 761.

After considering all the relevant factors, the appellate court reduced the total punitive award from $290 million to $23,723,287, which sum included $5 million to the estate of each deceased parent. The $5 million awarded to those estates was respectively 17 and 25 times the compensatory damages awarded them by the jury, and 1,000 times the amount each estate actually recovered after the trial court reduced the

jury awards to reflect comparative negligence adjustments and reductions resulting from a motion for judgment notwithstanding the verdict. Id., at 757, 763.

The Environmental Protection Agency (EPA) calculates the "value of a statistical life" for determining the feasibility of safety measures. According to recent news reports, that amount was lowered from $7.8 million five years ago to $6.9 million today. How to value life? EPA devalues its estimate $900,000 taken off in what critics say is way to weaken pollution rules, Associated Press, www.msnbc.msn.com/id/25626294/. That reflects a less than one-to-one ratio of the punitive damages to the statistical value of the life of Robert C. Heston.

D. Plaintiffs met their burden of proving TASER's financial condition.

Despite the fact that plaintiffs introduced TASER's 2007 financial statements, Exhibit 149A, by stipulation on May 22, 2008, R.T. at 1349-50, TASER argues that the punitive damage award must be vacated because plaintiffs failed to meet their burden of proving TASER's financial condition. TASER does not contend that the report lacks the needed information concerning its financial condition, but only that expert testimony was required to explain it to the jury. This contention lacks merit.

Expert opinion evidence is not required unless "the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen." Miller v. Los Angeles County Flood Control Dist., 8 Cal.3d 689, 702 (1973). TASER suggests, without citing any authority, that "an ordinary layperson could not be expected to interpret TASER's 2007 Annual Report without the assistance of expert testimony," TASER's Supplemental JMOL Memorandum at 19:24-26, but that simply is not the case. A lay person can understand categories such as "net sales," "net income," "revenues," "total assets" and "total liabilities" without expert opinion.

The documents showed TASER had a 2007 income of about $100 million and net worth of about $120 million. The $5.2 punitive damage award would translate to a $5,200.00 "fine" for a worker making $100,000 per year and possessing a net worth of $120,000. That is a restrained, appropriate amount, akin to the financial penalty for a

non-injury, first-offense driving under the influence of alcohol.

E. The Punitive Damage Award Was Not the Result of Passion or Prejudice.

"In deciding whether an award [of punitive damages] is excessive as a matter of law or was so grossly disproportionate as to raise the presumption that it was the product of passion or prejudice, the following factors should be weighed: The degree of reprehensibility of defendant's conduct, the wealth of the defendant, the amount of compensatory damages, and an amount which would serve as a deterrent effect on like conduct by defendant and others who may be so inclined." Grimshaw,119 Cal.App.3d at 819.

The first three factors (reprehensibility, the defendant's wealth, and the amount of compensatory damages) have already been discussed. Contrary to TASER's assertions, the degree of reprehensibility of TASER's conduct was not extremely low, and the ratio of punitive damages to the harm caused is not excessively high. As to TASER's wealth, plaintiffs were required to present evidence of TASER's financial condition and they did so. Regarding the fourth factor (an amount which would serve as a deterrent), TASER states: "The deterrence factor is inapplicable here as TASER's negligent failure to warn was not intentional or malicious." TASER's Supplemental JMOL Memorandum at 20:17-18. Again, the jury disagreed. It was instructed on the issue of malice, and its punitive damage award necessarily indicates that it found TASER guilty of malice.

In short, consideration of the four factors in no way indicates that the punitive damage award was the result of passion or prejudice.

F. The Punitive Damage Award Should Not Be Reduced.

This jury knew exactly what it wanted to do, and utilized the Court's instructions and verdict form to reach what it believed to be the just and fair result. Despite the extreme number of shocks delivered to Mr. Heston by the involved officers, the jury exonerated them, no doubt because the officers all believed that the shocks were not

potential lethal. They thought so because of TASER's reckless assurances of safety and failures to warn.

This jury also wanted to send a message of strong disapproval to the Robert C. Hestons of the world, that it is not acceptable to abuse methamphetamine, especially when a known effect is the triggering of agitated and delirious episodes. That message was made loud and clear by the exceptionally large 85 percent finding on comparative fault, and alone disproves the "passion and prejudice" argument.

Finally, and most important, the jury wanted TASER to understand that its policy of ignoring and misrepresenting the health risks of ECDs to boost sales is not acceptable corporate behavior. The jury wanted to deter such despicable conduct, and to create a fund to compensate the private attorneys who fight to expose it.

For all these reasons, the award was not due to passion or prejudice. The verdict should be affirmed, and the judgment entered.

VI. TASER IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' NEGLIGENT FAILURE TO WARN CLAIM BECAUSE THERE WAS NO NEED FOR EXPERT TESTIMONY REGARDING THE STANDARD OF CARE FOR THE WARNING.

TASER final argument is that it is entitled to judgment as a matter of law on plaintiffs' negligent-failure-to-warn claim because plaintiffs failed to put on expert testimony regarding the standard of care for warnings. Plaintiff presented all the expert testimony required, however.

Throughout its argument TASER conflates two separate issues as demonstrated in the following passage: "Plaintiffs' did not prove their negligent failure to warn claim against TASER because they failed to put on a warnings expert to testify that TASER did not take reasonable measures to warn of the potential risks of the TASER ECD which ordinary consumers would not have recognized. Plaintiffs' failure to put on expert evidence of the potential risks of the TASER ECD bars plaintiffs' negligent failure to warn claim as a matter of law." TASER Supplemental JMOL Memorandum

at 21:21-26.

The potential risks of the TASER ECD and whether TASER adequately warned of those risks are two separate issues. To the extent TASER's argument is intended to claim that plaintiffs failed to put on expert testimony regarding the ECD's risks, in other words that repeated or prolonged exposure can cause cardiac arrest, then it is false. Plaintiffs' scientific expert Mark D. Myers, M.D., testified to this effect, and the jury obviously accepted his testimony.

Once the danger or potential danger was established, the question arose as to whether TASER adequately warned of that danger. In TASER's four pages of argument on the subject it repeatedly asserts that plaintiffs should have put on a warnings expert, but it cites no authority whatsoever holding that expert testimony is needed to show the inadequacy of a warning when, as here, no warning was given.

As Bob Dylan once sang, "You don't need a weather man to know which way the wind blows." Subterranean Homesick Blues (1965) TASER never issued a warning about the risk of acidosis from repeated or prolonged exposures.[3] Concerned about hurting its sales pitch about complete safety, three months before the Heston death TASER buried a mealy-mouthed warning about impacting respirations deep in a power point. The lack of efficacy of this "warning" was demonstrated by the fact that none of the defendant officers heard anything about it, and the Salinas Police Department did not receive the power point until after the Heston death. Under such circumstances, expert testimony is unnecessary.

Cases from other jurisdictions illustrates the point. In Black v. Public Service Electric and Gas Co., 265 A.2d 129 (1970), the decedent was working with a high boom crane that came into contact with uninsulated high voltage wires 33 feet above the ground. The defendant utility had not posted any warning signs in the area, and no expert was called to testify that its failure to do so fell below the standard of care. The

[3] This remains true to the present.

court held that such expert testimony was not needed. "We think such persons acting in the capacity of jurors and comprehending the danger presented by the facts in this case, were competent to decide without expert testimony whether the duty to exercise care commensurate with the risk involved was satisfied when the utility failed to post warning signs." Id., at 136.

In Billiar v. Minnesota Mining and Manufacturing Co., 623 F.2d 240 (2d Cir. 1980), the plaintiff was injured by chemicals with which she was working. Plaintiff's employer did not require her to read the warnings printed on the cans containing the chemicals. Although she was provided smocks and rubber gloves, she was not required, instructed or even encouraged to wear them. The employer gave no safety instructions aside from telling plaintiff to wash her hands and not touch her face. The court held that expert testimony was not required to establish failure to adequately warn. "Under New York law, the jury does not need expert testimony to find a warning inadequate, but may use its own judgment considering all the circumstances." Id., at 247.

In Cocco v. Deluxe Systems, Inc., 516 N.E.2d 1171 (Mass. App.1987), the plaintiff was injured by a shredder. The manufacturer knew it would frequently jam, and that workers put their hands into the machine to clear it. The issue was whether operators should have been warned to use a disconnect switch on the wall when clearing the machine, rather than the on-off switch on the shredder, which could be turned back on accidently. The court held that expert testimony was not required. "Even if the technology of the machine was complex, the essential facts relating to the danger were not. Despite the absence of expert testimony that a warning, in the circumstances, was required to make the shredder reasonably safe, lay persons on the jury were competent to make the judgment that the defendants at the time of the sale had that duty." Id., at 1174.

In Marchant v. Dayton Tire & Rubber Co., 836 F.2d 695 (1st Cir. 1988), the defendant distributed to tire dealers a chart that warned not to inflate tires above 40 p.s.i. when mounting, but no such warning was placed on the tire or distributed to every

foreseeable tire mounter. This was consonant with industry-wide practice, and plaintiff offered no expert testimony that the warning was inadequate, but the court held none was needed. "The test is whether the warning is comprehensible to the average user and whether it conveys a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person. [Citation] Few questions are more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person." Id., at 701.

In the present case, plaintiffs presented expert testimony establishing the danger posed by a TASER ECD. Once that danger was established, the jury was perfectly capable of determining the adequacy of any warning given without the aid of expert testimony, especially given that TASER gave no warning.

VII. CONCLUSION

For the foregoing reasons, the motion of defendant TASER International, Inc., for judgment as a matter of law, or for modification and reduction of the jury's verdict in this case should be denied, and judgment entered accordingly.

DATED: August 25, 2008

Respectfully submitted,

THE LAW OFFICES OF JOHN BURTON

WILLIAMSON & KRAUSS

BY: /s/ JOHN BURTON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Betty Lou Heston, et al.,

Plaintiffs,

v.

City of Salinas, et al.,

Defendants.
_____/

NO. C 05-03658 JW

CLOSING INSTRUCTIONS

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. Copies of these instructions have been made available for you to consult.

As I have instructed you, it is your duty to find the facts from all the evidence in the case. To those facts you must apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. In deciding the case you must not be influenced by any prejudices or sympathy. This means that you must decide the case solely on the evidence before you and according to the law. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all of my instructions. You must not single out some and ignore others; they are all important.

The evidence from which you are to base your verdict consists of: the sworn testimony of witnesses, both on direct and cross-examinations, regardless of who called the witness; the exhibits which have been received into evidence; and any facts to which the lawyers have agreed or stipulated.

If there is a conflict between the testimony of one or more witnesses and that of other witnesses, you must decide which testimony to believe and which testimony not to believe. You may disbelieve all or any part of any witness' testimony. In making that decision, you should take into account a number of factors including the following:

(1) Was the witness able to see, or hear, or know the things about which that witness testified?

(2) How well was the witness able to recall and describe those things?

(3) What was the witness' manner while testifying?

(4) Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?

(5) How reasonable was the witness' testimony when considered in light of all the evidence in the case?

(6) Was the witness' testimony contradicted by what that witness said or did at another time, or by the testimony of other witnesses, or by other evidence?

In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail.

The persuasiveness of the evidence presented by each side does not necessarily depend on the number of witnesses testifying on one side or the other. You must

consider all the evidence in the case, and you may decide that the testimony of a smaller number of witnesses on one side has greater persuasiveness than that of a larger number on the other side.

You have heard testimony from individuals who, because of education or experience, have become experts in a particular field. The law permits experts to state opinions about matters in the field of their expertise and they are permitted to state the reasons for those opinions.

Expert opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves. In deciding whether to believe an expert's testimony, you should consider the expert's training and experience, the facts the expert relied on, and the reasons for the expert's opinion.

With respect to each claim, the Plaintiffs have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove that claim. This means that Plaintiffs have to produce evidence which, considered in light of all the facts, leads you to believe that what Plaintiffs claim is more likely true than not. To put it differently, if you were to put Plaintiffs' and Defendants' evidence on opposite sides of a scale, Plaintiffs would have to make the scale tip in Plaintiffs' favor. If you evaluate the evidence and you find that the evidence is evenly balanced between the two sides, your verdict must be in favor of the Defendants. If you evaluate the evidence and you decide that what the Plaintiffs claim is more likely true than not true, in other words, if the scale tips to the Plaintiffs' side–even slightly, then your verdict should be rendered in favor of the Plaintiffs.

As I instructed you at the beginning of the case, you might have heard of proof beyond a reasonable doubt. That is a stricter standard, i.e., it requires more proof than a preponderance of evidence. The reasonable doubt standard does not apply to a civil case and you should therefore put it out of your mind.

Evidence may be direct or circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence; that is, it is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

During the trial, if I ordered that evidence be stricken from the record and that you disregard or ignore the evidence, this means that when you are deciding the case, you must not consider the evidence which I told you to disregard.

During the trial, you heard testimony from experts about studies and report published after February 19, 2005, the date of the events in this case. The Plaintiffs' claims against the City of Salinas Police Department, and Michael Dominici, Juan Ruiz, James Godwin, or Lek Livingston relate to what those Defendants knew before February 19, 2005. Therefore, the information from studies and reports published after February 19, 2005, cannot be considered by you to decide any of the claims against the City of Salinas Police Department, or Michael Dominici, Juan Ruiz, James Godwin, or Lek Livingston.

During your deliberations, you may review evidence presented and admitted during the trial. Those exhibits capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. Ms. Garcia will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. If you need additional equipment or supplies, you may make a request by sending a note.

There is more than one Defendant in this case. You must consider the evidence against each Defendant separately. The verdict form will contain a place for you to indicate your verdict as to each Defendant. If you find that the Plaintiffs have not

proved a claim as to a particular Defendant, you must return a verdict against the Plaintiffs on that claim as to that Defendant.

One of the Defendants in this case, TASER International, is a corporation. All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party. Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of their authority.

This is a lawsuit in which the Executor of the Estate of a deceased person and his parents are claiming a right to recover money damages from individual police officers, the City of Salinas Police Department, and TASER International. Such a lawsuit can be brought under federal laws and under laws of the State of California. Plaintiffs are making some claims against some defendants under federal laws and some claims against other defendants under California laws. A plaintiff is permitted to make a claim under both federal and California law. With respect to each claim, I will instruct you on what the Plaintiffs must prove against each Defendant in order to receive your verdict. A plaintiff who proves more than one claim against a defendant is entitled to receive your verdict on every claim which the plaintiff has proved. However, simply because a plaintiff has proved multiple claims does not mean that the plaintiff is entitled to duplicate or multiple damages. As to each Defendant, I will instruct you on what the Plaintiffs must prove on each separate claim. Afterward, I will instruct you on the law with respect to damages.

In these instructions, I will refer to the electronic control device product of TASER International as the Taser ECD.

FIRST CLAIM

FEDERAL LAW

DEPRIVATION OF RIGHTS PROTECTED BY CONSTITUTION

BY PERSONS ACTING UNDER COLOR OF LAW

Plaintiffs' First Claim is under federal law. The First Claim is asserted against Defendants Police Officers Juan Ruiz, Lek Livingston, James Godwin, and Michael Dominici for depriving Robert C. Heston of rights protected by the Constitution or laws of the United States. In order to recover under this First Claim, the Plaintiffs must prove by a preponderance of the evidence that:

1. A particular Defendant Police Officer acted under color of law as a member of the City of Salinas Police Department;

2. While acting in such a capacity, that Defendant Police Officer committed an act or omission which deprived Robert C. Heston, now deceased, of a right protected by the Constitution or laws of the United States;

3. As a consequence of the acts or omission of that Defendant Police Officer: (a) prior to his death, Robert C. Heston was deprived of his civil rights to be free from excessive force,; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered harm because, as a consequence of the excessive force, Robert C. Heston died.

I will now discuss each of these elements with you.

As I have instructed you, you must decide the case with respect to each defendant separately. Plaintiffs have asserted this First Claim against four individual Police Officers. You must decide whether the Plaintiffs have proven each element against each Defendant Police Officer. The verdict form will have a place for a separate finding as to each Defendant Police Officer.

The federal law which entitles a plaintiff to recover money damages for infliction of excessive force is set forth in Title 42 of the United States Code at

Section 1983. Section 1983 provides that a plaintiff may recover money damages if the plaintiff proves by a preponderance of the evidence that a defendant, while "acting under color of law," deprives a person of rights guaranteed by the Constitution or laws of the United States.

Under the first element, the Plaintiffs must prove that a Defendant Police Officer "acted under color of law." A police officer who is attempting to detain or arrest a person is acting under "color of law" because the "law" gives the police officer the right to make a detention or arrest under proper circumstances. The parties have stipulated that the Police Officer Defendants were acting under color of law.

Under the second element, the Plaintiffs must prove that a Defendant Police Officer committed an act which deprived Robert C. Heston of "a right protected by the Constitution or laws of the United States." The Fourth Amendment to the Constitution of the United States protects individuals from "unreasonable searches and seizures." A detention or an arrest is a "seizure" – a seizure of the person. A police officer may lawfully detain or arrest a person when the police officer has probable cause to believe that the person is under the influence of an illegal drug or has committed an assault and battery upon another person.

Notice that in the second element, both an act or an omission can be the basis of recovery. A Defendant Police Officer is liable if that Defendant observes another police officer using excessive force and the Defendant Police Officer does not intercede to prevent the use of excessive force, again under circumstances in which a reasonable police officer would do so.

In this case, the parties have stipulated that when the Police Officer Defendants returned to the Heston home on the second occasion, they had probable cause to arrest Robert C. Heston. When a police officer has probable cause to detain or arrest a person, the police officer may use reasonable force to make the detention or arrest. A person being arrested or detained has a duty not to resist a police officer making an

arrest, unless the police officer is using unreasonable force. A police officer may only use such force as is "objectively reasonable" under all of the circumstances.

You must decide whether one or more of the Police Officer Defendants used unreasonable force in detaining and arresting Robert C. Heston. A detention or arrest is "unreasonable," and therefore a violation of rights protected by the Constitution or laws of the United States if a police officer uses "excessive force" in making a detention or an arrest, even if there is lawful cause for making the detention or arrest. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight.

In determining whether a Defendant Police Officer used "excessive force" in this case, consider all of the circumstances known to the Defendant Police Officer on the scene, including:

(1) The severity of the crime or other circumstances to which the Defendant Police Officer was responding;

(2) Whether Robert C. Heston posed an immediate threat to the safety of the Defendant Police Officer or to others;

(3) The officer's understanding or Robert C. Heston's physical condition and mental state;

(4) Whether Robert C. Heston was actively resisting detention or arrest or attempting to evade arrest by flight;

(5) The amount of time and any changing circumstances during which the Defendant Police Officer had to determine the type and amount of force that appeared to be necessary;

(6) The type and amount of force used;

(7) The risk of injury from the amount and type of force used;

(8) The availability of alternative methods to subdue Robert C. Heston;

(9) Whether force was applied after any resistance had ceased; and

(10) Whether the type of force applied was reasonable in accomplishing the objective of achieving compliance with lawful police orders being given to Robert C. Heston;

The deployment of a Taser ECD against a person is the use of force. The purpose of the device is to deliver electric shocks to an individual to disable the individual so that police officers can apply restraints to the individual. In this case, you must decide if one or more Defendant Police Officer delivered one or more electric shock cycles from his Taser ECD when a reasonable police officer under the same circumstances would not have done so.

In these instructions, I am using the word "deployment" to refer to the delivery of electric shock cycles from a Taser ECD.

A "prolonged deployment" refers to multiple, repeated electric shock cycles delivered to a person from one or more Taser ECDs.

With respect to this claim, Plaintiff Misty Kastner, the Executor of the Estate of Robert C. Heston, is entitled to your verdict if you find that excessive force was used, irrespective of whether the force caused the death of Robert C. Heston.

The money damages claimed by Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, are for their loss of the society and companionship of their child. They are entitled to recover damages only if you find that the excessive force was a substantial factor in causing the death of Robert C. Heston.

SECOND CLAIM
FEDERAL LAW
FAILURE ON THE PART OF
CITY OF SALINAS POLICE DEPARTMENT
TO ADEQUATELY TRAIN OR SUPERVISE

Plaintiffs' Second Claim is also under federal law and is asserted against the City of Salinas Police Department. Under federal law, a plaintiff may recover money damages against a City Police Department if an individual was deprived of a right protected by the Constitution or laws of the United States and that deprivation was caused by an official police department policy or practice. Included within a police department's official policy or practice are its policies and practices with respect to training or supervision of police officers. Supervision includes effectively monitoring the use of force by police officers. Plaintiffs claim that Robert C. Heston was deprived of his constitutional right to freedom from application of excessive force because the City of Salinas Police Department did not adequately train or adequately supervise the Police Officer Defendants on using the Taser ECD.

In order to prevail on this Claim, the Plaintiffs must prove each of the following elements by a preponderance of the evidence:

1. One or more police officers employed by the City of Salinas Police Department deprived Robert C. Heston of rights protected by the Constitution or laws of the United States by using excessive force in the deployment of Taser ECDs against him;

2. The training or supervision policies or practices of the Defendant City of Salinas Police Department were not adequate to train or supervise Salinas Police Officers to handle the usual and recurring situations with which they must deal with respect to the deployment of Taser ECDs;

3. The Defendant City of Salinas Police Department was deliberately indifferent to the obvious consequences of its failure to train or supervise their police officers adequately with respect to the deployment of Taser ECDs; and

4. The failure of the Defendant City of Salinas Police Department to provide adequate training or supervision caused the deprivation of the constitutional rights of Robert C. Heston by the Police Officer Defendants; that is, the Salinas Police Department's failure to train or supervise is so closely related to the deprivation of the Plaintiffs' rights as to be the moving force that caused either one or both of the following injuries: (a) prior to his death, Robert C. Heston was deprived of his civil rights to be free from excessive force and suffered damages; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered damages because the excessive force was a substantial factor in causing the death of Robert C. Heston.

Notice that the first element of this Claim requires that you find in favor of the Plaintiffs with respect to the first two elements of the First Claim, namely that one or more Salinas Police Officer deprived Robert C. Heston of a right protected by federal law. However, simply because you find one or more police officers liable does not mean that you must find the City of Salinas Police Department liable. If the training or supervision provided by a City Police Department is not proved inadequate, the City is not liable simply because a police officer acts inconsistently with the officer's training or supervision.

"Deliberate indifference" by the Salinas Police Department is the conscious choice to disregard the consequences of its acts or omissions. The Plaintiffs may prove deliberate indifference with respect to this Claim by showing that the Defendant City of Salinas Police Department knew its failure to train or supervise adequately made it highly predictable that its police officers would deploy Taser ECDs in a manner that would deprive a person, such as Robert C. Heston of his rights.

"Deliberate indifference" refers to the conduct of Defendant City of Salinas Police Department and not the conduct of a police officer in using the Taser ECD.

THIRD CLAIM

CALIFORNIA LAW

BATTERY

In their Third Claim, the Plaintiffs claim that Police Officer Defendants Juan Ruiz, Lek Livingston, James Godwin, and Michael Dominici committed a battery against Robert C. Heston because they used excessive force against him. Under California law, a battery is an intentional offensive touching of a person. A plaintiff may recover money damages for a battery committed by a defendant. In addition, if the battery is committed by the defendant while the defendant is acting in the course and scope of employment, the plaintiff may recover money damages against the employer of the defendant. In order to recover on the battery claim, Plaintiffs must prove the following elements by a preponderance of the evidence:

1. On February 19, 2005, while acting in the course and scope of employment as a Salinas Police Office, Police Officer Defendants Juan Ruiz, Lek Livingston, James Godwin, or Michael Dominici, or all of them, detained and arrested Robert C. Heston;

2. In the course of the detention and arrest, the Police Officer Defendants touched Robert C. Heston in an offensive manner, namely by intentionally using excessive force in the deployment of Taser ECDs against him;

3. Robert C. Heston did not consent to the offensive touching;

4. As a consequence of the intentional act of the Police Officer Defendants either one or both of the following injuries occurred: (a) prior to his death, Robert C. Heston was deprived of his civil rights to be free from excessive force and suffered damages; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the

parents of Robert C. Heston, suffered damages because, as a consequence of the excessive force, Robert C. Heston died.

Notice that with respect to this claim, the Plaintiffs have the burden to prove that the amount of force used by one or more Police Officer Defendants was excessive. The previous instructions I have given to you with respect to reasonable and excessive force apply to this Claim.

FOURTH CLAIM

CALIFORNIA LAW

NEGLIGENCE BY MANUFACTURER IN FAILING TO WARN

Plaintiffs' Fourth Claim is against TASER International only. In their Fourth Claim, Plaintiffs claim that TASER International is liable under the principles of "negligent product liability." Under California law, the manufacturer of a product must conduct itself in accordance with what a reasonable manufacturer of the product would do. Conduct which falls below this standard of care is considered "negligent." In this case, the Plaintiffs claim that a reasonable manufacturer of an ECD would have warned purchasers that prolonged deployment could cause acidosis to a degree which poses a risk of cardiac arrest in the person against whom the device is deployed. Plaintiffs claim that TASER International was negligent in failing to warn purchasers of this risk with respect to the M-26 ECD. In order to recover under the Fourth Claim, Plaintiffs must prove the following by a preponderance of the evidence:

1. TASER International was the manufacturer of Taser ECDs which are devices capable of delivering electric shocks to a person against whom they are deployed;

2. At the time TASER International manufactured and sold Taser ECDs, a reasonably prudent manufacturer of an electronic control device knew or reasonably should have known that the M-26 ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes

acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed;

3. A reasonably prudent manufacturer of an ECD would have warned purchasers of this risk;

4. TASER International failed to adequately warn purchasers about this risk;

5. On February 19, 2005, while using the product in a manner reasonably foreseeable by TASER International, members of the Salinas Police Department used a prolonged deployment of Taser ECDs against Robert C. Heston;

6. The failure by TASER International to warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the officers to use a prolonged deployment against Robert C. Heston;

7. As a consequence of the prolonged deployment either one or both of the following injuries occurred: (a) prior to his death, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered harm because, as a consequence of the cardiac arrest, Robert C. Heston died.

FIFTH CLAIM

CALIFORNIA LAW

STRICT PRODUCTS LIABILITY

Plaintiffs' Fifth Claim is against TASER International only. In their Fifth Claim, Plaintiffs claim that TASER International is liable under the principles of "strict product liability." Under California law, there are two different bases under which a manufacturer may be found liable for harm caused by its products. The first basis is called "negligent product liability." I have instructed you on the law of negligent failure to warn in the Fourth Claim. Under "strict product liability," if a manufacturer knows of a risk posed by its product or if the risk is knowable through

scientific information available, and the risk is not obvious to the purchaser of the product, and the manufacture does not warn of the risk, the product is deemed "defective," and the manufacturer may be held liable for harm caused by the product, irrespective of whether a reasonably prudent manufacturer would have given a warning or not. In order to recover under their Fifth Claim, Plaintiffs must prove the following by a preponderance of the evidence:

1. TASER International was the manufacturer of Taser ECDs which are devices capable of delivering electric shocks to a person against whom they are deployed;

2. In or around 2005, at the time TASER International manufactured and sold Taser ECDs to the Salinas Police Department, TASER International knew or it was knowable by the use of available scientific information that prolonged exposure to shocks from ECDs potentially causes acidosis to a degree which poses a substantial danger, namely of causing a person against whom the device is deployed to have a cardiac arrest;

3. Ordinary purchasers of the Taser ECDs would not have recognized this risk;

4. TASER International failed to adequately warn purchasers of this risk;

5. On February 19, 2005, while using the product in a manner reasonably foreseeable by TASER International, members of the Salinas Police Department used a prolonged deployment of Taser ECDs against Robert C. Heston;

6. The failure by TASER International to adequately warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the prolonged deployment of Taser ECDs by the officers against Robert C. Heston;

7. As a consequence of the prolonged deployment either one or both of the following injuries occurred: (a) prior to his death, Robert C. Heston suffered acidosis

which in turn caused him to have a cardiac arrest; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered harm because, as a consequence of the cardiac arrest, Robert C. Heston died.

COMPENSATORY DAMAGES

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

The Plaintiffs have the burden of proving damages by a preponderance of the evidence. The opinion of witnesses are not required as to the amount of reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation.

As to The Estate of Robert C. Heston:

Under the laws of both the State of California and the United States, the Executor of the Estate of a deceased person is entitled to recover for any injury inflicted upon the deceased person prior to death.

If, under the instructions of the Court, you find that the conduct of a defendant caused harm to Robert C. Heston, prior to his death, you must determine the amount of damages which will compensate for that harm and award them to Plaintiff Misty Kastner, the Executor of his Estate. Damages means the amount of money which would have reasonably and fairly compensated Robert C. Heston for any injury or loss you find was caused by the Defendants' conduct. With respect to Robert C. Heston's pre-death damages, you must consider the nature and extent of any injuries, the loss or damages that Robert C. Heston sustained or incurred before death, including any exemplary damages that he would have been entitled to recover had he lived. Under California law, these damages do not include damages for pain and suffering.

If you find in favor of Plaintiffs on the First and Second Claims, but find that Plaintiff Kastner has not proved that Robert C. Heston sustained damages, then you must return a verdict for the Plaintiffs in the nominal sum of one dollar.

If you find in favor of Plaintiffs on the Third Claim, and you find that the conduct was committed in the course and scope of their employment, your damage award would be assessed against the Individual Police Officer or Officers and the City of Salinas Police Department, as the employer of the officer or officers.

As to Robert H. Heston and Better Lou Heston

The damages claimed by Robert H. Heston and Betty Lou Heston fall into two categories called economic damages and non-economic damages. You will be asked to state the two categories of damages separately on the verdict form. Robert H. Heston and Betty Lou Heston do not have to prove the exact amount of their damages. However, you must not speculate or guess in awarding damages.

Robert H. Heston and Betty Lou Heston claim the following economic damages:

1. The financial support, if any, that Robert C. Heston would have contributed to the family during either the life expectancy that Robert C. Heston had before his death or the life expectancy of Robert H. Heston and Betty Lou Heston, whichever is shorter;

2. The loss of gifts or benefits that Robert H. Heston and Betty Lou Heston would have expected to receive from Robert C. Heston;

3. Funeral and burial expenses; and

4. The reasonable value of household services that Robert C. Heston would have provided.

Your award of any future economic damages must be reduced to present cash value. The parties have agreed that the funeral expenses incurred by Plaintiffs to date are $1,189.30.

Robert H. Heston and Betty Lou Heston also claim the following non-economic damages, namely, the loss of Robert C. Heston's love, companionship, comfort, care, assistance, protection, affection, society, moral support.

No fixed standard exists for deciding the amount of non-economic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. Your award for non-economic damages must be reduced to present cash value.

In determining Robert H. Heston and Betty Lou Heston's loss, do not consider:

1. Robert H. Heston and Betty Lou Heston's grief, sorrow, or mental anguish;

2. Robert C. Heston's pain and suffering; or

3. The poverty or wealth of Robert H. Heston and Betty Lou Heston.

Damages for wrongful death may be based on a person's life expectancy. In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to a table of mortality, the life expectancy of a male person aged 40 years is 39.5 additional years. According to a table of mortality, the life expectancy of a female person aged 65 years is 18.4 additional years. According to a table of mortality, the life expectancy of a male person aged 69 years is 15.5 additional years. This published information is evidence of how long a person is likely to live but is not conclusive. It is an average life expectancy of persons who have reached that age.

These figures may be considered by you in connection with other evidence relating to the probable life expectancy of Robert C. Heston and each individual Plaintiff, including evidence of occupation, health, habits and other activities, bearing in mind that many persons live longer and many die sooner than the average.

Damages Resulting from Negligence or Strict Product Liability

Damages for a Claim of Negligent Failure to Warn or for Strict Product Liability are subject to reduction under the law of comparative fault. If you find that TASER International is liable under the Fourth or Fifth Claim, or both, you must determine whether the harm to Robert C. Heston was caused, in whole or in part, by his own negligent conduct. A person is negligent if he does something that a reasonably careful person would not do or if he fails to do something that a reasonably careful person would do in the same situation. If you find that Robert C. Heston was negligent and that this negligence was a substantial factor in causing his death, you must decide on the percentage of his responsibility for his injuries.

You must also determine the comparative fault between Defendants with respect to Plaintiffs' strict liability and negligence claims. If either TASER International or the Police Officer Defendants were at fault regarding the use of the Taser ECDs and the use of the Taser ECDs was a substantial factor in causing Robert C. Heston's death, then you must decide the percentage of their responsibility for his own injuries in comparison to the percentage of responsibility of TASER International.

The percentage fault of the parties must add up to 100%. However, you only need to calculate their percentage of fault, not an actual dollar number. I will make the final calculation of the apportionment of damages in later proceedings.

The Same Injuries Resulting from Conduct of Multiple Defendants

If you find that the Police Officer Defendants and the City of Salinas Police Department and TASER International, or any combination of these are liable for the same injuries to the Plaintiffs, you must decide, as among the liable Defendants the percentage of responsibility between or among them. The verdict form will have a place for you to indicate these percentages if such an allocation is necessary from your findings.

PUNITIVE DAMAGES

The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future. If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the Defendants' conduct and the relationship of any award of punitive damages to any actual harm inflicted on the Plaintiffs.

Under the law, punitive damages may be no more than 10 times the amount of compensatory damages, but can be as little in amount as the jury decides.

As to Police Officer Defendants

If you find for Plaintiffs against a Police Officer Defendant and if you award compensatory damages or nominal damages, you may, but are not required to, award punitive damages.

You may award punitive damages only if you find a Police Officer Defendant's conduct was malicious, or in reckless disregard of Plaintiffs' rights. Conduct is malicious if it is accompanied by ill-will, spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of Plaintiffs' rights if, under the circumstances, it reflects complete indifference to the rights of others.

As to the City of Salinas Police Department

Punitive damages may not be awarded against the City of Salinas Police Department.

As to Defendant TASER International

If you find for Plaintiffs against TASER International on the Fourth and Fifth Claims, you may award punitive damages if you find by clear and convincing evidence that TASER International's conduct constitutes a conscious disregard of the

probability of injury to others. You must find that TASER International was aware of the probable dangerous consequences of its conduct and deliberately failed to avoid those consequences.

ARGUMENT OF COUNSEL

I will now permit counsel for the parties to make their closing arguments. Counsel for Plaintiffs will make a closing argument, followed by the closing arguments by counsel for Defendants. If he does not use all of his allotted time, counsel for Plaintiffs will be permitted a brief rebuttal argument and then I will have some brief additional instructions for you with respect to the conduct of your deliberations. Remember, statements of the attorneys are not evidence.

DUTY TO DELIBERATE

When you retire, you should elect one member of the jury as your foreperson, i.e., your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

During the course of your deliberations, you may take rest breaks or lunch breaks as you wish. Since we will be standing by pending your deliberations,

please send us a note as to what your schedule will be. During any break, do not deliberate further upon the case. Cease all deliberations until your foreperson has brought you back into session with all of you present.

RETURN OF VERDICT

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that will be given to you, sign and date it and advise the marshal or clerk of court outside your door that you are ready to return to the courtroom.

COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you will find a form for that purpose included in the material sent into the jury room. Any one of you may communicate with me by filling out the form. Bring it into my Chambers and give it to me or a member of my staff. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. Remember that you are not to tell anyone—including me or Ms. Garcia— how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

Dated: June 3, 2008

JAMES WARE
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY LOU HESTON and ROBERT H. HESTON, individually, and MISTY KASTNER, as the personal representative of ROBERT C. HESTON, deceased,

Plaintiffs,

v.

CITY OF SALINAS, SALINAS POLICE DEPARTMENT, MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON, JUAN RUIZ and TASER INTERNATIONAL, INC.,

Defendants.

Case No. C 05-03658 JW

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TASER'S MOTION FOR A NEW TRIAL; DECLARATION OF PETER M. WILLIAMSON IN SUPPORT THEREOF

Trial:

Date Commenced: May 13, 2008

Date of Verdict: June 6, 2008

Post-Trial Telephonic Conference:

September 17, 2008 at 9:00 a.m.

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1. INTRODUCTION

After four weeks of hotly contested trial, the Court gave thorough instructions. Following extended deliberations, the jury returned a general verdict with special questions against defendant TASER International, Inc., (TASER) for negligently failing to warn about the risks of its product, the M26 ECD. The jury awarded compensatory damages of $21,000.00 to the estate of Robert C. Heston, and $1,000,000.00 to his parents, Robert H. Heston and Betty Lou Heston, for their wrongful death damages. The jury apportioned fault 85 % to the decedent and 15% to TASER. Finally, the jury assessed punitive damages of $5,200,000.00 against TASER.

TASER now moves for a new trial on myriad grounds, which can be grouped into the following six categories: 1) The jury verdict should be ignored because it was contrary to the weight of the evidence and inconsistent; 2) Plaintiff's "experts" were not qualified, yet the Court erroneously permitted them to testify; 3) The Court's instructions to the jury were erroneous and prejudicial; 4) The Court erroneously allowed plaintiff's counsel to commit prejudicial misconduct; 5) The Court erroneously allowed misconduct by the jury; and 6) The Court prepared an erroneous verdict form.

None of the arguments has merit. The verdict is amply supported by the record. The new trial motion, along with the supplemental motion for JMOL, should be denied, the jury verdict affirmed, and judgment entered in favor of plaintiffs and against TASER.

2. STANDARD OF REVIEW

A motion for a new trial brought pursuant to FRCP Rule 59 may be granted if, in the Court's view, the verdict is against the clear weight of the evidence. Molski v. M.J. Cable, Inc., 481 F. 3d 724, 729 (9th Cir. 2007). A trial judge may set aside a verdict only where "the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice." (Carr v. Wal-Mart Stores, Inc., 312 F. 3d 667, 670 (5th Cir. 2002))

No definitive language exists to help explain the meaning of "clear weight of the evidence." Arguably, the verdict should be set aside only where the trial court "is left with

the definite and firm conviction that a mistake has been committed by the jury." (Landes Const. Co., Inc., v. Royal Bank of Canada, 883 F.2d 1365, 1371-72) (9th Cir. 1987)) (emphasis added).

The jury made no such mistake here. The jury had ample grounds to hold TASER responsible for consciously disregarding the lives and safety of people like Mr. Heston who are subjected to ECD exposures, all to increase its sales and financial bottom line.

3. TASER IS NOT ENTITLED TO A NEW TRIAL BECAUSE THE CLEAR WEIGHT OF THE EVIDENCE SUPPORTED THE JURY'S VERDICT.

Plaintiffs produced substantial evidence to support the jury's verdict. They established that the theory of metabolic acidosis causing cardiac arrests was well known to the medical and scientific community for many years prior to this incident. In this regard, plaintiffs introduced evidence of a review of the physiological effects of the Sticky Shocker and other ECD's which was conducted at Penn State University in 1999. In that review, a panel of scientists led by Dr. Raymond M. Fish considered the possibility that electrical insults from ECDs could result in metabolic acidosis. The Penn State review, admitted into evidence as Plaintiff's Exhibit No. 151a, contained the following statement:

> "deaths following Tasers use may be due to acidosis. Acidosis may have caused cardiac dysrhythmias or failure in the presence of illicit drugs that are usually present in persons being Tasered. Deaths following Tasers use may be related to the ability of these devices to cause increased muscle activity and decreased breathing."

The concept of metabolic acidosis causing cardiac arrest was further supported by the testimony of Dr. Mark Myers, the only board certified electro-physiologist to testify at trial. Dr. Myers explained to the jury how TASER ECDs cause metabolic acidosis. First, he explained that severe muscle contractions produce lactic acid. Second, he described what happens to a human being when lactic acid levels in the blood increase too rapidly without an ability to compensate or blow-off the acid through respiration. And, finally, Dr. Myers described how severe metabolic acidosis lowers pH to such a dangerous level that

it can trigger a cardiac arrest. Dr. Myer's testimony was supported by several significant pieces of evidence.

First, TASER's own CEO, Patrick Smith, testified that TASER ECDs cause severe muscle contractions. In fact, the very purpose of the TASER is to cause muscle contractions to such an extent that a subject is completely incapacitated. TASER's own use videos were shown to the jury during the testimony of Officer Fairbanks, without objection, to illustrate the severe muscle contractions that result from TASER discharges. Second, Mr. Smith further conceded that severe muscle contractions do produce a build-up of lactic acid in the blood. Plaintiffs produced peer-reviewed research which established statistically significant elevations in lactate in the blood in human subjects after only one 5-second discharge. The results of this research correlated with similar peer-reviewed research studies of swine introduced into evidence by plaintiffs. These comparative studies proved that the physiological effects of TASER discharges on humans are nearly identical to swine. Plaintiffs also introduced research conducted by Dr. James Jauchem on behalf of the U.S. Air Force which showed dangerous elevations in lactate in swine after repeated TASER discharges, significantly less than the number Mr. Heston was subjected immediately prior to his cardiac arrest. Third, Dr. Myers testified that the emergency room records of Natividad Medical Center indicated that Mr. Heston's pH was measured at 6.8 shortly after his admission – far below the life-threatening level of 7.0 – further evidence that he was suffering from severe metabolic acidosis.

Finally, Dr. Myers' expertise in cardiology and electro-physiology was more than sufficient to inform the jury as to Mr. Heston's cause of death. His testimony was clearly supported by the overwhelming medical and scientific evidence presented to the jury.

For whatever tactical reason, TASER chose not to call an electro-physiologist to counter Dr. Meyers' testimony even though it had designated two - Dr. Richard Luceri and Dr. Raymond Ideker - in its Rule 26 Expert Disclosures. TASER's decision not to call Dr. Luceri or Dr. Ideker allowed Dr. Myers' testimony – the most crucial in the case – to go unchallenged. TASER's reason for not calling these witnesses is that they would have

supported rather than undercut plaintiffs' cause-of-death theory.

Dr. Jeffrey Ho, TASER's medical expert (an emergency room physician and paid TASER consultant), testified that Mr. Heston's cardiac arrest resulted from metabolic acidosis.

The clear weight of the evidence, which essentially went unchallenged by TASER, established that metabolic acidosis caused Mr. Heston's cardiac arrest. Thus, the jury was left to decide what caused the metabolic acidosis in Mr. Heston's case. The evidence established that he was subjected to as many as 25 five-second ECD discharges over a 74-second period. Although TASER and the Salinas defendants suggested that Mr. Heston did not actually receive electrical current from all these discharges, neither introduced expert testimony on this issue nor produced physical evidence to establish that the ECDs failed to deliver electrical current. It is clear, based on the weight of the evidence, that the jury reasonably concluded that the TASER ECDs caused a sudden, dangerous metabolic acidosis which, in turn, resulted in Mr. Heston's cardiac arrest.

The jury was asked to consider whether TASER knew or should have known about the risks posed by metabolic acidosis in the context of prolonged duration ECD applications and, if so, whether it warned potential users of this danger. (Note – a more detailed discussion of the jury's verdict and its consistency is set forth below.) Once again, the evidence established that as early as 1999, in the published Penn State review conducted by Dr. Fish and his colleagues, the possibility that ECDs could cause metabolic acidosis to such an extent that it could result in cardiac arrest was known in the scientific community. The review recommended that further research be conducted on this issue. TASER, through the testimony of its CEO, Patrick Smith admitted that no such research was conducted by TASER. When Mr. Smith learned the results of the Jauchem experiments, which confirmed the effect of repeated TASER ECD discharges on blood acid levels, he testified that his company immediately published a warning concerning this risk. The warning was allegedly sent to TASER purchasers, including the Salinas Police Department, in January, 2005, but was not received by Salinas, according to the testimony of Sgt.

Michael Groves, and was not transmitted to the officers who shocked Mr. Heston.

This warning was introduced by plaintiffs as Exhibit 148:

> The application of the TASER is a physically stressful event. Although there is no predetermined limit to the number of cycles that can be administered to the subject, officers should only apply the number of cycles reasonably necessary to allow them to safely approach and restrain the subject. Especially when dealing with persons in a health crisis such as excited delirium, it is advisable to minimize the physical and psychological stress to the subject to the greatest degree possible.
>
> Further, TASER applications directly across the chest may cause sufficient muscle contractions to impair normal breathing patterns. While this is not a significant concern for short (5 sec) exposure, it may be a more relevant concern for extended duration applications. Accordingly, prolonged applications should be avoided where practicable.

Although the warning cautions against prolonged TASER applications under certain circumstances, it is also contradictory and misleading by its inclusion of the statement that "there is no predetermined limit to the number of cycles that can be administered to the subject." More importantly, the words "metabolic acidosis" do not even appear in this warning. By TASER's own admission, this is the only warning it issued concerning the risks of prolonged TASER discharges prior to Mr. Heston's death. Thus, the jury heard evidence that no warning was ever issued by TASER regarding the risks of metabolic acidosis caused by prolonged TASER discharges even though this possibility was recognized in the scientific community prior to the initial manufacture and marketing of the Model M26 ECD, and known to TASER prior to Mr. Heston's demise.

Based on the clear weight of the evidence, the jury came to the obvious and inescapable conclusion that TASER failed to adequately warn that TASER ECDs were dangerous or likely to be dangerous because repeated or prolonged ECD exposures potentially cause metabolic acidosis to such a degree that it poses a risk of cardiac arrest.

The reason, the jury obviously surmised, was that such warnings would adversely affect sales by contradicting TASER's exaggerated claims of safety and its principle marketing slogan, "Saving lives every day."

Apart from the conclusory statements made in its moving papers, TASER has offered no evidence to establish that the jury's verdict is against the clear weight of the evidence or is based upon evidence which is false, or that the verdict will result in a miscarriage of justice, or that a mistake has been committed by the jury. For these reasons, TASER's Motion for a New Trial should be denied.

a. Plaintiffs' witnesses were well-qualified to provide expert testimony concerning Robert C. Heston's cause of death.

TASER contends that the Court erred when it overruled its objections to the testimony of Dr. Myers and Dr. Terri Haddix. The admissibility of an expert witness' testimony is governed by Fed. R. Evid. 702, which states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Ninth Circuit has stressed that "care must be taken to assure that a proffered witness truly qualifies as an expert, and that such testimony meets the requirements of Rule 702" because such status allows the witness "to testify based on hearsay information, and to couch his observations as generalized 'opinions' rather than as first-hand knowledge." (Jinro Am., Inc. v. Secure Inv., Inc., 266 F.3d 993, 1004 (9th Cir. 2001)).

As the "gatekeeper" under Rule 702, the Court reviewed the proposed expert testimony to insure that it rested on reliable foundation and was relevant to the issues before the trier of fact. (See Daubert v Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579

(1993) (scientific testimony); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (non-scientific testimony)). An expert may only be precluded from testifying at trial on the ground that the witness lacks "specialized" knowledge on the particular subject or that the expert opinion is not based on scientific, technical, or other specialized knowledge.

As previously discussed, Dr. Myers is a cardiologist and Board Certified electro-physiologist who is eminently qualified to offer expert opinions concerning metabolic acidosis (a phenomenon well-documented in the medical literature and known to all physicians for many years), its inverse relationship to pH, and the manner in which a sudden drop in pH affects the electrical output of the heart. See, e.g., Hicks, et al., Metabolic Acidosis in Restraint-Associated Cardiac Arrest: a Case Series (1999).

The opinions expressed by Dr. Myers were based, not only on his specialized knowledge, background and experience, but also on peer-reviewed scientific research concerning the psychological effects of TASER electrical discharges. These include Jauchem, et al., Acidosis, Lactate, Electrolytes, Muscle Enzymes, and Other Factors in the Blood of Sus Scrofa Following Repeated TASER Applications (2005), and Dennis, et al., Acute Effects of TASER X26 Discharges in a Swine Model (2007).

TASER, through its own CEO, admitted that TASER discharges cause severe muscle contractions and that these contractions cause the muscle to produce lactic acid. These facts were never in dispute. TASER's quibbles about Dr. Myers' supposed lack of expertise, and his simple misunderstanding (promptly corrected and irrelevant to his opinions) with respect to one aspect of TASER electrical output, were paraded in front of the jury repeatedly. These went to the weight rather than the admissibility of the expert testimony. Dr. Myers' background and experience as a cardiologist with specific expertise in electro-physiology – the electrical functioning of the heart – was more than sufficient, under Daubert, to permit him to offer his expert opinion that metabolic acidosis caused Mr. Heston's heart to stop.

Dr. Terri Haddix, a board certified forensic pathologist, was the only truly independent expert to testify during the trial. TASER repeatedly and incorrectly claims that

Dr. Haddix was designated as plaintiffs' "retained" expert. She was not. As the medical examiner who performed the autopsy on Mr. Heston's body on behalf of the Monterey County Sheriff-Coroner, she was designated by stipulation as a non-retained "percipient" doctor (under other circumstances, she would have been described as a "treating" physician). Dr. Haddix testified that she has performed over 2,500 autopsies during her career. Although she, admittedly, had little experience dealing with TASER deaths – there have been less than 400 throughout the United States in the last decade – she was, nonetheless, eminently qualified to testify regarding her autopsy findings, including the TASER burn marks which she independently analyzed microscopically.

Dr. Haddix did not simply conduct an autopsy in this case. She investigated to determine the state of the scientific research concerning the physiological effects of TASER discharges. She was unable to find any published research on this subject since no peer-reviewed scientific studies had been published in February 2005. She contacted various colleagues about TASER electrical output and burn marks and went so far as to contact TASER itself to gain insight into how TASER ECDs operated. She also requested information regarding the TASER dataport downloads and corresponded with a representative of TASER in an effort to understand the implications of the data. In sum, Dr. Haddix made an exhaustive effort to understand every aspect of the TASER device, going far beyond what medical examiners typically do in such situations.

The expert opinions ultimately offered by Dr. Haddix dealt with the observations and conclusions she drew from her autopsy findings, from an analysis of Mr. Heston's blood, and from medical examinations of his heart and brain. Her opinion that Mr. Heston's cardiac arrest occurred simultaneously with the final TASER discharge was supported by testimony that it was exactly then that the officers observed Heston's head turn blue, and that this tight temporal relationship suggested that Mr. Heston suffered metabolic consequences that may have caused him to develop a fatal heart arrhythmia.

Contrary to TASER's assertion, Dr. Haddix' ultimate opinion regarding Mr. Heston's cause of death need not have been predicated on her knowledge of TASER

components, usage or electrical output. As a board certified forensic pathologist, Dr. Haddix was eminently qualified to offer her opinions as to Mr. Heston's cause of death.

TASER's challenge of Drs. Myers and Haddix on Daubert grounds simply has no merit. The Court was correct to allow the testimony.

b. The court's instructions and corresponding jury verdict form comport with California products liability law and properly apprised the jury of the claims and defenses raised by the parties.

TASER next makes a number of arguments concerning the propriety of the Court's closing jury instructions. It contends that some instructions were inadequate and others were erroneous, thereby resulting in prejudice to TASER justifying a new trial.

Jury instructions are designed to clarify issues for the jury and to educate the jurors about what factors are probative on those issues. Generally, jury instructions should be: 1) relevant, 2) an accurate statement of the law, 3) as brief and concise as possible, 4) understandable to the average juror; and 5) not repetitive. The basic requirement is that the proposed instructions fairly and adequately cover the issues presented, correctly state the applicable law, and not be misleading. (Gulliford v. Pierce County 136 F.3d 1345, 1348 (9th Cir. 1998)).

1) Instructions re: plaintiff's failure to warn claim

In the instant case, the jury instructions given by the Court were completely consistent with California products liability law, and, specifically, plaintiffs' Fourth Claim – Negligence by Manufacturer in Failing to Warn. The elements of plaintiffs' claim are set out in CACI 1222:

1. That TASER manufactured the model M26;
2. That TASER knew or reasonably should have known that the model M26 was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;
3. That TASER knew or reasonably should have known that users would not realize the danger;

4. That TASER failed to adequately warn of the danger;

5. That a reasonable manufacturer under the same or similar circumstances would have warned of the danger;

6. That Robert Heston was harmed; and

7. That TASER's failure to warn was a substantial factor in causing Robert Heston's harm.

(See Putensen v. Clay Adams, Inc., 12 Cal. App.3d 1062, 1076-77(1970); Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 1002 (1991)).

The Court gave the following instruction, which both comports with California products liability law and mirrors CACI 1222:

In order to recover under the Fourth Claim, Plaintiffs must prove the following by a preponderance of the evidence:

1. TASER International was the manufacturer of Taser ECDs which are devices capable of delivering electric shocks to a person against whom they are deployed;

2. At the time TASER International manufactured and sold Taser ECDs, a reasonably prudent manufacturer of an electronic control device knew or reasonably should have known that the M-26 ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed;

3. A reasonably prudent manufacturer of an ECD would have warned purchasers of this risk;

4. TASER International failed to adequately warn purchasers about this risk;

5. On February 19, 2005, while using the product in a manner reasonably foreseeable by TASER International, members of the

Salinas Police Department used a prolonged deployment of Taser ECDs against Robert C. Heston;

6. The failure by TASER International to warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the officers to use a prolonged deployment against Robert C. Heston;

7. As a consequence of the prolonged deployment either one or both of the following injuries occurred: (a) prior to his death, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered harm because, as a consequence of the cardiac arrest, Robert C. Heston died.

It is clear and apparent from reading the aforementioned instruction that each and every element of plaintiffs' claim, set forth in CACI 1222, was included in the actual instruction given by the court. While the Court modified the instruction to fit the facts of the case, the substantive law remained intact. Although not obligated to do so, trial courts may modify proposed instructions to make them applicable to the case and therefore more comprehensible to the jury. (Reno-West Coast Distrib. Co., Inc. v. Mead Corp. 613 F. 2d 722, 726 (9th Cir. 1979)). That is what the Court did here.

TASER's primary objection focuses on the second element of the instruction that "the M26 ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed." This element of the claim required that the jury find that TASER "knew or reasonably should have known that the M26 was dangerous or likely to be dangerous." The thrust of this instruction was not altered by the court's inclusion of plaintiff's cause of death theory – metabolic acidosis. The instruction given by the court simply added language identifying the danger and made it clear that the jury had to first find that a danger "existed" or "likely existed" before it

could find that TASER failed to warn about it. TASER was not prejudiced by this instruction, which served simply to focus the jury's attention where it belonged.

TASER's objection to this instruction incorrectly places the emphasis on the words "poses a risk" and "potentially causes". The real focus of this instruction is on the knowledge of the danger – that TASER "knew" or "reasonably should have known" that the M26 ECD was dangerous or likely dangerous. Regardless, the plaintiffs proved, by the clear weight of the evidence, that TASER "knew" or "reasonably should have known" of the dangers associated with use of its ECDs. Plaintiffs offered in evidence the Penn State review from 1999 which raised the concern that TASER ECD's could cause metabolic acidosis to an extent that it could result in cardiac arrest. The Penn State review was included in TASER's research compendium. TASER's CEO, Patrick Smith, testified he was aware of the Jauchem test results by November 2004, three months before Robert Heston's death. In light of this evidence, the jury reasonably concluded that TASER knew or reasonably should have known the M26 ECD was dangerous or likely to be dangerous at the time of Mr. Heston's death.

Indeed, plaintiffs rested their entire case on their metabolic acidosis theory, something that should have been obvious to anyone who listed to the evidence. Had the jury rejected the claim that TASER's ECDs caused Robert Heston to suffer severe metabolic acidosis which resulted in his cardiac arrest, they clearly would have found in TASER's favor on the failure to warn claim. The court's instructions on this point were neither inadequate nor erroneous. Likewise, TASER suffered no prejudice due to the Court's instruction. TASER's Motion for a New Trial on this ground should be denied.

2) Instructions re: "Substantial factor"

TASER also raises an objection to the court's instructions and the corresponding questions on the verdict form including questions Nos. 15, 18 and 19. TASER claims the court committed prejudicial error by failing and/or incorrectly instructing the jury on the "substantial factor" test and then including erroneous questions on the verdict form. TASER correctly points out that plaintiffs were required to prove that the defendant's

failure to warn was a substantial factor in causing plaintiff's harm (CACI 1222).

As noted above, the court did instruct the jury regarding the "substantial factor" test. Its instructions on the failure to warn claim included the following two instructions:

> 6. The failure by TASER International to warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the officers to use a prolonged deployment against Robert C. Heston.
>
> 7. As a consequence of the prolonged deployment either one or both of the following injuries occurred: (a) prior to his death, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered harm because, as a consequence of the cardiac arrest, Robert C. Heston died.

TASER claims that the Court failed to give a proper instruction on "substantial causation" "because it omits the direct line of causation between TASER's failure to warn and the decedent's injuries." (TASER's New Trial Memorandum at 16:27-28). But, TASER's argument is misguided because the instructions must be read together and viewed in their entirety. As TASER correctly points out, all the Court did was take one instruction and divided it into two. When viewed in their entirety, the aforementioned instructions required the jury to find, albeit in two steps, a direct line of causation between the failure to warn and decedent's death. First, the jury had to decide that the failure to warn was a substantial factor in the officers' prolonged deployment of their TASERs against Robert Heston, and second to find that as a consequence of the prolonged deployment, Mr. Heston suffered metabolic acidosis to a degree that caused him to suffer a cardiac arrest.

The aforementioned instructions mirrored the Verdict form, which also separated the issue into three Questions, Nos. 15, 18 and 19. Once again, the language of the "substantial factor" test was included in Question No. 15. Once again, the simple division

of the question into three parts still required the jury to first find that TASER's failure to warn of the risks of its device was a substantial factor in causing the prolonged deployment of the ECDs by the Salinas police officers. Only after it answered this question in the affirmative would it then proceed to the next question on the Verdict form – whether Mr. Heston's death was a consequence of the prolonged deployment.

Once again, the court's instructions on this point, when considered in their entirety, were neither inadequate nor erroneous. The Verdict form submitted to the jury mirrored the Court's instructions. TASER's Motion for a New Trial on this ground should be denied.

3) Instructions re: "clear and convincing" and "conscious disregard"

TASER next argues that it was prejudiced by the Court's failure to include the "clear and convincing" standard of proof in Question No. 21 of the Jury Verdict form. It also claims prejudice by the Court's failure to include in Question No. 21 the requirement that the jury find that TASER's conduct was in "conscious disregard" of Mr. Heston's rights.

TASER's arguments simply have no merit. TASER fails to cite any legal authority for the proposition that every single issue must be addressed explicitly in a verdict form. TASER admits that the "clear and convincing" and "conscious disregard" language was contained in the Court's instructions to the jury. The jury instructions and verdict form are required to be read as a whole, one supporting the other. So long as the jury was properly instructed on the law of the case (which TASER admits it was), it was not necessary for the verdict form to contain the "clear and convincing" and "conscious disregard" language.

TASER's Motion for a New Trial on this ground should be denied.

4) Supplemental jury instruction re: sufficient warnings

TASER claims that the Court committed prejudicial error by failing to give a supplemental instruction on the sufficiency of warnings. It proposed the following instruction which was rejected by the court:

"There can be no liability for failure to warn where the instructions or

warnings sufficiently alert the user to the possibility of danger."

Instead, the Court gave the following instruction, which covered the identical subject matter:

"Plaintiffs must prove . . . 4. TASER International failed to adequately warn purchasers about this risk."

The Court was correct in its decision to reject TASER's proposed instruction because it was simply not supported by the evidence. Throughout its moving papers, TASER consistently refers to a warning being given to users of its ECDs about the risks posed by its operation. However, TASER failed to introduce any evidence that it warned users of its ECDs of the risk that prolonged duration discharges from its devices could cause metabolic acidosis to the extent that it would result in cardiac arrest. In the absence of a warning having been given, there is no merit to the suggestion that the Court erred in failing to instruct the jury on the sufficiency of a warning.

5) Supplemental Jury Instruction re: foreseeable dangers

TASER also claims that the Court committed prejudicial error by failing to give a supplemental instruction on foreseeable dangers. It proposed the following instruction which was rejected by the court:

"The duty to warn does not include the duty to warn of known dangers foreseeable or readily known by the user."

This argument has no application to the facts of this case. Acidosis and cardiac arrest are not common knowledge. Each police officer who used a TASER ECD during this incident testified that no training was ever provided to him that his use of the M26 could result in an acidosis induced cardiac arrest. Further, it would be unlikely, if not impossible, for any police department to be aware of the current state of research in the scientific and medical community regarding the physiological affects of ECDs on humans. Instead, customers such as the Salinas Police Department reasonably relied on TASER to keep them abreast of such research. TASER never warned its customers the potential risks of metabolic acidosis prior to Robert Heston's death. In fact, it did just the opposite – it

assured users that its ECDs were non-lethal and could not cause serious bodily injury – "Saving lives every day."

Since it was not supported by the evidence, the Court's failure to give TASER's supplement instruction on "foreseeable dangers" was not error.

Although TASER argues that the court's refusal to give each and every one of its requested instructions was prejudicial and, therefore, grounds for a new trial, it has not provided any evidence of any prejudice, misstatement of the law or an erroneous instruction given that would require the court to grant their request for a new trial. Since the instructions given by the court more than adequately covered the law and all claims and defenses raised by the parties, all of TASER's arguments regarding inadequate, misleading or erroneous jury instructions must fail.

But, even if some of the jury instructions given by the Court were either inadequate or erroneous, TASER was required to make specific objections to preserve its right to raise this issue at a later time. A party cannot object to jury instructions by using plain error as the basis of raising the issue for the first time in a motion for new trial when it did not make a timely objection to the instructions pursuant to Rule 51(c). (See: Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 713 (9th Cir. 2001)).

F. R. C. P. Rule 51 provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." In Palmer v. Hoffman, 318 U.S. 109, 119 (1943), the Supreme Court stated that "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." The purpose of Rule 51, and the requirement of specificity in the objection, is to "bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials." (See Bertrand v. Southern Pac. Co., 282 F.2d 569, 572 (9th Cir. 1960)). TASER's objections were not legally sufficient to protect its right to raise this issue in a Motion for New Trial.

c. No misconduct was committed by Plaintiffs' Counsel.

TASER contends that an animation and training video shown to the jury during plaintiff's closing argument amounted to prejudicial misconduct.

The Court has discretion to allow counsel to use visual aids in closing argument – e.g., diagrams, charts, graphs, etc. – if they illustrate matters already in evidence. Murphy v. National R.R. Passenger Corp. 547 F.2d 816, 818 (4th Cir. 1977). Such visual aids should not go into the jury room or remain before the jury after the conclusion of counsel's argument. Id. That was the procedure followed.

The demonstrative animation used by plaintiff's counsel relied exclusively on evidence that was already before the jury. First, the animation showed the number of TASER discharges recorded on the dataports. This evidence was introduced through Sgt. Michael Groves of the Salinas Police Department. Second, the animation contained excerpts of the 911 call placed by witness, Clifford Satree, which was also admitted into evidence. Third it showed the duration of the TASER discharges, again framed by the play-by-play description provided by Mr. Satree during his 911 call. Fourth, the animation depicted the names of the officers that entered the Heston living room at the time Mr. Heston was subjected to the TASER discharges. Each of those officers testified. Fifth, the animation included the distinctive clicking sound made by TASER ECDs while they are being discharged. (Throughout the trial, jurors repeatedly heard the sound of the TASER during the playing of various training videos.) And, sixth, the animation depicted the moment in time when Mr. Heston was observed to be in cardiac arrest. This was based on the testimony of various officers involved in the restraint of Mr. Heston that they observed his head turn blue either immediately before or seconds after the completion of Officer Godwin's final ECD discharge.

In sum, everything contained in the animation was supported by evidence adduced at trial. Plaintiffs' counsel did not "testify" during this portion of his closing argument but, rather, simply commented on the evidence, through the animation. He was legally entitled to do this.

TASER also claims that plaintiffs' counsel committed misconduct during his closing argument when he played a particular TASER training video to illustrate a subject's severe muscle contractions as a result of one 5-second discharge from two TASER ECDs. TASER claims the showing of this video was highly prejudicial because "it had not been admitted into evidence." TASER's recollection of what evidence was admitted during the trial is clearly flawed. The video in question was shown to the jury without objection during the direct examination of Officer Fairbanks. In fact, Officer Fairbanks was asked specifically whether the muscle contractions shown in the video mirrored his own experience being tased, and he answered in the affirmative. The video was admitted into evidence, without objection, as plaintiffs' Exhibit 110 – TASER's Training Ver. 8.

But, even more disturbing is the fact that TASER's fails to recall that its counsel played the very same video for the jury during its case in chief. TASER suffered no prejudice by the showing of the subject video and, to claim otherwise, is simply disingenuous at best and intentionally misleading at worst.

d. The jury did not conduct an improper experiment

TASER contends that it should be granted a new trial because the Court allowed the jury to commit misconduct by test firing the M26 defendants' introduced into evidence during jury deliberations. TASER argues that 1) it was prejudiced by the so-called "secret" experiment, and 2) the jury obtained or used evidence which had not been introduced at trial.

Defendants offered, and the Court admitted into evidence, a fully functional TASER M26 along with a battery back. The jury did not conduct an "experiment" merely by putting the two components together – a task that required no special skill or experience.

In Konkel v. Bob Evans Farm Inc., 165 F.3d 275, 282 (4th Cir. 1999) (citing United States v. Beach, 296 F.2d 153, 158 (4th Cir.1961)), the Court of Appeals held that jury experiments that are nothing more than critical examinations of exhibits are not inappropriate. The jury in that case performed an experiment using a coffee pot and carafe, which were both admitted exhibits, and a cup, which had not been admitted into evidence.

The jury read the directions off the packet of detergent that was an exhibit and found that the liquid solution swallowed by the plaintiff was twelve times stronger than it was supposed to be. The court concluded that the jury's experiment did not constitute jury misconduct.

The basis of the decision was that the jury simply examined the coffee pot, carafe, and packet of detergent that were admitted into evidence and applied the testimony to the testing. Since the jury simply applied the testimony concerning the size of the plaintiff's mug, the jury's experiment did not place it in possession of evidence not previously presented at trial. This is analogous to what the Court allowed the jury in this case to do. It took evidence already introduced by TASER itself and matched that evidence to the sound the TASER ECD and to the testimony of the police officers.

The defendants claim that "TASER only allowed its devices to be submitted to the jury with the understanding they were inoperable." (TASER's New Trial Memorandum at 13:1-2). It should be noted that at no time prior to the jury requesting the 8 AA batteries, did any party or counsel advise the Court of any intention to render the ECD inoperable. In fact, defense counsel were asked in open court whether they had advised anyone of the fact that the AA batteries were inoperable and they all admitted they had not.

TASER further claims it was not given the opportunity to provide guidance to the jury about the operation of its ECD nor permitted to cross-exam or rebut any information about the operation of the ECD and the test results. TASER had ample opportunity during the course of the trial to explain the ECD's operational details, and in fact did so. Similarly, TASER claims that the jury was intimidated or somehow psychologically affected because of the test firing, and that these emotional reactions to the TASER caused prejudice. This contention is pure speculation and has no merit. TASER offers no evidence of any kind in this regard, nor any law to support such a wild claim.

Finally, the jury's stated purpose in test firing the ECD was to "hear" the sound it made. It is illogical to think that this inquiry was relevant to the plaintiff's failure to warn claim against TASER since the sound of the TASER would have nothing to do with such

a claim. More likely, the jury's reason for wanting to hear the sound of the TASER was directed towards the conduct of the individual police officer defendants. It is reasonable to conclude that once the jury heard the sound of the TASER, it was then able to resolve conflicts in the trial testimony relating to the officers' actions during their encounter with Robert Heston and, specifically, the extent to which the ECDs were actually discharging electricity during the critical 74-second period.

TASER has demonstrated neither impropriety nor prejudice as a result of the Court's allowing the jury to test fire the ECD. Its Motion for a New Trial on this ground should be denied.

e. The jury's findings are supported by the evidence and are consistent and completely reconcilable

TASER contends that it is entitled to a new trial on the ground that the "Special" Verdict rendered by the jury was inconsistent. According to TASER, if the jury's verdicts are "ineluctably inconsistent," the trial court must order a new trial. (TASER's New Trial Memorandum at 20:14-15. TASER's Motion for a New Trial on this ground lacks merit for two reasons: 1) the verdict itself is not only consistent but directly reflects the case presented by plaintiffs, and 2) TASER waived its right to contest any inconsistency verdict by failing to object prior to the jury being discharged.

When a jury's verdict answers are inconsistent, the judge has a duty under the Seventh Amendment to "harmonize" or "reconcile" them whenever possible. The trial "court asks, not whether the [inconsistent] verdict necessarily makes sense under any reading, but whether it can be read in light of . . . evidence to make sense." (White v. Ford Motor Co. 312 F3d 998, 1005 (9th Cir.2002).

1) The Jury's Answers to Questions 13 and 16 are Not Inconsistent

TASER's specific challenge to the Verdict relies on the jury's responses to Questions 13 and 16 on the Verdict form. TASER claims the responses to these two questions are inconsistent because the questions are the essentially the same but were answered differently.

> [W]hen confronted by seemingly inconsistent answers to the interrogatories of a special verdict, a court has a duty under the seventh amendment to harmonize those answers, if such be possible under a fair reading of them. A court is also obligated to try to reconcile the jury's findings by exegesis, if necessary. Only in the case of fatal inconsistency may the court remand for a new trial.

Floyd v. Laws, 929 F.2d 1390, 1396 (9th Cir. 1991) (citing; Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108 (1963) (citations omitted).

A closer reading of the two questions, in light of the evidence presented in this case, establishes that they are not the same and, indeed, required very different evidence to sustain.

Question 13 reads:

> Do you find that, at the time TASER International manufactured and sold TASER ECDs, a reasonably prudent manufacturer of an electronic control device knew or reasonably should have known that the TASER ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed?

(emphasis added).

Question 16 reads:

> Do you find that at the time TASER International manufactured and sold TASER ECDs to the Salinas Police Department, TASER International knew or it was knowable by the use of available scientific knowledge, that prolonged exposure to shocks from TASER ECDs potentially causes acidosis to a degree which poses a substantial danger, namely of causing a person against whom the device is deployed to have a cardiac arrest?

(emphasis added).

The distinction between these two questions is obvious. Question No. 13 deals with

the negligence aspect of a products liability failure to warn claim. The verdict response to this question was "yes" – a decision based on the clear weight of the evidence

"Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." (Anderson v. Owens-Corning Fiberglass Corp., supra, 53 Cal. 3d at1002)

Clearly, the jury concluded, based on the evidence, that acidosis was a theoretical risk from prolonged ECD exposure, and that a reasonably prudent manufacturer before marketing its new, higher powered ECD, should have tested for the possibility that it might cause metabolic acidosis to such an extent that the acidosis could result in cardiac arrest. Had TASER done such testing, the company then might have warned about this risk.

Question No. 16 added another component to the plaintiffs' failure-to-warn claim. Question 16 required plaintiffs to prove that a reasonably prudent manufacturer knew, or it was knowable by the use of available scientific knowledge, of a particular risk associated with the use of its product. "Available scientific knowledge" means the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available." (Carlin v. Superior Court, 13 Cal.4th 1104, 1112 (1996) (emphasis added))

The jury answered Question No. 16 "No" because it had already decided that TASER unreasonably failed to perform the relevant testing for acidosis, and, therefore, "the best scientific and medical knowledge available" did not exist on this critical issue. In other words, the jury reasonably answered Question No. 16 "No" because the danger was not "known" or "knowable" in the sense that one could research medical publications and determine the effects of prolonged TASER discharges on blood acid. Answering Question No. 16 "Yes" would have contradicted the jury's finding on TASER's unreasonable disregard for the acidosis risk.

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Plaintiffs introduced the results of three peer-reviewed independent research studies specifically measuring the physiological effects of TASER discharges on both humans and swine. The first, conducted by Dr. James Jauchem, on behalf of the U.S. Air Force, appeared in the scientific literature in November 2005, approximately eight months after Mr. Heston's death. Subsequent peer-reviewed research conducted by Drs. Vilke and Dennis, appeared in the scientific literature in 2006 and 2007. Since this scientific knowledge was not knowable to TASER at the time it manufactured and sold the ECDs due to its own negligent failure to do the research, it is easy to understand why Question No. 16 was answered in the negative.

It is clear that the answers to Questions 13 and 16 were completely consistent with one another based on the state of the evidence introduced at trial by both plaintiffs and TASER. TASER fails to appreciate the distinction between these two questions – one founded in negligence and the other in strict liability.

The Court should have no trouble reconciling the answers and therefore denying the New Trial motion.

Regardless, TASER waived its right to contest any alleged inconsistency in the verdict by failing to raise the issue before the jury was discharged. A party waives any objection to an inconsistent general verdict with special interrogatories if he or she fails to object to the inconsistency before the jury is discharged. (Williams v. KETV Television, Inc. 26 F3d 1439, 1442-1443 (8th Cir. 1994); Austin v. Paramount Parks, Inc. 195 F3d 715, 726 (4th Cir. 1999); Correia v. Fitzgerald, 354 F. 3d 47, 57 (1st Cir. 2003) ("failure to object to . . . inconsistency while . . . jury is still in the box forfeit's . . . objection").

But, it is important to emphasize that even though plaintiffs contend that by failing to object to the verdict while the jury was still impaneled, TASER waived its right to raise this issue in its Motion for New Trial, the question need not be resolved inasmuch as there is no inconsistency in the verdict.

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f. Expert testimony is not required to prove a failure to warn claim where evidence established that TASER gave no warning of any kind regarding metabolic acidosis.

TASER claims that plaintiffs' failure to call an expert witness in support of their Failure to Warn claim justifies the granting of a new trial. This claim presupposes that expert testimony on the subject was, in fact, necessary. It was not. In every case the court must be guided by the general rules governing the use of expert testimony. If the fact sought to be proved is one within the general knowledge of lay persons, expert testimony is not required. (See: Truman v. Vargas 275 Cal. App. 2d 976 (1969)).

The court in Ewing v. Northridge Hosp. Medical Center, 120 Cal. App. 4th 1289 (2004), stated that there are circumstances, even if rare, in which negligence on the part of a doctor is demonstrated by facts which can be evaluated by resorting to common knowledge. In such a situation, expert testimony is not required since enhanced scientific testimony is not essential for the determination of an obvious fact. (citing Franz v. Board of Medical Quality Assurance, 31 Cal. 3d 124, 141 (1982)).

The court in Ewing went on to say that in cases where a layperson "is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised . . . no expert testimony is required." Id at 601. This reiterates the long held view that expert opinion testimony is necessary only where the subject is sufficiently beyond common experience that the opinion of an expert would be necessary to assist the trier of fact.

Here, the undisputed evidence proved that TASER never issued a warning to its purchasers concerning the possibility that prolonged TASER discharges might cause metabolic acidosis to such an extent that the acidosis might result in cardiac arrest. TASER admitted as much in a seven-page "Training Bulletin" published on its web site within a week of the verdict. A copy is attached to as Exhibit 1.

The jury verdict found a negligent failure to warn of the specific risk of the metabolic effects of TASER device induced muscle contractions in

> exhausted, acidotic subjects such as Mr. Heston. On June 28, 2005, TASER International issued revised warnings that included language about the risks of extended, prolonged, or multiple TASER ECD applications on exhausted or otherwise compromised subjects.
>
> The Heston case occurred before those warnings were issued, hence a failure to warn case for incidents after June 28, 2005 are highly unlikely to find a failure to warn claim on this issue or any other known risk discussed in those warnings.

Exhibit 1 at 5.

As previously discussed, the only warning ever issued by TASER concerning prolonged TASER discharges was published in January 2005, approximately one month prior to Mr. Heston's death. However, this warning, buried deep in a PowerPoint presentation, never mentioned the risk of metabolic acidosis, and was not delivered to the Salinas Police Department, much less seen by the officers who shocked Mr. Heston.

In a case such as this where NO warning of any kind was ever given to its purchasers, there was no need for plaintiffs to have called an expert to testify that no warning was ever issued.

g. Where the Jury concluded that acidosis brought on by TASER discharges could cause cardiac arrest, the failure of TASER to give a warning of this potentially life-threatening risk supported an award of Punitive Damages.

The defendant incorrectly asserts that since the verdict form did not contain the "clear and convincing" or "conscious disregard" standard applicable to punitive damage awards, the verdict form was improper and a new trial should be granted.

The court should consider first whether the jury instructions were legally sufficient. The defendant concedes that "the 'clear and convincing' and 'conscious disregard' standards were included in the Court's closing instructions." (TASER's New Trial Memorandum at 17:20-21) The court did not intend, nor was it necessary, for the verdict

form to list each individual sub-issue and evidentiary burdens relevant to each claim.

The burden of proof for each claim was contained in the written jury instructions, a copy of which was given to each and every juror. The verdict form was intended to be read in conjunction with the jury instructions. TASER presents no evidence to suggest this was not done. The instructions were not misleading and taken as a whole properly informed the jury of the applicable law. Furthermore, the jury instructions submitted to the jury allowed all the parties to argue their theory of the case.

In U.S. v. Reed, 147 F. 3d 1178 (9th Cir. 1998) , the court described verdict forms as, in essence, additional instructions to the jury.

Here, the jury instructions and verdict from, taken together as a whole, more than adequately covered all the issues presented, were not misleading or erroneous, and allowed the parties to argue their theory of the case. Based on the facts presented, the jury reasonably concluded that TASER's failure to warn was wanton, malicious and in conscious disregard of Robert Heston's rights. As such, the award of punitive damages to deter TASER from engaging in similar future misconduct should stand.

h. Compensatory Damages Need Not Be Awarded in Order to Recover Punitive Damages In Favor of a Decedent's Estate

The jury was instructed as to the specific standard required to award punitive damages in a case such as this one and rendered its decision according to those instructions. Although this argument is discussed more fully in Plaintiffs' Memorandum of Law in Opposition to Defendant TASER's Renewed and Supplemental Motion for Judgment as a Matter of Law (JMOL) or Reduction in Punitive Damages, filed herewith, it should be noted that substantial punitive damages are appropriate in wrongful death cases, because proportionality is based on "harm" rather than pecuniary loss, and there is no "harm" greater than the termination of a human life. (Romo v. Ford Motor Co., 113 Cal. App. 4th 738 (2003)).

The Romo court explained the rationale for its decision by stating that a small award could simply be written off as a part of the cost of doing business and would have no

deterrent effect. An award which affects the company's pricing or affects its competitive advantage would serve as a deterrent. More importantly, the court acknowledged the long standing axiom that it would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim.

TASER fails to cite a single authority for the proposition that "since there was no proven compensatory damages [to the estate], the award of $200,000 in punitive damages also fails." (TASER's New Trial Memorandum at 25:4-5) (In fact, compensatory general damages were "proven," they just did not survive. The burial expenses did and were properly awarded to the estate.)

However, it does cite the case of County of Los Angeles v. Superior Court (Schonert) 21 Cal. 4th 292, 304 (1999) ,which holds, contrary to their argument, that "under California's survival law, an estate can recover not only the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages."

TASER's argument is a legal Catch-22. Punitive damages must be proportional to the compensatory damages actually recovered, but compensatory damages do not survive under California law, therefore neither do punitive damages, although both statute and case law say they do survive. Garcia v. Superior Court (County of Los Angeles), 42 Cal. App. 4th 177 (1996), specifically rejects this conundrum. Declining to follow federal law which allows for the survival of general damages in section 1983 death cases (and hence the basis for their inclusion on the Court's general verdict form), the court of appeal ruled regarding a section 1983 claim in state court "The deterrent purpose of the federal Civil Rights Act is satisfied, we believe, by the fact that Code of Civil Procedure section 377.34 expressly allows punitive damages the decedent would have been entitled to recover had he survived," noting that "though the statute does not permit the estate to recover specific damages for decedent's pain and suffering, California law permits the estate representative to seek punitive damages for violation of decedent's rights." Id. at 185.

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TASER's claim that the Estate of Robert C. Heston is not entitled to an award of punitive damages has no basis in fact nor law and should be rejected.

i. Evidence adduced at trial clearly established that TASER Manufactured and sold the ECDs used by the Salinas Police Officers during their restraint of Robert C. Heston

Finally, as sort of a throw-away line, TASER argues that plaintiffs failed to produce evidence that TASER manufactured and sold the particular ECDs used by the Salinas Police Department during this incident. At no point during the entirety of the trial or litigation did TASER's counsel ever raise this issue, and it is injudicious for them to do so now.

Ample evidence during the course of the trial established that the Salinas Police Department investigated TASER brand ECDs prior to purchasing them.

Sgt. Michael Groves, who was one of the Salinas officers assigned to investigate ECDs for the Department, testified that based on his findings and a decision of the City Council the Salinas Police Department proceeded with the purchase of a large number of TASER Model M26s (no other manufacturer produces an ECD known as a Model M26.) The M26s were purchased directly from TASER in 2004, the ECD introduced into evidence had "TASER" written on it, and the Salinas Police Department relied on the training materials provided by TASER to train its own officers how to operate the device. No objection was ever made to the introduction of this evidence.

It should also be noted that TASER's proposed Special Verdict form included the following language:

"The parties have stipulated that TASER International, Inc. ("TASER") manufactured the TASER m26 Electronic Control Device ("M26 ECD") which was used on Mr. Robert C. Heston, Jr."

The evidence clearly established that TASER manufactured and sold the M26 ECDs used during this incident as well as the approximate date that the ECDs were first delivered to the Salinas Police Department.

4. TASER'S TRIAL STRATEGY WAS INTENDED TO INSULATE THE POLICE OFFICER DEFENDANTS FROM INDIVIDUAL LIABILITY AND THIS GOAL WAS ACHIEVED.

On June 12, 2008, within days of the verdict, TASER published a seven-page "Training Bulletin" on its web site and, presumably, emailed it to customers. A copy of this bulletin is attached to as Exhibit 1. The bulletin explains TASER's trial strategy as follows:

> "TASER International worked carefully and cooperatively with the Salinas Police Department in developing a joint litigation strategy to ensure that the most important parties, the police officers involved (who were facing exorbitant personal punitive damages), were not 'scape-goated' in any way. This strategy included TASER International taking some additional risks at trial, a strategy that we believe is the right thing to do."

TASER Training and Legal Bulletin 14.0-5, Page 5, ¶ 2.

The Court should take this missive into account when deciding the new trial motion. Given TASER's decision to "fall on the sword" to protect its customer base, any new trial order should include all parties and claims, and not just plaintiffs' claims against TASER.

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5. CONCLUSION

TASER has offered no evidence to establish that the jury's verdict is against the clear weight of the evidence, is based upon evidence which is false, that the verdict will result in a miscarriage of justice, or that a mistake has been committed by the jury. For these reasons, TASER's motion for a new trial should be denied, and judgment entered on the verdict.

DATED: August 25, 2008

Respectfully submitted,

THE LAW OFFICES OF JOHN BURTON WILLIAMSON & KRAUSS

BY: /s/ PETER M. WILLIAMSON
Attorneys for Plaintiffs

DECLARATION OF PETER M. WILLIAMSON

I, PETER M. WILLIAMSON, declare:

1. That I am an attorney at law duly licensed to practice before all the Courts of the State of California and am a member of the Bar of this Court. I am co-counsel, along with John Burton, on behalf of the plaintiffs herein.

3. If duly sworn, I could and would testify to the following facts of my own personal knowledge.

4. That on June 12, 2008, TASER published a seven-page "Training Bulletin" (TASER Training and Legal Bulletin 14.0-5) on its web site which I downloaded directly therefrom. A copy of this bulletin is attached to plaintiff's Opposition to TASER's Motion for a New Trial as Exhibit "1".

5. I can further attest to the fact the excerpted portions of TASER's Training and Legal Bulletin 14.0-5 are true and correct.

I declare under penalty of perjury, pursuant to the laws of the United States, that the foregoing is true and correct.

Executed this 25th day of August, 2008 at Tarzana, California.

/s/ PETER M. WILLIAMSON
Peter M. Williamson

III. Handling Strip Search Cases: Panel Discussion

Materials:

Strip Searches and the Fourth Amendment Rights of Prisoners
Howard Friedman

Response to Motion to Dismiss
Order re Plaintiff's Motion for Partial Summary Judgment
Plaintiff's Proposed Strip Search Policy
Julia Sherwin

Presenters:

Howard Friedman, Law Offices of Howard Friedman, Boston, MA
Julia Sherwin, Haddad & Sherwin, Oakland, CA
Marian Meier Wang, Emery, Celli, Brinckerhoff & Abadi LLP, New York, NY

Strip Searches and the Fourth Amendment Rights of Prisoners

by Howard Friedman

Law Offices of Howard Friedman, P.C.
Boston, Massachusetts

The author thanks Mark Hentz, Esq. for his assistance on this paper.

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FOURTH AMENDMENT RIGHTS OF PRE-TRIAL, PRE-AND POST-ARRAIGNMENT DETAINEES

I. INTRODUCTION

In 1984 the Supreme Court held that prisoners have no privacy interest protected by the Fourth Amendment in their prison cell. *Hudson v. Palmer*, 468 U.S. 517 (1984). This is still the law. As discussed below, convicted prisoners have very limited Fourth Amendment rights. But without saying that a different standard applies, pre-arraignment detainees, detainees waiting for their first court appearance, and pre-trial detainees have been found to have a more significant fourth amendment expectation of privacy in their bodies. The Constitution limits strip searches of these people. These materials discuss the contours of this right.

A. *Bell v. Wolfish* - Individualized Reasonable Suspicion

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The question is when is a strip search unreasonable?

The now heavily litigated area of the constitutionality of strip searches began with *Bell v. Wolfish*, 441 U.S. 520 (1979). Bell was a challenge to conditions at the federal detention center in New York City designed to hold pre-trial detainees. The plaintiffs challenged the policy of strip searching prisoners after contact visits. The Supreme Court's majority opinion written by Justice Rehnquist said the practice "instinctively gives up the most pause" but went on to find these strip searches to be reasonable under the Fourth Amendment. The Court held:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

The justification for the search is the most frequently litigated issue, but even if a strip search is justified, it may be unconstitutional if it is conducted in an unreasonable manner or place.

Bell held that pre-trial detainees could be strip searched after a contact visit. After *Bell* the lower courts began to applying its reasoning to intake strip searches of people who had just been arrested and had yet to go to court for a determination of bail[1]. The first cases after *Bell* held that blanket strip search policies of arrestees at a police station or on admission to detention facilities were unconstitutional. The courts reasoned that most people do not start their day planning to be arrested. The courts quickly agreed that an admission strip search, at least of a minor offender can take place if the police or corrections officers has a reasonable suspicion to suspect the person has concealed contraband. The initial cases were brought by people charged with minor offenses. Thus, the holdings were limited to the rights of detainees held on such minor offenses. *See Tinetti v. Wittke*, 479 F.Supp 486 (E.D. Wisc. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980)(speeding); *Logan v. Shealy*, 590 F.2d 1224 (4th Cir. 1981)(operating under the influence); *Tikalsky v. City of Chicago*, 687 F.2d 175 (7th Cir. 1982)(disorderly conduct); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983)(women charged with traffic, regulatory, or misdemeanor offenses); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984)(warrant for an outstanding speeding ticket and violation of a restriction on driver's license.); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984)(warrant for outstanding parking tickets); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985)(arrest for misdemeanors punishable only by fines, public intoxication and an outstanding warrant for issuing a bad check, following a routine traffic stop); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985)(summons for a violation of the local leash law); *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986)(misdemeanors for false report and resisting arrest) *Watt v. City of Richardson Police Department*, 849 F.2d 195 (5th Cir. 1988) (warrant for failing to register a dog violating a city ordinance).

[1] This group is referred to as arrestees or pre-arraignment detainees, typically it includes people arrested on default warrants and those held on non-criminal material witness warrants.

The first reported case after *Bell* to challenge an admission strip search conducted without any evaluation for cause was *Tinetti v.Wittke,* 479 F.Supp 486 (E.D. Wisc. 1979), *aff'd,* 620 F.2d 160 (7th Cir. 1980). The *Tinetti* court relied on an unpublished case from New York, *Sala v. County of Suffolk,* (E.D.N.Y. 11/28/78), in which one of the plaintiffs had been arrested for failure to pay a speeding fine and the other plaintiff for failing to respond to a summons which had been sent to the wrong address. The district judge in *Sala*, stated:

> Here on one side of the balance scale we have the intrusion into personal dignity and privacy in a way that for some people at least might cause serious emotional distress. A search of (this) . . . type . . . including the visual inspection of the anal and genital areas, has been characterized by various witnesses here, and by judges in some other cases, as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission . . ..

This language describing strip and visual body cavity searches was repeated in *Tinetti* and has become the standard description adopted by most courts.

The decisions in these materials describe well-settled law but in September 2008 a split developed in the circuit courts which could lead to a decision on this issue by the Supreme Court. On September 4, 2008, the 11th Circuit sitting *en banc* broke with its own precedent in *Powell v. Barrett,* F.3d , 2008 WL 4072800 (11th Cir 2008) and created a split in the Circuits based on their reinterpretation of the Supreme Court's 1979 decision in *Bell v. Wolfish, 441 U.S. 520* (1979). The 11th Circuit has some support from an unlikely place, the 9th Circuit. *Bull v. City and County of San Francisco.* 539 F.3d 1193 (9th Cir. 2008). This panel decision upheld district judge Breyer's ruling that blanket strip searches are unconstitutional but a dissent by Judge Tallman argued that the appellate courts had lost sight of the meaning of *Bell*, and the concurring opinion by Judge Ikuta agreed that precedent in the circuit required affirmation but made it clear that she favored hearing *en banc* starting his opinion stating: "While compelled by Ninth Circuit case law, the disposition is in tension with Supreme Court precedent."[ll]

II. WHAT IS A STRIP SEARCH?

The term "strip search" has different meanings to correctional administrators and officers than it does to lawyers. It is essential to understand these differences so that lawyers, clients and witnesses can meaningfully communicate with one another. A corrections employee may honestly state that a person was not strip searched, although the person

[ll] I understand that the defendants will be requesting a rehearing *en banc* which is likely to be granted in light of *Powell*.

was required to remove all of his clothing and was viewed while naked, because this procedure is not defined as a "strip search" in the institution's policies. Further muddling the definition, many states have statutes that purport to define strip searches. Lawyers can confuse the issue as well by using the term strip search to refer to any procedure that requires individualized reasonable suspicion, including, for example, searches of an individual's body cavities.

A. Correctional Administrator's Definition

When prison or jail administrators refer to a strip search, they are typically talking about a search that involves the examination of an inmate's body conducted in a prescribed order and involving specific areas of the inmate's body. These areas usually include the mouth, hair, armpits, fingers, toes, soles of the feet, and groin area. This is typically the definition contained in the institution's policy manual.

B. Statutory Definition

Many states statutorily define strip searches. The plaintiff in *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003), pointed to 14 states' definitions, including Illinois (725 ILL. COMP. STAT. 5/103-1(d)), Florida (F.S.A. § 901.211), Ohio (R.C. §2933.32) and Michigan (M.C.L.A. 764.25a). It is imperative to remember that just because a department or state has a definition, the definition may not be constitutionally appropriate.

C. Fourth Amendment Definition

Under the fourth amendment, the term strip search typically refers to a search that requires exposure of a portion of a person's body that is ordinarily private. For example, one court has stated that "include[d] within the term strip search [is] any exposure or observation of a portion of a person's body where that person has a 'reasonable expectation of privacy.'" *Doe v. Calumet City*, 754 F.Supp. 1211, 1216 n.9 (N.D. Ill. 1990). The *Doe* court went on to hold that "[t]here is simply no question that plaintiffs had a reasonable expectation of privacy in those private parts. Deeply imbedded in our culture ... is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have their 'private' parts observed or touched by others." *Id*. at 1218. The parts of a person's body where there exists a reasonable expectation of privacy are not universally agreed upon. Some courts include only the genitals, buttocks and, for females, breasts, while others include bare skin when it is visible only if forcibly shown.

1. Application of the Fourth Amendment Definition

a. Complete nudity is not required

Under the Fourth Amendment, a strip search may take place even though the person is not required to remove all of his or her clothing. For example, in *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989), the plaintiff was initially required to unbutton her blouse and expose her chest for inspection and later was required to completely disrobe and submit to a visual body cavity inspection. The Sixth Circuit noted that there were two incidents and that "either would be treated as a strip search if it occurred alone." *Id*. at 1253. *See also, Mason v. Village of Babylon*, 124 F.Supp.2d 807 (E.D.N.Y. 2001)(The plaintiff was ordered to raise her shirt and expose her bra. She was then asked to pull out, but not remove, her bra so as to dislodge anything that might be hidden underneath. She was also asked to lower her pants to her thighs. While she was not asked to remove her underwear, she was required to reposition them. This was analyzed as a strip search.); *Gonzalez v. City of Schenectady*. 141 F.Supp.2d 304 (N.D.N.Y. 2001); *Huck v. City of Newburgh*, 712 N.Y.S.2d 149 (N.Y. App. 2000)(The plaintiff was asked to remove all her outer garments and, while in her underwear, she was asked to lift her bra exposing her breasts. The court analyzed this as a strip search.). The First Circuit noted that "precedent does not require that a search be either prolonged or thorough to be termed a strip search." *Wood v. Hancock County*, 354 F.3d 57, 63 (1st Cir. 2003). In a case involving the search of student in a school the Ninth Circuit agreed that requiring her to strip to her bra and underwear and to shake her undergarments was a strip search. *Redding v. Stafford Unified School District* 541 F.3d 1071, 1081 *(9th Cir. 2008)*.

To make matters more confusing for non-lawyers, the term strip search is at times used as legal shorthand to refer to any search that is so intrusive that it requires individualized reasonable suspicion. *See, e.g., Justice v. City of Peachtree*, 964 F.2d 188, 191 (11th Cir. 1992)(Requiring a 14 year-old girl to strip down to her underwear because the officers suspected her of concealing drugs on her person was found to be a strip search under this definition.). In *Pace v. City of Des Moines*, 201 F.3d 1050 (8th Cir. 2000), the court found that a person has a reasonable expectation of privacy in the upper body and any tattoos on the upper body. Thus, an order by a policeman that the plaintiff remove his shirt to permit photographing of a tattoo on his chest violated his fourth amendment rights. This was true even though the plaintiff had been seen wearing a tank top that exposed most of the tattoo in

public on numerous occasions. Some courts have generally referred to a person's right not to be involuntarily required to disrobe. *See Justice v. City of Peachtree City*, 964 F.2d 188 (11th Cir. 1992). *Stanley v. Henson*, 337 F.3d 961(7th Cir. 2003) (held that a policy requiring detainees to strip to their underwear is analyzed as a strip search but found the policy to be reasonable).

b. Observation while using the bathroom

Courts have required individualized reasonable suspicion when police officers observe a detainee using the bathroom, even if the officer did not ask the person to disrobe. *See DiLoreto v. Borough of Oaklyn*, 744 F.Supp. 610, 620 (D.N.J. 1990). Note, however, that observation may be considered reasonable while a person is giving a urine sample for a drug test.

c. Observation during a changeover, dress-out or clothing search

A changeover, or dress-out, is the process during admission, into a detention facility where a detainee is required to remove his or her street clothing and get dressed in a uniform. The process may be accompanied by a strip search and/or delousing. Observation of inmates during a changeover, or dress-out, may require individualized reasonable suspicion. For example, in *Doan v. Watson*, 168 F.Supp.2d 932 (S.D. Ind. 2001), the observation of misdemeanor arrestees while showering and delousing prior to being dressed in prison-issued uniforms by officers who were specifically instructed to examine the prisoners' entire bodies for contraband, was found to violate the prisoners' Fourth Amendment rights. The specific instruction to prison officers to examine the inmates' bodies was viewed as a blanket strip search policy.

Observation of a detainee while she changed into a jail-issued uniform was characterized as a strip search in *Burns v. Goodman*, 2001 WL 498231 (N.D. Tex. May 8, 2001), *aff'd*, 2002 WL 243248 (5th Cir. Jan. 16, 2002), *cert. denied*, 537 U.S. 840 (2002). In *Burns*, a male corrections officer observed the plaintiff, a female detainee, change into a prison-issue dress. Such observation was in violation of the facility's policy, although there was evidence that such observation was common practice. The court acknowledged that if "this was the customary practice, it would constitute a strip search." *Id*. at *5.

A similar episode ended in a different result in *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003). The plaintiff was arrested for assaulting a police officer. Jail policy required that all detainees who were not to be released on their own recognizance be changed into jail-issue uniforms and for a same-sex officer to observe the changeover. The policy allowed detainees to leave their undergarments on. However, the plaintiff was not wearing a brassiere at the time of her arrest, so the changeover resulted in the exposure of her bare breasts. The court analyzed the changeover as a strip search, but found it to be a relatively minimal intrusion, pointing to the brief period of observation/exposure, the policy that undergarments may remain on, and the fact that there was no touching by the officer. The court found this minimal intrusion to be justified because Stanley was arrested for assaulting a police officer and her jailers knew nothing of the circumstances of her arrest. The court focused on the reasonableness of the policy in general rather than its effect on the plaintiff.

d. Vermin inspection

Some facilities inspect the bodies of detainees for vermin and/or delouse new detainees. In *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000), the court upheld as reasonable a physical examination of the plaintiff by an opposite gender nurse's assistant. The search consisted of the male nurse's assistant running his fingers through plaintiff's cranial and pubic hair. The Eleventh Circuit held that "it is not inappropriate for medical personnel to conduct a strip search of an inmate of the opposite sex." *Id*. at 684. Unusual in this case was the fact that Skurstenis was not searched until shortly before she left the jail. The court dismissed this oddity as acceptable, given that the medical personnel were previously unavailable to perform the examination. Further, the court noted that the Sheriff's office was specifically charged by the Alabama legislature to "exercise every precaution to prevent the spread of disease among the inmates." Alabama Code §14-6-95. The spread of lice, which was apparently prevalent amongst inmates in Alabama, was of particular concern.

One must wonder how effective a disease prevention program is if detainees are not searched upon admission to the facility. While physical or visual examinations of detainees' naked bodies for vermin are generally upheld, the details of the procedure should be

carefully examined. Such a search represents a tempting subterfuge to skirt the limitations on strip searches.

e. Touching bare body parts

Courts apply the individualized reasonable suspicion standard for searches in which a detainee is subjected to touching of the genitals, buttocks or, for women, bare breasts. Courts utilize the body of law developed for strip searches to analyze such cases, even though this physical touching is more than a strip search. *See Schmidt v. City of Lockport*, 67 F.Supp.2d 938 (N.D. Ill. 1999). While a pat search through clothing may be conducted as part of an intake procedure, touching a person's bare body requires at least reasonable suspicion.

f. Intent Required

The fact that a law enforcement officer views a person's naked body does not, by itself, mean that a strip search has taken place. The viewing must be part of a search procedure, rather than inadvertent or accidental viewing. Accidental viewing, sometimes called incidental, occurs when an officer who is not involved in a search unintentionally or unavoidably views a person's naked body. For example, an officer may walk past a shower while a person is exiting. The First Circuit requires an "inspection," which is defined to include "formal or official viewing or examination." *Wood v. Hancock County*, 354 F.3d 57 (1st Cir. 2003). *Wood* held that the officer's intent is not controlling. A district court recently held that the only intent required is the intent to search. *See Blihovde v. St. Croix County*, 2003 WL 23139401 (W.D. Wisc. 2003). The fourth amendment applies only to unreasonable searches, so the viewing must be part of a process aimed at detecting contraband. Of course, as discussed above, changing the stated purpose in an attempt to evade the constitutional requirements is unlikely to succeed.

III. FOURTH AMENDMENT STANDARD

A. The Plaintiff's Status as Pre-Arraignment, Pre-Trial, or Post-Conviction Changes the Balance

The standard for evaluating reasonableness does not change as a detainee's status changes, but the balance of interests articulated in *Bell* does. As the level of judicial process an inmate receives increases, the balance shifts further in favor of institutional security concerns. The interaction between the status of the individual detainee and the nature of the institution where the inmate is being held must also be kept in mind and will be discussed later in these materials.

At the pre-arraignment and post-arraignment-awaiting-bail stages, the nature of the crime with which an individual is charged plays a role in establishing the standard for justifying a strip search, as will be discussed shortly. By the time an inmate is being held pending trial or serving a sentence, the specifics of the crime are not a factor and the standard depends more on the detainee's status and the nature of the facility holding the detainee.

1. Admission to the General Population

Typically detainees awaiting a first court appearance are held in a police lock-up or a county jail separate from other prisoners. Our smallest state, Rhode Island, established a "unified" system in which such detainees were held in an intake facility, which was classified as a maximum security prison, and where the detainees were mixed with the general prison population. The First Circuit rejected the claim that this intermingling provided a basis for strip searching the detainees because it was "inherently limited and avoidable" and the security interests of a facility do not always outweigh the privacy interests of detainees. *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001). Other courts agree. *Calvin v. Sheriff of Will County*, 405 F.Supp. 2d 933 (N.D. Ill. 2005); *Cruz v. Finney County*, 656 F. Supp 1001 (D.Kan. 1987) However, other courts have held that pre-arraignment detainees can be strip searched without evaluating for reasonable suspicion before the detainee is to be placed in the general population of a jail. *Evans. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (*en banc*); *Gustafson v. Polk County Wis.*, 226 F.R.D. 601 (W.D. Wis. 2005).

2. Before Arraignment or a First Court Appearance

Policies involving routine strip searches upon admission of people who have just been arrested and are waiting for bail to be set or for a first court appearance have been held unconstitutional, in part because such individuals do not typically plan to be arrested. In *Roberts*, the First Circuit noted that "the deterrent rationale for the *Bell* search is simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration." *Id*. at 111. The Ninth Circuit expressed a similar view in

Giles v. Ackerman, stating "there is no indication whatsoever that the county's strip search policy could or did have any deterrent effect. Visitors to the detention facility in *Bell* could plan their visits and organize their smuggling activities. In contrast, arrest and confinement in the Bonneville County Jail are unplanned events, so the policy could not possibly deter arrestees from carrying contraband." *Id*. at 617.

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983), challenged Chicago's practice of strip searching women arrested on misdemeanor offenses before admitting them to city lock-ups to await bail. The Seventh Circuit acknowledged that strip searches are invasive stating, "we can think of few exercises of authority by the state that intrude on the citizen's privacy and dignity as severely as the visual anal and genital searches practiced here." *Id*. at 1272. This extreme invasion of privacy weighed heavily on one side of the balancing test established in *Bell*, requiring the City to demonstrate a strong need for the searches. The court recognized that "the more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted." *Id*. at 1273. Authorities must have a specific reasonable suspicion that an arrestee is concealing contraband to outweigh the extreme intrusion involved in strip searching an arrestee. *See id*.

The nature of the reasonable suspicion necessary to constitutionally strip search a pre-arraignment detainee was discussed in *Kelly v. Foti,* 77 F.3d 819 (5th Cir. 1996). "A strip search is permissible only if the official has an individualized suspicion that the arrestee is hiding weapons or contraband. This suspicion must relate to the individual arrestee, not a category of offenders and does not arise merely because an arrestee fails to post bond immediately and police move him to general population. In short, pure speculation does not create a reasonable suspicion; nor does a generalized fear of a category of arrestees." *Id*. at 822 (citations omitted). This general standard has been widely embraced. *See, e.g.*, *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001)(holding unconstitutional the strip search of DUI arrestee detained until blood alcohol level diminished); *Weber v. Dell*, 804 F.2d 796, 804 (2nd Cir. 1986) ("We conclude that a reasonable suspicion that an accused misdemeanant or other minor offender is concealing weapons or other contraband – suspicion based on the particular traits of the offender, the arrest and/or the crime charged – is necessary before subjecting the arrestee to the indignities of a strip/body cavity search."); *Chapman v. Nichols*, 989 F.2d 393 (10th Cir.

1993)(holding unconstitutional the strip searches of women arrested for traffic offenses and not suspected of having concealed weapons or drugs).

a. Default warrants

Many cases challenging strip search policies have been brought by people arrested on default warrants. While some people may have defaulted after their first court appearance, these individuals are treated the same as pre-arraignment detainees. *See Masters v. Crouch,* 872 F.2d 1248 (6th Cir. 1989)(default warrant for failing to appear for a traffic hearing); *Hill v Bogans,* 735 F.2d 391 (10th Cir. 1984)(arrest on a bench warrant for failing to appear at a hearing for traffic offenses).

b. Parole or probation violations

Since many courts have held that, in some instances, a criminal charge itself can provide reasonable suspicion to support a strip search, it is necessary to determine how to treat an arrest for parole or probation violations. An arrest for violating probation or parole is distinct from the underlying offense that resulted in the imposition of probation or parole in the first place. A violation can include a wide range of conduct, including acts that are not crimes, such as missing an appointment with a parole officer, as well as acts that could indicate criminal conduct, such as a positive drug test. The nature of the probation violation itself and not just the fact that there has been a violation, must play a role in determining whether reasonable suspicion exists to justify a strip search.

The issue of strip searches of probation violators is discussed in *Silvia v. Clackamas County*, 2001 WL34039482 (D. Or. Nov. 14, 2001). Clackamas County argued that strip searches of probation violators should be evaluated using the standard for convicted prisoners. The County reasoned that the violation resulted in the reimposition of the original sentence, rendering the plaintiff a prisoner. The court rejected this contention, holding instead that "probation violations relate to conduct which is separate and apart from the conduct underlying the original conviction." The court applied the standard for pretrial detainees in evaluating the strip search of the plaintiff. The notion that a probation violation alone is not an automatic justification for a strip search was embraced in *Dodge v. County of Orange*, 209 F.R.D. 65 (S.D.N.Y. 2002). The *Dodge* court granted a preliminary injunction prohibiting the Orange County Correctional Facility from maintaining its current

strip search policy, holding that, based on the information before it, "[b]eing admitted for a violation of probation or parole does not in and of itself provide individualized reasonable suspicion." *Id*. at 77. A probation violation is a factor that may be considered in forming the reasonable suspicion necessary to justify a strip search, but is not itself automatic justification for a strip search.

2. Post-Arraignment-Awaiting-Bail

Once bail has been set, individuals may be detained while waiting to post bail. In *Wachtler v. County of Herkimer*, 35 F.3d 77 (2nd Cir. 1994), the plaintiff was arrested for obstructing governmental administration, a misdemeanor, when he refused to answer an officer's questions during a routine traffic stop. Wachtler was taken before the nearest available judge, bail was set and he was taken to the county jail. As part of processing Wachtler into the jail, he was strip searched and placed in solitary confinement. Overturning the district court's dismissal of Wachtler's claim, the Second Circuit applied the basic misdemeanant standard holding that, "if the standard procedure included routine strip-searches of misdemeanor arrestees, absent reasonable suspicion of weapons or contraband, and if no reasonable suspicion concerning Wachtler's possession of such items existed, then Wachtler would prevail." *Id*. at 82.In *Shain v. Ellison*, 273 F.3d 56, 64 (2nd Cir. 2001) the court affirmed that, even after an arraignment, a misdemeanor arrestee cannot be strip searched without reasonable suspicion.

3. Pre-Trial Inmates

The balance between a detainee's privacy rights and a detention facility's need to strip search detainees shifts when detainees are held pending trial, as demonstrated by the decision in *Bell*. *Bell* addressed challenges to a variety of prison procedures brought by pre-trial detainees at a short-term federal detention facility, including strip searches of detainees after contact visits. The Court emphasized the status of pretrial detainees, noting that "a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial." *Bell*, 441 U.S. at 1866. The Court further cautioned that "[a] detention facility is a unique place fraught with serious security dangers." *Id*. at 1884. Given the deference that must be provided to jail administrators, it is not surprising that the Court upheld the strip search policy which was reasonably limited to searching inmates after they had an opportunity to obtain contraband during contact visits.

The importance of taking into account the dangers inherent in a pre-trial detention facility and inmates held pending trial is highlighted in *Shain v. Ellison*, 273 F.3d 56 (2nd Cir. 2001). In *Shain*, a family court judge ordered the plaintiff held without bail following his arrest for a misdemeanor offense, harassment. Upon admission to the Nassau County Correctional Center (NCCC), Shain was strip searched in accordance with institutional policy. The court applied the standard for misdemeanor arrestees in evaluating the strip search. Using this standard, the court found that "it was clearly established in 1995 that persons charged with a misdemeanor and remanded to a local correctional facility like NCCC have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons." *Id*. at 66.

While the strip searches in *Bell* were upheld by the Supreme Court, it is not a per se validation of strip searches in a detention setting, or even of strip searches of pretrial detainees. *See Masters v. Crouch*, 872 F.2d 1248, 1252 (6th Cir. 1989)("*Bell v. Wolfish* did not give carte blanche approval to a practice of strip searching all pretrial detainees."); *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987). The plaintiff in *Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992), was also a pretrial detainee challenging a policy under which he was subjected to random strip searches. Unlike the plaintiffs in *Bell*, Covino was held in a state prison pending trial and intermingled with convicted inmates. The search policy was upheld under the deferential *Turner* standard for evaluating prison regulations. (This standard is discussed later in these materials, in the sections addressing the reasonableness standard applied in a prison setting.)

Thus, the constitutionality of strip searches of pretrial detainees is determined by a balancing of interests. The status of the pretrial detainee shifts the balance of interests, and the decisions of prison/jail administrators to strip search detainees is shown greater deference.

4. Former Inmates, Released After Court Proceedings

Once a person held pre-trial is freed from any pending criminal charges, he regains his full rights under the Fourth Amendment. As a result, if a prisoner who was held pending trial goes to court and is found not guilty, he may not be strip searched on his return to the jail to pick up his belongings. While this seems obvious, plaintiffs have brought suit to establish this right in several jurisdictions. *See Bynum v. District of Columbia*, 217 F.R.D. 43 (D.D.C. 2003)(class action challenging practice

of strip searching court returns after they have been ordered released); *Gary v. Sheahan*, 1998 WL 547116 (N.D. Ill. 1998).

5. Convicted Prisoners

Once a detainee has been convicted and sentenced, the required balancing of interests is weighted even more heavily in favor of the detention facility's security concerns. In *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), the court upheld a policy of strip searching inmates in the segregation unit of a state prison every time they left, or entered, the unit. The court compared the challenged search policy to that in *Bell*, and found even greater reasons to justify a search in the prison setting. If the *Bell* strip searches were constitutional, the court reasoned, the prison policy must also be constitutional given the additional justifications for the searches. Both search policies dealt with searches after inmates had an opportunity to acquire contraband in settings fraught with serious dangers. Additional factors justifying the searches in the prison setting included that the facility was a maximum security prison with the segregation unit holding only the most dangerous inmates and that there was a long history of contraband problems in the facility, including a documented history of guards smuggling in contraband. All of these factors made the prison's strip search policy reasonable and outweighed any invasion of the prisoners' privacy rights.

This result has been reached consistently by courts evaluating strip searches in the prison setting. *See Hay v. Waldron*, 834 F.2d 481 (5th Cir. 1988); *Goff v. Nix*, 803 F.2d 358 (8th Cir. 1986); *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988), *Thompson v. Souza*, 11 F.3d 694 (9th Cir. 1997). Strip searches of convicted prisoners should still meet the *Bell* requirements. Thus, strip searches designed to humiliate or intimidate prisoners can be unconstitutional.

6. Juveniles

Two circuit courts held that juveniles can be strip searched on arrest based on the doctrine of *in loco parentis*. *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir.2004). This was followed by the 8th Circuit in a case where the juvenile was only required to strip to her underwear. *Smook v. Minnehaha County* F.3d (8th Cir. 2006) reversing, 353 F.Supp.2d 1059, (D.S.D. 2005.) At least one district court disagreed with this analysis applying *Bell* to find such routine strip search unconstitutional. *Moyle v. County of Contra Costa*, 2007 WL 4287315 (N.D. Cal. 2007).

B. Cause to Support a Strip Search

1. Factors To Be Considered

The three broad categories typically considered when evaluating the reasonableness of a strip search are:

- the nature of the criminal charge
- the characteristics of the arrestee; and
- the circumstances of the arrest.

See Weber v. Dell, 804 F.2d 796 (2nd Cir. 1986); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 957 (6th Cir. 1987); *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996).

2. The Nature of the Criminal Charge

The nature of the crime charged is a factor in making a decision whether a detainee may be strip searched. Some courts have held that the charge alone provides reasonable suspicion to conduct a strip search.

a. The charge alone may be enough

The offense with which a detainee is charged plays a role in justifying a strip search of the detainee upon arrest or while awaiting bail. Decisions holding that the criminal charge alone supports a strip search are based on the view that the charge itself supplies the needed reasonable suspicion. *See Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986); *Dufrin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983). Interestingly, the concept that those charged with more serious crimes or crimes of violence are more likely to be carrying concealed contraband that could only be detected through a strip search is not supported by any scientific studies.

b. Traffic violations and minor offenses

Traffic violations and minor offenses normally preclude a strip search in the absence of individualized reasonable suspicion that the detainee is concealing contraband. The prevalence of this standard is reflected by the court's remarks in *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989), that "[t]he decisions of all the federal courts of appeals that have considered the issue reached the same conclusions: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband is unreasonable."

c. Drug charges

Because illegal drugs are often in small, easy-to-hide packages, strip searches are frequently conducted to search for drugs. The Tenth Circuit held that the fact that a person was arrested for a drug charge and is going to be placed in the general population provides reasonable suspicion to support a strip search. *See Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1434 (10th Cir. 1984), *vacated for reconsideration on other grounds*, 474 U.S. 805 (1985), *aff'd*, 796 F.2d 1307 (10th Cir.), *cert. denied*, 479 U.S. 884 (1986). In contrast, in the First Circuit, the fact that a detainee is charged with a drug offense is not, by itself, enough to justify a strip search. In *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997), the fact that Swain was alleged to have dropped a baggie of marijuana at the scene of the arrest was not enough to justify a strip search.

Swain holds that the justification for the search must be legitimate, rather than pretextual. Swain had been at the police station for some time before the decision was made to strip search her. During that time, she had been permitted to use the bathroom unsupervised and had been left unsupervised in a cell. According to the plaintiff, it was not until she refused to provide the police with information regarding her boyfriend that the officer strip searched her. The court held that there was a possibility that the strip search was conducted in retaliation for her non-cooperation. *Id*. at 8. A pre-textual justification does not provide the reasonable suspicion necessary to justify a strip search and, thus, any search based on such a premise is unconstitutional. *See also*, *Sarnicola v. County of Westchester*, 229 F.Supp.2d. 259 (S.D.N.Y. 2002)(holding that a drug-related arrest does not automatically justify a strip search). Similarly in *Doe v. Burnham*, 6 F.3d 476 (7th Cir. 1993) the court remanded for trial a claim of an unconstitutional strip search even though the officers claimed they thought the plaintiff had marijuana.

d. Crimes involving violence

A number of courts have found that crimes involving violence create a presumption that the detainee is concealing weapons or other contraband and create the reasonable suspicion necessary to justify a strip search. *See Dufrin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983). The court upheld a strip search of Ms. Dufrin because she was charged with a violent felony, assaulting her stepdaughter with a broom handle, and because she would

potentially be introduced into the general jail population. The court also found that the search had been conducted in a reasonable manner. The Sixth Circuit stated that it was not establishing a bright-line rule, but the opinion has been interpreted to permit strip searches of people charged with violent felonies.

Two oddities about *Dufrin* are worth mentioning. First, the assault at issue occurred two months before Dufrin was arrested, so the presumption arose from the nature of the charge itself. It had nothing to do with a close proximity between the crime and the arrest, which could suggest that the arrestee still possesses the weapon used in committing the crime. Secondly, although the court relied on the fact that the potential existed for Dufrin to mingle with the general jail population, she actually spent her time in a holding cell by herself. *See also*, *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 958–59 (6th Cir. 1987)(holding that "[m]enacing [a violent misdemeanor] is an offense that is associated with weapons, and may well raise reasonable suspicion on the part of jail officials that a person detained on that charge may be concealing weapons or other contraband").

A similar position is advocated in dicta in *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989). "It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates. There is an obvious threat to institutional security." *Id*. at 1255.

In an effort to establish a bright-line rule, many courts have permitted strip searches based on the title given a crime by the legislature. The theory is that people charged with "violent" offenses are more likely to have hidden weapons or contraband. However, the title of a criminal offense does not always tell whether a weapon was actually used, much less whether the person is likely to have anything hidden on or in his body. "Assault and battery with a dangerous weapon," for example, sounds like a violent crime involving a weapon that could justify a strip search. But, if the police report or criminal complaint describes the weapon as a "shod foot," the claim makes no sense, since a person who kicks someone while wearing a shoe is hardly more likely than anyone else to have hidden weapons. In *Durfin*, the plaintiff had threatened her stepdaughter with a broom handle. It is reasonable to assume that the case more likely involved a weapon

chosen based on its availability at the time, rather than a weapon used by a calculating person, who is likely to have hidden other weapons in her body cavities.

e. Misdemeanor/felony distinction

Some courts have held that the classification of a crime as a misdemeanor or a felony charge is not a significant factor in evaluating the reasonable suspicion necessary to justify a strip search. *Kennedy v. LAPD*, 901 F.2d 702 (9th Cir. 1990), is the first circuit court case to hold that a blanket policy of strip searching all felony arrestees is unreasonable. Kennedy was charged with grand theft for stealing her roommate's television. The court recognized that the classification of an offense as a felony offered little insight into the likelihood that the arrestee was concealing weapons or contraband. In assessing the constitutionality of the strip search, the court held, "[t]hat this case involves a felony arrest does not alter the level of cause required to justify a visual body cavity search." *Id*. at 716.

A number of district courts have likewise found that the classification of an offense does not provide reasonable suspicion. *See Murcia v. County of Orange*, 226 F.Supp.2d 489 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 154 F.Supp.2d 131, 143 (D. Mass. 2001); *Elliott v. Strafford County*, 2001 U.S. Dist. LEXIS 1246(D.N.H. 2001); *Tardiff v. Knox County*, F. Supp. 2d. (D.Me. 2005) For a scholarly discussion of using the felony/ misdemeanor distinction to justify strip searches, *see* Gabriel M. Helmer, Note, *Strip-Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L.Rev. 239 (2001).

3. The Characteristics of the Arrestee

a. Criminal History as a Basis for Reasonable Suspicion

The Fifth Circuit held that an eleven-year-old minor drug offense does not provide reasonable suspicion to support a strip search in *Watt v. City of Richardson Police Department*, 849 F.2d 195 (5th Cir. 1988). Ms. Watt was arrested on an outstanding warrant for failing to register her dog. She volunteered that she had been convicted of a minor drug offense eleven years earlier. The conviction had been expunged from her record. The city's policy required that any arrestee charged with drug, weapons or shoplifting offenses, or with a history of such charges, was to be

strip searched. Ms. Watt challenged the constitutionality of the strip search. The court recognized that strip searches of pre-trial detainees and convicted prisoners have been upheld as constitutional, but noted that searches of "minor offense arrestees, who would be detained pending the posting of bond, often for short periods of time, have been scrutinized much more closely." *Id*. at 197. The court ruled that justifying strip searches of arrestees based on prior criminal history can be reasonable. However, based on the facts presented by Ms. Watt's case, her strip search was unconstitutional. See also, *Burns v. Goodman*, 2001 WL 498231 (N.D.Tex.,2001) (an arrest for marijuana four months earlier could not justify a strip search since the defendants did not rely on the arrest at the time of the search). Since a balancing test is applied, the older the criminal charge, the less likely it could serve as a basis for a strip search. A better practice, as discussed below, is to rely on numerous characteristics of the arrestee, with criminal history being only one of those characteristics. See, *Nieves v. State*, 2003 WL 23004983 (Md.App.,2003) (Court refuses to allow strip searches on arrest for a minor offense when person had a prior drug offense two years earlier.

b. Individual Characteristics of Arrestees

Any individual characteristic of an arrestee may be considered and may help create reasonable suspicion. Factors that are considered include furtive gestures, gang affiliations, signs of recent intravenous drug use and, most importantly, previous attempts to bring contraband into a facility. No matter what the charge, individualized suspicion based on characteristics of the arrestee may support a strip search.

4. Circumstances of Arrest

Officials may have reasonable suspicion to strip search a detainee based on behavior observed during an arrest or processing. An example of this is seen in *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000), where the strip search of a DUI arrestee was upheld based on the presence of a handgun in her car at time of arrest. The Eleventh Circuit ruled that "this court holds that possession of a weapon by a detainee provides the reasonable suspicion necessary to authorize a strip search." *Id*. at 682. In other situations, a combination of circumstances have created reasonable suspicion. For example, in *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992), officers formed reasonable suspicion based on a variety

of circumstances, including: that the arrest took place in a parking lot, where it was suspected that drinking and drug activity regularly occurred; observation by an officer of one suspect handing something to the suspect strip searched; and the nervousness of the suspect strip searched.

If the circumstances existing at the time of the arrest are considered, should the fact that the arresting officers conducted a strip search at the police station be considered when the prisoner is brought to the holding facility while waiting for court? In other words, if the arresting officers have already conducted a constitutional strip search, can the holding facility officials conduct a subsequent strip search on the same basis? This question has yet to be decided.

5. Contact with Outsiders

Bell held that a strip search of pre-trial detainees in federal detention after a contact visit was reasonable because of the danger that contraband could be introduced into the facility. Since *Bell*, courts have generally held that strip searches after contact visits or other contact with outsiders is reasonable. See, *Wood v. Hancock County Sheriff's Department*, 354 F.3d 57,68-69 (1st. Cir. 2003) ("The widely acknowledged risk posed by contact visits furnishes sufficient suspicion to justify a blanket policy." Under *Bell*, "except in atypical circumstances, a blanket policy of strip searching inmates after contact visits is constitutional.") *Elliott v. Strafford County*, 2001 WL 274827 (N.H. 20001)(dismissing claims for strip searches after contact visits and court appearances.). If the strip search policy after contact visits is not applied uniformly or if the strip search is used for the purpose of harassment, it would be unconstitutional.

6. Stripping Inmates Naked for Suicide Prevention or Prevention of Rowdiness

It is unconstitutional under *Bell* to strip detainees naked and leave them naked in a cell for refusing to answer intake questions asking whether or not they feel suicidal. *Wilson v. City of Kalamazoo*, 127 F.Supp.2d 855 (W.D. Mich. 2000). However, the same court held that placing inmates who refused to answer if they were suicidal in a cell clad only in their underwear is constitutional. *Johnson v. City of Kalamazoo*, 124 F.Supp.2d 1099, 1106 (W.D. Mich. 2000). Similarly, placing detainees naked in administrative segregation as punishment for rowdy and disruptive behavior during booking is unconstitutional. *Rose v. Saginaw County*, 353 F.Supp.2d 900 (E.D. Mich. 2005).

Complete nudity has been found acceptable by some courts in certain situations. See *McMahon v. Beard*, 583 F.2d 172, 175 (5th Cir. 1978) (finding permissible the confinement of prisoner completely naked in a cell where prisoner had previously attempted to commit suicide by hanging but was cut down by jailers, and had threatened future self harm).

D. Reasonable Manner

1. No Touching by the Officer

Many courts upholding challenged strip searches of all classes of prisoners have mentioned favorably the fact that the search was visual only, with the searching official never touching the detainee. *See Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988)("The searches are conducted on convicted prisoners in [the] most restrictive unit, and are visual only, involving no touching."); *Stanley v. Henson*, 337 F.3d 961, 965 (7th Cir. 2003)("[She] was not touched during the search."); *Dufrin v. Spreen*, 712 F.2d 1084, 1089 (6th Cir. 1983)("[T]he search actually conducted was visual only."); *Fernandez v. Rapone*, 926 F.Supp. 255, 262 (D. Mass. 1996)("[N]or were the prisoners touched during the searches, which lasted only minutes.").

Inappropriate touching of the detainee resulted in a search being held unconstitutional in *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001). Amaechi was searched incident to arrest on the street in front of her house before she was placed in the patrol car. She was wearing a light house dress that had no buttons below the chest, leaving her exposed from the chest down. She alleged that the officer touched her skin with his hand, penetrated her genitalia and kneaded her buttocks during a pat search. The officer claimed the "right to conduct a full search of the person under *Robinson* includes the right to briefly 'swipe' the arrestee's outer genitalia and slightly penetrate the genitalia." The court allowed the plaintiff's claim to go to trial.

Touching by medical personnel is treated differently. For example, in *Skurstenis v Jones*, 236 F.3d 678 (11th Cir. 2000), the court held that it was appropriate for an opposite gender nurse's assistant to touch Skurstenis, by running his fingers through her head and pubic hair, as he examined her for lice.

2. Limits on Instructing the Person to Touch Himself

Basic touching to help facilitate the search has not gone unchallenged. In this category of instructions are orders to open the mouth, move the

tongue, run the hands through hair, splay fingers, bend over and spread the buttocks, lift arms and/or legs, lift and/or move genitals or breasts, and squat and cough.

As with all features of strip searches, such instructions are subject to the test for reasonableness. Instructions that are reasonable in the context of facilitating the search by allowing the officer to conduct the search without having to touch the inmate, are permissible. These would include instructions to open the mouth, move the tongue, raise the arms, and so forth. Instructions that are intended purely to humiliate or embarrass or those which serve no legitimate penological purpose are likely unreasonable. So, for example, ordering an inmate to probe her own body cavities, is likely to be held to be unreasonable. Such an instruction would serve no purpose, since an arrestee who had drugs hidden in a body cavity would be unlikely to report this finding to the authorities.

3. Derogatory Comments

Officers conducting strip searches, regardless of the type of facility or status of the detainee, should conduct themselves professionally. This includes refraining from the use of derogatory or abusive language. This tenet appears in almost all written policies governing how a strip search is to be conducted. In practice, these policies are not always adhered to.

Verbal abuse alone will not give rise to a constitutional claim. In examining a claim of qualified immunity involving the use of abusive language during a strip search, the Eleventh Circuit reviewed cases dealing with verbal abuse, including cases from the First, Fifth, Eighth and Eleventh Circuits, and concluded that, "[i]n light of this case law treating verbal abuse, even vile language and racial epithets, as insufficient to constitute a constitutional violation, we cannot conclude that it was clearly established that [the searching officer's] taunts and threats of prison rape might so exacerbate the intrusiveness of the strip search as to violate the appellees' constitutional rights." *See Evans v. City of Zebulon*, 351 F.3d 485, 495 (11th Cir. 2003), vacated for reh'g en banc, 2003 WL 23351898 (11th Cir. March 31, 2004).

4. No More People than Necessary

To insure that a strip search is no more humiliating and demeaning than necessary, only those officers required to safely and effectively carry out the search should be present. The presence of additional officers or others may violate the Fourth Amendment. A number of cases comment on the presence, or absence, of unnecessary personnel during a strip search. For

example, one of the factors mentioned by the Tenth Circuit in *Hill* in finding the search at issue unconstitutional, was the fact that it took place in a public area where 10 to 12 people were milling about. *See Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). Similarly, in *Abshire v. Wells*, 830 F.2d 1277, 1280 (4th Cir. 1987), the court pointed to the presence of "six to eight police officers – five who were in the room with [the detainee] and several others, including a female officer, who witnessed the search while standing in the adjacent hallway," as one of the factors that properly made the reasonableness of the search at issue a jury question.

The absence of excess personnel is often cited as demonstrating the reasonableness of a particular strip search. *See Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983); *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003)(the presence of a single same-sex officer listed as a factor in finding the search was minimally intrusive). *See also, Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992)(holding that, even though two officers were present for a strip search of the juvenile, the search was conducted in the least intrusive manner possible).

5. Strip Search By Opposite Sex Officer

The fact that a detainee is searched by a same sex officer is often cited as one factor rendering a search reasonable. *See Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992)(noting approvingly that the search was conducted by two officers of the same sex); *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003); *Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983). A strip search by an opposite sex officer is unreasonable, unless it was unavoidable due to emergency conditions.

In *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994), a convicted prisoner sued seeking damages and injunctive relief, alleging that female guards strip searched him during a shakedown of his housing unit and regularly observed male inmates while they slept, showered and dressed. The Seventh Circuit reversed dismissal of the complaint, ruling that it was possible for the plaintiff to state a claim for relief on these facts. In *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997), the Ninth Circuit evaluated a claim of qualified immunity for female prison guards who regularly conducted non-emergency strip searches on a male inmate in violation of prison policy. The court held that, as of October 1993, when the searches occurred, there was no clearly established right of a male inmate to be free of opposite gender strip searches.

In an emergency situation, presence of an opposite sex officer is likely to be reasonable under the Fourth Amendment. For example, it is reasonable to have male officers assist in transferring a naked and unruly female detainee, who is a danger to herself. Once that inmate has been transferred and restrained, however, it would be unreasonable to continue to allow male officers to view her naked body. *See Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002).

6. Videotaping a Strip Search

Videotaping of strip searches is occasionally mentioned, although no reported cases directly address the constitutionality of the practice. Cameras at jails are usually said to be either switched off or covered when a strip search is occurring in the room. *See Swain v. Spinney*, 117 F.3d 1, 4 (1st Cir. 1997). The majority of taped searches occur in the prison setting, either for training purposes or when the search takes place as part of a confrontation with the inmate, e.g., when a response team is sent in to compel a prisoner to comply with instructions or to remove him from his cell. In this circumstance, the entire process is taped, not just the search. If taping the strip search of a prisoner serves a legitimate security interest, courts allow the taping. For example, in *Hayes v. Marriot*, 70 F.3d 1144, 1148 (10th Cir. 1996), the court concluded that "[w]e certainly agree with the prison officials that legitimate security interests, as well as other interests, may support the videotaping of prisoner searches." Searches that are taped for illegitimate reasons, such as humiliating or punishing a prisoner, would be unconstitutional. Videotaping presents a danger for administrators because liability may arise if the tapes are misused. Because this is a severe invasion of privacy, such tapes must be properly secured.

E. Reasonable Place

A detainee should only be strip searched in a location that allows the detainee the maximum amount of privacy, thus minimizing embarrassment, while still allowing the search to be conducted safely and efficiently. This principle was reflected nearly twenty years ago in *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985). Jones was strip searched at the jail in a sheltered alcove off of a hallway, without a screen. The court advised that, "although the location of the search did not expose Jones to the scrutiny of other jailers or passersby, this degree of privacy seems to have been entirely fortuitous; we suggest that where legitimate security concerns justify this kind of search, jail officials should take precautions to insure that the detainee's privacy is protected from exposure to others unconnected to the search." *Id*. at 742. One way to protect a prisoner's privacy

during a strip search is a privacy screen. This is used in Cook County. *Bullock v. Sheahan,* --- F.Supp.2d ----, 2008 WL 2931606 (N.D.Ill.).

Requiring that a strip search be conducted in a reasonable place helps to protect the privacy concerns previously addressed.

1. Outside

An obvious example of an unreasonable place to conduct a strip search is on the side of a road. In *Starks v. City of Minneapolis*, 6 F.Supp.2d 1084 (D. Minn. 1998), police officers searched a drug suspect by the side of the road, only three to five minutes away from the police station. This was held to be an unreasonable place. In ruling on the issue of qualified immunity for the searching officer, the court held that "a reasonable police officer would not be justified in assuming an on-street strip search was within the constitutional boundaries defined by the Fourth and Fourteenth Amendments of the United States Constitution." *Id*. at 1088. The court remarked that it was difficult to find case law explaining that a public strip search is inappropriate because the principle is so self-evident, such searches simply do not take place.

In *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001), an officer searched the plaintiff on the street in front of her house. The court found this to be unreasonable because she could be viewed by her "family, the public, and the officers." *Id*. at 361. Even if an officer has reasonable suspicion to conduct a strip search, the search will be unconstitutional if it takes place outside, where the person could be viewed by others.

2. In a Police Vehicle

Strip searching a suspect in a drug bust in a police van was upheld in *United States v. Dorlouis*, 107 F.3d 248 (4th Cir. 1997). Police were searching for marked currency used to purchase drugs from the suspect earlier in the day. The court concluded that "the search in question was not an unconstitutional strip search. The search did not occur on the street subject to public viewing but took place in the privacy of the police van." *Id*. at 256. Obviously it is important that the vehicle was private. A police car would be inappropriate because the person being searched could be viewed through the windows.

3. Rooms with a View

Strip searches should not be conducted in rooms that allow the naked detainee to be seen by those outside the room. The door to a strip search room should be closed and any windows should be covered. *Logan v.*

Shealy, 660 F.2d 1007 (4th Cir. 1981), demonstrates this premise. Logan was searched in a holding cell off of the booking area, in which she claimed the blinds were either broken or not closed. In discussing the officer's claim of qualified immunity at this early date, the Fourth Circuit stated, "we think that, as a matter of law, no police officer in this day and time could reasonably believe that conducting a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search is a constitutionally valid governmental 'invasion of (the) personal rights that (such a) search entails.'" *Id*. at 1014 (citation omitted). *See also*, *Iskander v. Village of Forest Park*, 690 F.2d 126, 129 (7th Cir. 1982). The Massachusetts Appeals Court held that even for convicted prisoners "a strip search conducted in nonprivate areas viewed by nonessential persons (particularly of the opposite sex), violate the Fourth Amendment to the United States Constitution unless justified by legitimate penological interests." *Sabree v. Conley*, 62 Mass. App. Ct. 901 (2004).

4. Group Strip Searches

Since strip searches should be conducted in a manner that minimizes the embarrassment and humiliation of the detainee being searched, detainees should not be strip searched in groups. *See Gary v. Sheahan*, 1998 WL 547116 (N.D. Ill. Aug. 20, 1998)(female inmates returning from court ordered to spread out in a line for strip searches without any privacy).

F. Strip Searches of Convicted Prisoners

The balancing of interests required by *Bell* is heavily weighted in favor of prison administrators when evaluating strip searches in a prison setting. Remember that the typical prison inmate is a convicted, sentenced offender.

Most courts reason that since the strip searching of pretrial detainees was upheld by the *Bell* Court, then the strip searching of convicted inmates serving sentences in prison should likewise be upheld. The rationale for deferring to administrators' expertise in *Bell* is more compelling when dealing with convicted prisoners; a prison is at least as dangerous a setting as a short-term detention center and the dangers of contraband being smuggled into the facility are likewise at least as serious. As the Seventh Circuit said, "given the considerable deference prison officials enjoy to run their institutions it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment." *Peckham v. Wisconsin Department of Corrections*, 141 F.3d 694 (7th Cir. 1998).

In *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), *cert. denied*, 464 U.S. 999 (1983), the plaintiff was an inmate in the segregation unit of a maximum security facility with a history of contraband problems. He challenged the legality of a prison regulation requiring inmates in the segregation unit to be strip searched every time they left the unit. The court upheld the policy, reasoning that if contraband concerns in *Bell* justified strip searching pretrial detainees after contact visits, the justification in *Arruda* was even more compelling. Given the dangerousness of the inmates held in the segregation unit and the history of contraband problems experienced by the facility, "these searches [were] more, not less, reasonable than those in Wolfish." *Id*. at 887. The court reasoned that, leaving the tier presented an opportunity for inmates in the segregation unit to acquire contraband and, thus, strip searches were justified to prevent the introduction of weapons or other contraband into the segregation unit.

Courts have affirmed strip searches of convicted prisoners in groups in some circumstances. *Fernandez v. Rapone*, 926 F.Supp.255 (D.Mass. 1996), involved a challenge by state prisoners to a policy of strip searching inmates in groups of up to ten prisoners following contact visits. A provision in the policy provided that an inmate could opt out of the group strip search and insist on being searched individually. The court upheld the searches, ruling that "the fact that plaintiffs were often searched in the presence of other inmates being searched does not render the searches unreasonable." *Id*. at 262.

There have been situations where a strip search policy has been struck down due to abuse during the search. In *Hurley v. Ward*, 584 F.2d 609 (2nd Cir. 1978), an inmate housed in the special housing unit of the state prison refused to comply with portions of the facility's strip search policy and was forcibly searched on several occasions as a result. These forcible searches included verbal abuse. The court upheld a preliminary injunction barring searching Hurley in this manner, stating "it is clear to us that here also the gross violation of personal privacy involved in the anal/genital searches of Hurley especially in view of the physical and verbal abuse incident to the procedure far outweighed the evidence adduced by the State at the preliminary hearing to justify the searches as a prison security measure." *Id*. at 611. The specific physical and verbal abuse referred to by the court is not contained in the record, so it is impossible to know what the threshold is, or if verbal abuse alone could rise to a level at which the court would find a search unreasonable.

A similar case challenging strip searches of state prisoners in a location exposing them to viewing by other inmates is *Franklin v. Lockhart*, 883 F.2d 654 (8th Cir. 1989). *Franklin* addressed the reasonableness of searches of groups of inmates as they returned to the barracks. Inmates were returned four at-a-time and were

brought just inside the barracks to be strip searched. The location of the searches exposed the nude inmates to observation by other inmates already inside the barracks. The search policy was upheld based on security concerns of the prison, which had insisted that conducting the searches in this way was necessary to insure safety.

A different standard applies in emergency situations, for example, following a riot or other disturbance. *See Elliot v. Lynn*, 38 F.3d 188 (5th Cir. 1994)(upholding the strip searching of inmates in the most efficient way possible when the prison was in a state of emergency).

Turner v. Safley, 482 U.S. 78 (1987), established a deferential standard of review for prison regulations. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

The Court provided four factors to guide lower courts in the application of this rule:

1) Is there a rational relationship between the regulation and alleged governmental interest?
2) Is there an alternative means of exercising the right? (Note that this factor is not applicable in the strip search context.)
3) What impact would the accommodation of the asserted right have on prison guards, inmates and other prison resources?
4) Does the absence of alternatives provide evidence of the reasonableness of the policy?

In the prison setting, a strip search policy that serves a legitimate penological purpose outweighs the invasion of a prisoner's privacy rights.

> However, "not all strip search procedures will be reasonable; some could be excessive, vindictive, harassing or unrelated to any legitimate penological interest." *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988). A search carried out for any of the reasons mentioned above would lack a valid penological interest and thus, would fail the test set forth in *Turner v. Safley*, 482 U.S. 78 (1987). The Massachusetts Appeals Court held that "a strip search conducted in nonprivate areas viewed by nonessential persons (particularly of the opposite sex), violate the Fourth Amendment to the United States Constitution unless justified by legitimate penological interests." *Sabree v. Conley*, 62 Mass. App. Ct. 901 (2004).

Despite this limitation, most strip searches in a prison setting are upheld as serving a legitimate penological interest. Examples include rulings that:

- Strip searching inmates in the administrative segregation unit of a maximum security prison every time they leave their cells is rationally related to the penological interest of maintaining internal security. *See Rickman v. Avaniti*, 854 F.2d 327 (9th Cir. 1988).

- Strip searching inmates in maximum security every time they leave their tier, even when the search is conducted in view of other inmates and extraneous opposite gender correctional officers, is reasonably related to a legitimate penological interest. *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988).

- *Williams v. Price*, 25 F.Supp.2d 605 (W.D.Pa.,1997). The strip search of convicted prisoners after a non-contact visit was upheld under *Turner*.

- The strip search of an inmate during a search for drugs in the institution based on the fact that the inmate shared a cell with an inmate who had a history of drug use while in prison was upheld. *See Thompson v. Souza*, 111 F.3d 694 (9th Cir. 1997).

- The strip search of a pretrial detainee being held at the prison and commingled with sentenced inmates, pursuant to a policy where each night two cells were randomly selected for search, including strip searches of the inmates in the cells in order to help control contraband at the facility was upheld. *See Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992).

G. Physical Body Cavity Searches

Physical body cavity inspections of non-convicted prisoners should be conducted when there is probable cause. They should be conducted by medical personnel. For a physical examination of the body cavity of a prisoner, the facility needs reasonable suspicion and a valid penological need for the search. *Vaughan v. Ricketts*, 950 F.2d 1464, 1469 (9th Cir. 1991); *Tribble v. Gardner*, 860 F.2d 321,325 (9th Cir. 1988). Such a search must be conducted in a reasonable manner. *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986).

H. Equal Protection

The equal protection clause has been held to require that strip search policies be applied equally to men and women. There have been a number of cases where blanket strip searches were conducted on women, but not to men in similar circumstances. Courts have consistently found such practices unconstitutional.

The leading case is *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983). Starting in 1952, Chicago had a policy of conducting strip and visual body cavity searches of every woman who was arrested, but not of men. Four women arrested for minor offenses challenged Chicago's policy of subjecting all female detainees to a strip and visual body cavity search, while similarly situated male detainees were only thoroughly hand searched. In analyzing the city's policy, the court stated, "the party seeking to uphold a policy that expressly discriminates on the basis of gender must carry the burden of showing an exceedingly persuasive justification for the differing treatment. The burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id*. at 1273–74 (citations omitted). Attempting to justify the disparate treatment, the city claimed that the strip searches were necessary due to women's ability to conceal weapons in the vaginal cavities. The court rejected this justification, pointing to the fact that men were also able to conceal contraband in their anal cavities, and that the city produced no evidence to show that women were more likely to conceal contraband in their body cavities than men.

In another case from Illinois, *Gary v. Sheahan*, 1998 WL 547116 (N.D. Ill. Aug. 20, 1998), female court returns were strip searched while male court returns were not. The defendant's policies required a strip search of men and women, but men were not strip searched because there were too many of them. This practice was held unconstitutional. Ironically the same county was sued again when it stopped strip searching women but sent male court returns to their housing units while waiting to be released and thus strip searched all of the male court returns. *Bullock v. Sheahan,* --- F.Supp.2d ----, 2008 WL 2931606 (N.D.Ill.). Similarly, in *Ford v. City of Boston*, 154 F.Supp.2d 131 (D. Mass. 2001), the city was found to be violating the equal protection clause by sending female arrestees to jail, where they were routinely strip searched, while male arrestees were held in city lock-ups, where they were not strip searched. The city did not have an important governmental objective that this policy was substantially related to achieving. *See also, Wilson v. Shelby County Alabama*, 95 F.Supp.2d 1258, 1264, n.3 (N.D. Ala. 2000).

I. Effectiveness of Intake Strip Searches

The statistics cited in the case law indicate that strip searches of newly admitted detainees only rarely discover contraband. In *Dodge v. County of Orange*, 209

F.R.D. 65 (S.D.N.Y. 2002), jail records submitted to the court covering a fifty-month period encompassing the admission of approximately 23,000 inmates, showed only five incidences where contraband was discovered in the body cavity or undergarments of a detainee. Of those five incidents, the judge determined that "there may have been reasonable suspicion to strip search four of these five detainees, based upon either the nature of the offense or the characteristics of the detainee." *Id.* at 70. Thus, in the absence of the blanket strip search policy, if the correct reasonable suspicion standard had instead been employed, there was one instance in the processing of 23,000 detainees where contraband would have entered the facility. These numbers are consistent with what other courts have reported. See, *Bull v. City and County of San Francisco*, 2006 WL 449148 (N.D.Cal.) *affirmed in part,* 539 F.3d 1193 (9th Cir. 2008).

Statistics examined in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), showed nine incidences of contraband discovered in 1800 searches over a two-month period. Other cases support a very low incidence of "hits." *See Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984)(only 11 persons out of 3,500 searched had concealed anything warranting a report); *John Does 1-100 v. Boyd*, 613 F. Supp. 1514 (D. Minn. 1985)(13 incident reports of contraband over an 11-year period and all of the items were found in clothing, not through a strip search); *Shain v. Ellision*, 1999 U.S. Dist. Lexis 8401 (June 1, 1999)(over a two-year period, with approximately 14,000 inmates admitted per year, there were six instances in which a weapon was discovered during the intake strip search and eight instances where drugs were discovered).

J. Qualified Immunity for Strip Searches

When considering qualified immunity, courts are challenged to strike a balance between protecting the public's constitutional rights and affording governmental officials the protection to reasonably react in confrontational situations without fear of subsequent individual liability. The fundamental justification for the defense of qualified immunity is that public officials performing discretionary functions should be free to act without fear of punitive litigation except when they can fairly anticipate that their conduct will expose them to liability. *See Davis v. Scherer*, 468 U.S. 183 (1984).

The Supreme Court established the standards for qualified immunity over two decades ago in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) stating,:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

> constitutional rights of which a reasonable person would have known . . . .

The standard of inquiry is an objective one and the inquiry into the reasonableness of a governmental official's conduct should focus on the discernable case law at the time of the alleged occurrence. *See Savard v. Rhode Island*, 338 F. 3d 23, 27 (1st Cir. 2003). The law governing strip-searches has changed significantly over the last thirty years. For example, the First Circuit case of *Swain v. Spinney*, 117 F 3d 1 (1st Cir. 1997), stands for the proposition that strip and visual body cavity searches cannot be conducted without individualized reason to suspect that a person is harboring weapons or contraband. Prior to *Swain*, a review of relevant case law in the First Circuit could have allowed a reasonable person in a position of authority over persons in custody to believe that a routine strip search policy was within constitutional boundaries.

Qualified immunity is generally granted and the defendant shielded from liability if the defendant did not violate plaintiff's constitutional rights or if there is no Supreme Court or relevant circuit court case law clearly establishing the plaintiff's right at the time of the event in controversy. *Harlow*, 457 U.S. at 818. However, a public official's hands-off approach to his job does not absolve him of the responsibility for unconstitutional policies developed and promulgated by his underlings. *See Ford*, 154 F.Supp.2d at 146. The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). In the absence of a constitutional violation, the need for further analysis is over. Generally, courts will decline to consider whether the right was clearly established before granting qualified immunity and releasing the defendant from liability on this issue.

Even if a plaintiff's rights are violated, defendants will be entitled to qualified immunity if an objectively reasonable officer in the defendant's position could argue that the action taken was within the boundaries of permissible behavior under existing law. *Harlow*, 457 U.S. at 818. For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). This is a purely objective standard; the defendant's subjective intent is irrelevant.

The theory of qualified immunity is that if a public official is to be punished by the imposition of damages against him personally, the punishment must be for violating some clear, legal duty he plainly already had at the time of the event. *See Hope*, 536 U.S. at 737. He should not be punished for violating what is, in

effect, some new legal duty recognized or announced by the judge and jury in the official's trial. Preexisting case law that is materially similar to the circumstances facing an official, when the specific current circumstances are enough like the facts in the prior precedent, might make a difference to the conclusion about whether the official's conduct was lawful or unlawful, in light of the precedent. *See id*., at 744.

Officers are protected by qualified immunity from 42 U.S.C.A. §1983 claims unless a constitutional violation occurred; a reasonable officer similarly situated would have known the right was clearly established; and, the officer acted objectively unreasonable in light of the clearly established constitutional right.

One area where an officer might successfully claim a qualified immunity defense in the area of strip searches is routine strip searches of felony arrestees. Most of the case law on strip searches of arrestees has involved individuals charged with minor offenses. The Ninth Circuit in *Kennedy v. LAPD*, 901 F.2d 702 (9th Cir. 1990) and district courts in *Murcia v. County of Orange*, 226 F.Supp.2d 489 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 154 F.Supp.2d 131, 143 (D. Mass. 2001); *Elliott v. Strafford County*, 2001 U.S. Dist. LEXIS 1246 (D.N.H. 2001) have held that a blanket policy of strip searching all felony arrestees is unreasonable, an officer, in a different jurisdiction could argue that law was not so clearly established at the time that his actions could be found to be objectively unreasonable. If successful, he would be entitled to qualified immunity for his actions.

K. Class Action Challenges to Strip Search Policies

Most courts that have considered whether a class action is appropriate in strip search cases have certified the class where plaintiffs are challenging a policy or custom of conducting strip searches of pre-arraignment detainees without evaluating for reasonable suspicion. *See, Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004) (April 9, 2004); *Eddleman v. Jefferson County*, 96 F.3d 1448 (Table), 1996 WL 495013 (6th Cir. 1996); *Johnson v. District of Columbia*, 248 F.R.D. 46, (D.D.C. 2008); *Blihovde v. St. Croix County*, 219 F.R.D. 607 (W.D. Wisc. 2003); *Bynum v. District of Columbia*, 217 F.R.D. 27 (D.D.C. 2003); *Maneely v. City of Newburgh*, 208 F.R.D. 69 (S.D.N.Y. 2002); *Dodge v. County of Orange*, 209 F.R.D. 65 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000); *Doe v. Calumet City*, 754 F.Supp. 1211 (N.D. Ill. 1990); *Smith v. Montgomery County*, 573 F.Supp. 604 (D. Md. 1983). However, a few courts have disagreed. *See Klein v. DuPage County*, 119 F.R.D. 29 (N.D. Ill. 1988); *Bledsoe v. Combs*, 2000 WL 681094 (S.D. Ind. 2000); *Augustin v. Jablonsky*, 2001 WL 770839 (E.D.N.Y. March 8, 2001); *Rattray v. Woodbury County, Iowa*, --- F.Supp.2d ----, 2008 WL 4099880 (N.D.Iowa 2008). Most of

the cases in which a class was certified, involved damages class actions under Federal Rule of Civil Procedure 23(b)(3). Some were certified for injunctive relief under (b)(2) only, or for both damages and injunctive relief.

L. Damages for Unlawful Strip Searches

Most strip search cases involve visual searches without any touching by the correctional officer. Some cases have resulted in large verdicts, particularly when the plaintiff was arrested on a minor charge or a warrant for a minor offense that had been recalled, and was subjected to a search that was not private. Some of these plaintiffs have had significant psychological trauma as a result of the search. *See Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985)(plaintiff who suffered depression, sexual dysfunction and post traumatic stress disorder, awarded $177,040 for three manual body cavity searches). In *Martinez v. Tully*,1994 U.S. Dist. LEXIS 20935 (E.D. Ca. 1994), four women arrested for disturbance of a public assembly and other offenses, including one woman who was charged with assault with a deadly weapon, an egg, which could be a misdemeanor or a felony, received verdicts of $175,000 in compensatory damages for three of the women, and $225,000 for the remaining woman, who was menstruating at the time of the search.

Levka v. City of Chicago, 748 F 2d 421 (7th Cir. 1984), reviewed strip search cases with judgments ranging from $112,000 to $3,300 (the $112,000 judgment was reduced by the district court to $75,000). In *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir. 2001), a jury awarded $65,000 for an unlawful 2 ½ hour detention and strip search. The plaintiff in *Watt v. Richardson*, 849 F.2d 195 (5th Cir. 1988) was awarded $20,000 in compensatory damages. She had been strip searched following her arrest on a warrant for failing to register her dog and was searched based on an 11 year-old drug conviction. In *Abshire v. Wallis*, 830 F.2d 1277 (4th Cir. 1987), the plaintiff received a total award of $7000 based on his unconstitutional strip search following his arrest for disorderly conduct. In contrast, the plaintiff in *Foote v. Spiegel*, 2001 U.S. App. LEXIS 2405 (10th Cir. 2001), was awarded only $1.00 and, in *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985), one plaintiff received only $1.00, while the other received $15,000.

M. The Effect of the PLRA on strip search litigation

The Prison Litigation Reform Act (PLRA) prevents damage suits for unconstitutional visual strip searches from being filed by current inmates because the act requires a physical injury to file suit. 42 U.S.C. Sec. 1997e(e). However, the PLRA does not apply to cases brought by people who are not incarcerated when the suit is filed. *See Doan v. Watson*, 168 F.Supp.2d 932 (S.D. Ind. 2001), and *Kerr v. Puckett*, 138 F.3d 321 (7th Cir.1998), C*f, Milledge v. McCall*, 2002

WL 1608449 (10th Cir. July 22, 2002) (prisoner cannot bring a strip search claim while confined under the PLRA). One reason strip search cases are filed for people who were temporary detainees is because they were only in custody for a short time so they can file after release.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARIE DOE, a minor, through her mother and Next Friend, MELBA DOE, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

No. C-04-4914 MJJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS CITY AND COUNTY OF SAN FRANCISCO, JUVENILE PROBATION DEPARTMENT, AND TIM DIESTEL'S MOTION TO DISMISS PURSUANT TO F.R.CIV.P. 12(b)(6)

Date: March 15, 2005
Time: 9:30 a.m.
Place: Courtroom 11, 19th Floor

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INTRODUCTION

This civil rights class action arises out of Defendants' unconstitutional policy of subjecting every child who is detained at San Francisco's Juvenile Hall to strip searches, urine tests, and other medical tests and procedures, regardless of whether there is any reasonable suspicion that the child is concealing weapons, drugs or other contraband.

Defendants' policy requiring these suspicionless strip searches and tests flies in the face of the U.S. and California constitutions, years of case law, California statutes, and basic dignity.

Plaintiff Marie Doe brings this case on behalf of herself and other similarly situated individuals for damages, injunctive and declaratory relief. Plaintiff, a 12-year-old girl, was falsely arrested on a legally invalid charge and taken to Juvenile Hall. There, she was subjected to a visual strip search during a shower, and later a "squat and cough" strip search, in addition to nonconsensual urine and blood testing, and inquiries about her sexual history.

At no time was there any suspicion that Plaintiff was hiding weapons, drugs, or other contraband, and there was never any legal basis for any of these searches or inquiries. Rather, Plaintiff was strip searched pursuant to Defendants' blanket policy of strip searching all children who are detained at Juvenile Hall, regardless of whether there is any justification for the search.

Three Defendants – the City and County of San Francisco, the Juvenile Probation Department, and Director of Juvenile Hall Tim Diestel – have now filed a motion to dismiss.[1] The motion of these three Defendants [hereafter "Defendants' motion"] must be denied.

STATEMENT OF FACTS

At all relevant times, Plaintiff Marie Doe was a 12-year-old girl and a student at Luther Burbank Middle School. Complaint ¶ 18.[2] On October 21, 2003, a male student kicked Plaintiff

[1] The remaining Defendants have neither filed an answer nor joined in this motion.

[2] All references to the Complaint will be by paragraph number only, e.g. "¶ 19."

and engaged in horseplay at school with Plaintiff and another female student. The other female student allegedly brought the male student to the ground and kneed him in the stomach. **¶ 19.**

The male student later claimed that he sustained a temporary, non-incapacitating stomachache that did not require medical treatment. There was no evidence or allegation that Plaintiff caused any injury to the male student or to anyone else in that incident. **¶¶ 20-21**.

The school administration reported the incident to the San Francisco Police approximately one week after the incident, on October 28, 2003. The next day, on October 29, the school administration provided statements from Plaintiff Marie Doe and the two other students involved in the horseplay incident that had taken place eight days earlier to Defendants CCSF and Police Officer Jacqueline Selinger**. ¶¶ 22-23.**

Defendant Selinger interrogated Marie Doe and the other students, without the knowledge, presence, or consent of their parents. **¶ 24.**

Defendant Selinger and other officers decided to arrest Marie Doe and the other female student for violation of Cal. Penal Code § 245(a)(1), alleging the factual basis for the charge against Plaintiff as "assault with a deadly weapon (feet)." Defendants then decided to incarcerate Marie Doe at Juvenile Hall. **¶¶ 25-26.**

Defendants performed a thorough physical search of Marie Doe at the school, including searching her bra, before removing her from the school premises. **¶ 27.** This search revealed no weapons, drugs, or other contraband.

At no time prior to Defendants' interrogation, arrest, search, and removal of the students from school premises did any Defendant or school official contact Plaintiff's mother. **¶ 28.**

After Defendants took Plaintiff to Defendants' "Youth Guidance Center" (Juvenile Hall), Defendant Selinger contacted Plaintiff's mother, Melba Doe, for the first time and informed her that Marie had been arrested and taken to Juvenile Hall for "assault with a deadly weapon." **¶ 29.**

At Juvenile Hall, Defendants booked Marie Doe into custody for alleged "assault with a deadly weapon (feet)" under California Penal Code § 245(a)(1). **¶ 30.**

Any reasonable law enforcement officer would have known at that time that there was no legal basis for Marie Doe's arrest or incarceration under these circumstances. Among other things, the law was clearly established that a person's feet, or any part of a person's body, as a matter of law cannot constitute a "deadly weapon" under Cal. Penal Code § 245(a)(1). **¶ 31**; *See,* People v. Aguilar, 16 Cal. 4th 1023, 68 Cal. Rptr. 2d 655 (1997).

Nonetheless, Defendants booked Marie Doe, photographed and fingerprinted her, ordered her to take a shower, took her clothes and gave her jail clothes to wear. On information and belief, during Plaintiff's shower, Doe Defendants conducted a visual strip search of Plaintiff. **¶ 32.**

A probation employee took blood and urine samples from Marie Doe, interrogated her about her sexual history, and conducted other non-consensual medical testing on her. **¶ 33.**

Defendants allowed Marie Doe to see her mother for a supervised visit in the early evening on October 29, 2003. **¶ 35.** After Marie's visit with her mother, a Doe Defendant who is employed by these Defendants ordered Plaintiff to pull her pants and underpants down to reveal her naked genital area, and to squat and cough. Marie complied with that order. **¶ 36.**

At all times, Plaintiff had no drugs, weapons, or other contraband. At all times, no Defendant had any evidence, reasonable suspicion, or reason to believe that Plaintiff was hiding any drugs, weapons, or other contraband anywhere, including on her person. **¶¶ 37-38.** At all times, Plaintiff was peaceful and did not threaten any person. **¶ 40.**

Defendants never obtained any proper consent for any interrogation, search, tests, or strip search of Plaintiff. **¶¶ 34, 39.** Defendants' interrogations, searches, seizure, arrest, incarceration, and medical testing/procedures conducted on Plaintiff were all without Warrant, probable cause, reasonable suspicion, or other legal right. **¶ 41.**

Defendants held Plaintiff in custody overnight in a cell, and released her to her mother the next day, October 30, 2003. **¶ 43.** Marie Doe was never charged with any crime. **¶ 44.**

Defendants' policy requiring strip searches and/or visual body cavity searches of minors who are pretrial detainees at Juvenile Hall is without regard to: the nature of the alleged offense; whether or not the minor is eligible for cite and release under Cal. Penal Code § 853.6; whether or not the minor is eligible for release on her own recognizance or to her parents; and whether or not the Defendants have any reasonable belief that the minor possesses weapons or contraband, or that there are facts supporting a reasonable belief that the search would produce contraband. **¶ 52.**

Defendants' strip and/or visual body cavity searches of pretrial detainees at Juvenile Hall routinely violate Cal. Penal Code § 4030, 15 C.C.R. § 1360, and other laws. **¶ 53.**

ARGUMENT

I. STANDARD OF REVIEW.

"It is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." McDougal v. County of Imperial, 942 F.2d 668, 676 n.7 (9th Cir. 1991)(citation omitted). A court may not dismiss a complaint under Rule 12(b)(6) unless it appears "***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (emphasis added).[3]

All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992). Courts must assume that all general allegations "embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano Unified School Dist., 37 F.3d 517, 521 (9th Cir. 1994).

[3] *See also,* S.E.C. v. Seaboard Corp., 677 F.2d 1315, 1316 (9th Cir. 1982) (no dismissal unless it appears ***"to a certainty"*** that Plaintiff can prove no set of facts entitling him to relief).

"Civil rights complaints are to be liberally construed." Buckey, supra; Gobel v. Maricopa County, 867 F.2d 1201, 1203 (9th Cir. 1989).

"Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires 'a short and plain statement of the claim showing that the pleader is entitled to relief.' 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, p. 1356 (1990)." Meek v. County of Riverside, 982 F.Supp. 1410, 1414 (C.D. Cal. 1997), quoting Gilligan v. Jamco Devel. Corp., 108 F.3d 246, 248 (9th Cir. 1997). Indeed, Rule 8(a) requires pleading to be "simple, concise, and direct." *See*, Galbraith v. County of Santa Clara, 307 F.3d 1119, 1121 (9th Cir. 2002) (Supreme Court overruled heightened pleading requirement of Branch v. Tunnell, 937 F.2d 1382, 1385-88 (9th Cir. 1991)).

"The notice pleading standard set forth in Rule 8 establishes 'a powerful presumption against rejecting pleadings for failure to state a claim.'" Meek, 982 F.Supp. at 1414; Gilligan, 108 F.3d at 248. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint is found deficient and can possibly be cured by the inclusion of additional factual allegations. Meek, 982 F.Supp. at 1414, citing, Doe v. U.S., 58 F.3d 494, 497 (9th Cir. 1995). Dismissal without leave to amend is proper only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

II. PLAINTIFFS' FOURTH AMENDMENT CLAIMS ARE PROPER.

Even a limited search of a person is a substantial invasion of privacy. Terry v. Ohio, 392 U.S. 1, 24-25 (1967). The United States Supreme Court set forth the standard for determining whether a particular search is unreasonable in violation of the Fourth Amendment in Bell v. Wolfish, 441 U.S. 520 (1979). In Bell, the Supreme Court held that visual body-cavity searches could, in some circumstances, be conducted on less than probable cause, and set forth the test:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. It requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.

> Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

441. U.S. at 559, 560.[4]

As will be discussed below, cases that have engaged in the balancing test mandated by Bell have routinely required that strip searches be conducted only on individualized, reasonable suspicion that a person is concealing weapons or contraband.

"Exceptions to the requirement of individualized suspicion are generally appropriate ***only where the privacy interests implicated by a search are minimal*** and where other safeguards are available to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)(emphasis added, internal quotations and citations omitted).

"The more intrusive the search, the more justification for the search must come." Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988), citing Terry v. Ohio, 392 U.S. at 18 n. 15.

Even a search of a fully-clothed child's person is "undoubtedly a severe violation of subjective expectations of privacy." New Jersey v. T.L.O., 469 U.S. 325, 337-338, 341 (1985).

Defendants would have this Court dispose of the balancing test required by the Supreme Court in Bell. Defendants provide no justification for their suspicionless strip-searches of Plaintiff and other children. Rather, they simply assert that any time a child is accused of a crime involving "violence," a strip search is always allowed. Defendants' argument ignores the need for the search, the scope of the intrusion of personal rights the search entails, the manner in which it is conducted, and the place in which it is conducted, all factors Bell requires courts to consider.

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[4] Cases such as this one, which require a careful balancing of interests, are particularly ill-suited to motions to dismiss. "[A] balancing test … is inappropriate in evaluating a dismissal under Fed. R. Civ. P. 12(b)(6) as no countervailing state interest could have been alleged since the claim is evaluated solely upon the pleadings of the plaintiff." Lander v. Summit County School District, 109 Fed. Appx. 215, 221 (10th Cir. 2004).

Additionally, Defendants' assertion that Plaintiff was accused of "violence" ignores the facts set forth in the Complaint, that Plaintiff, a 12-year-old-girl, was falsely accused of "violence," and falsely arrested on a legally invalid charge, essentially for engaging in horseplay with other schoolchildren. The facts of this case make clear that Defendants' proposed new rule – they may strip search any child accused of "violence" – will trap many children whose only "crime" is the overreaction of adults to rambunctious 12-year-old behavior. Those children will then be subjected to urine and blood tests, along with the extreme indignity of being forced to strip, squat and cough while revealing their naked bodies to complete strangers.

Furthermore, Defendants fail to address the fact that their policy calls for strip searching *all* children, not just those accused of "violent" crime, and that Plaintiff Doe was strip searched pursuant to that blanket strip search policy. "A ham-handed approach to policy making runs the serious risk of infringing upon detainees' constitutional rights." Kennedy v. Los Angeles Police Department, 901 F.2d 702, 713 (9th Cir. 1989).

A. The Ninth Circuit Has Never Held that an Accusation of "Violent Crime" Permits Blanket Strip Searches of All Accused Arrestees.

Contrary to Defendants' assertion, the Ninth Circuit has never held that an accusation of "violent crime" permits the wholesale strip-searching of all those accused, regardless of whether they are suspected of concealing weapons, drugs, or contraband. Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), cert. den. 471 U.S. 1053 (1985), Kennedy v. Los Angeles Police Department, 901 F.2d 702 (9th Cir. 1989), and Fuller v. M.G. Jewelry, 950 F.2d 1437 (9th Cir. 1991), which Defendants cite for their new rule, did not involve people accused of 'violent crime.' Rather, the lack of an accusation of 'violence' was cited as one of many factors the court weighed in determining that the Fourth Amendment *prohibited* the strip searches of the plaintiffs in each of those cases, where there was not a particularized reasonable suspicion that they were concealing weapons or other contraband.

In Giles, the Ninth Circuit held that a policy of strip searching all people booked into county jail on minor traffic offenses violated the Fourth Amendment. Of the 3,500 adults strip searched during an 18-month period, only 11 people had concealed anything, including cigarettes, warranting a report. 746 F.2d at 617.[5]

The court balanced the jail's interest in institutional security against the privacy interests of the arrestees, and held "that arrestees charged with minor offenses may be subject to a strip search only if jail officials possess a reasonable suspicion that the individual arrestee is carrying or concealing contraband. Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." 746 F.2d at 617.

Thus, the nature of the offense was only one of the factors to be considered in determining whether there was reasonable suspicion to justify the strip search.

The adult plaintiff in Giles had committed a minor traffic offense that was not related to drugs or weapons; had no prior record; was cooperative and orderly. 746 F.2d at 618. She was strip searched "with all due courtesy" pursuant to the blanket strip search policy, and the Ninth Circuit held that her Fourth Amendment rights were violated. Here, Plaintiff Doe, was a 12-year-old child with no record, who was arrested from school more than a week after a student horseplay incident, on a legally invalid charge [assault with a deadly weapon (feet), when as a matter of law feet cannot be a deadly weapon], was not alleged to have injured anyone, had no contraband, was not suspected to possess any contraband, had already been subjected to a thorough pat-down and clothing search that revealed no weapons or contraband, and was peaceful and non-threatening.

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[5] Of course, Defendants here have not yet produced any discovery relating to the justification for their strip searches, and what those searches have produced, a further indication that their dispositive motion is premature.

And, unlike the plaintiff in Giles who was placed with the general population – which the defendant put forth as further justification for the strip search -- Plaintiff Doe was kept in a separate cell overnight. Complaint, ¶ 43.

In Kennedy v. LAPD, the plaintiff was arrested for grand theft and subjected to the LAPD's policy requiring a visual body-cavity search on all felony arrestees. The Ninth Circuit, in affirming that the policy violated the Fourth Amendment, noted:

> "The intrusiveness of a body-cavity search cannot be overstated. Strip searches involving the visual exploration of body cavities is dehumanizing and humiliating. The Supreme Court has commented: "Admittedly, this practice instinctively gives us the most pause." Bell v. Wolfish, 441 U.S. 520, 558 … *see also id. at* 576-577 ("In my view the body-cavity searches … represent one of the most grievous offenses against personal dignity and common decency.")(Marshall, J., dissenting).

901 F.2d at 711 (internal citations omitted).

The Kennedy court rejected making a distinction between felony and misdemeanor arrestees, noting **"A glaring omission from the LAPD's justification is any documentation (or even assertion) that felony arrestees have attempted to smuggle contraband into the jail in greater frequency than misdemeanor arrestees. … [T]he felony/misdemeanor classification alone indicates little about the likelihood of the arrestee's concealing drugs, weapons, or contraband."** 901 F.2d at 713, 714.

Likewise, Defendants' proposed new rule that they be given blanket permission to strip search all juvenile arrestees accused of "violence" bears no relationship to the likelihood that the individual child will conceal or attempt to smuggle drugs, weapons, or contraband into Juvenile Hall. Especially in cases like this one, where the alleged crime of "violence" involves the unarmed conduct of a 12-year-old, and the child is arrested unexpectedly from school more than a week after the incident, the likelihood of such concealment of weapons or contraband is nil.

The Kennedy court found that "the classification of the offense **in some cases might** inform the *presence* of suspicion, but it does not inform the *level* of suspicion required." 901 F.2d at 716 (emphasis added and emphasis in original).

Indeed, the nature of the crime is just one factor – not the only factor – in determining whether there is a reasonable suspicion that the arrestee is concealing weapons or contraband. Other factors include the arrestee's appearance and conduct, and prior offense record. Id. In this case, Marie Doe's arrest for an unarmed crime of "violence" had to be considered along with other factors heavily weighing against strip searching her [12-year-old child with no offense record, behaving in a non-threatening and peaceful manner, falsely arrested unexpectedly from school more than a week after the incident, who was already subjected to a thorough pat-down search which revealed nothing untoward].

In Fuller, at 1447, the Ninth Circuit reviewed the caselaw since Bell and observed, **"These decisions suggest that strip and body cavity searches of detainees may be conducted based on reasonable suspicion only where such searches are *necessary* to protect the overriding security needs of the institution – that is, *where officials have a reasonable suspicion that a particular detainee harbors weapons or dangerous contraband*."** (Emphasis added).

The plaintiffs in Fuller were arrested for grand theft of a ring from a jewelry store, and were strip searched both pursuant to a Los Angeles Police Department policy requiring the strip searching of all felony arrestees, and to find the ring the plaintiffs were accused of stealing.

The Fuller court, agreeing with Kennedy, held the distinction between felony and misdemeanor arrestees in earlier cases was "of no consequence." 950 F.2d at 1446.

In Fuller, the Ninth Circuit observed the rationale underlying Bell and Kennedy -- that strip searches of detainees are allowed on less than probable cause when the objective is to discover weapons or contraband – did not apply to that grand theft case. The court refused to allow a strip

search on reasonable suspicion to look for the stolen ring, and instead held that such a search still required probable cause. 950 F.2d at 1448-1449.

Defendants' reliance on Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989), is misplaced. Thompson did not validate a blanket strip search policy, but rather considered that policy "in the context of the particular circumstances of this case." 885 F.2d at 1445. That case involved an adult male who was arrested while he was in the act of felony grand theft of an automobile, and strip searched before being placed the general jail population. The Thompson court specifically limited its holding to the facts before it: **"We emphasize, however, that our decision is extremely narrow and only applies to theft of an automobile."** 885 F.2d at 1447 n.6. And, the plaintiff in Thompson had no valid false arrest claim. Id. at 1442 n.1. Moreover, Thompson was decided before the Ninth Circuit's decisions in both Kennedy and Fuller.

In addition to Giles, Kennedy, and Fuller, discussed above, numerous courts both in and outside the Ninth Circuit have invalidated blanket, suspicionless strip search policies. Ward v. County of San Diego, 791 F.2d 1329, 1333 (9th Cir. 1986), cert. den. 483 U.S. 1020 (1987) (reversing summary judgment in case involving strip search of arrestee before hearing to determine whether she was eligible for an own recognizance ("O.R.") release: **"In most instances, the unreasonableness of a strip search conducted prior to an O.R. release determination is plain"**); Chapman v. Nichols, 989 F.2d 393, 399 (10th Cir. 1993); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984)(noting the plaintiff's alleged crime was not commonly associated by its very nature with the possession of weapons or contraband and "almost anything that the examining officer could have found through this [strip search] procedure would already have been discovered during the pat down search conducted on the plaintiff's arrival at the jail); Jones v. Edwards, 770 F.2d 739, 742 (8th Cir. 1985); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983); Stewart v. Lubbock County, 767 F. 2d 153, 156-157 (5th Cir. 1985),

cert. den. 475 U.S. 1066 (1986); Weber v. Dell, 804 F. 2d 796, 801 (2nd Cir. 1986), cert. den. 483 U.S. 1020 (1987); Watt v. Richardson Police Dep't, 849 F.2d 195, 199 (5th Cir. 1988); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), cert. den. 455 U.S. 942 (1982); Newkirk v. Sheers, 834 F. Supp. 772, 789-790 (E.D. Pa. 1993)(noting lack of evidence to support a belief that the plaintiffs were dangerous or threatening to the security of the prison); Wilson v. Shelby County, 95 F. Supp. 2d 1258, 1262 (N.D. Ala. 2000)(any "mechanical" application of a strip search policy, such as the one proposed by Defendants here, "is the very antithesis of a balancing of the interests involved"); Masters v. Crouch, 872 F.2d 1248, 1253 (6th Cir. 1989).[6]

B. Given the Extreme Invasion a Strip Search Entails, Defendants Must Have At Least an Individualized, Reasonable Suspicion that a Child Is Concealing Weapons or Contraband Before Strip Searching Her.

Courts are uniform in recognizing the egregious violation of privacy strip searches entail. In Giles, the strip search -- conducted in an appropriate place and "with all due courtesy" -- was a "frightening and humiliating" invasion of privacy. 746 F.2d at 617. In Chapman v. Nichols, 989 F. 2d at 395-396 (10th Cir. 1993), the court stated:

> There can be no doubt that a strip search is an invasion of personal rights of the first magnitude. It is axiomatic that a strip search represents a serious intrusion upon personal rights. The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the authority of the state, in an enclosed

[6] Defendants cite Masters v. Crouch, along with Dufrin v. Spreen, 712 F.2d 1084 (6th Cir. 1983), and Dobrowolskyj v. Jefferson County, 823 F.2d 955 (6th Cir. 1987), to support their new rule that any time a child is accused of a crime involving violence, she can be subjected to a blanket, suspicionless strip search. However, in Masters v. Crouch the court found the defendants were not entitled to qualified immunity for the suspicionless strip search of the plaintiff, noting "We have found no authority approving a practice of conducting a strip search of a person arrested for a simple traffic violation in the absence of at least reasonable suspicion that the person might be carrying a weapon, illegal drugs, or other contraband." 872 F. 2d 1248. The Masters court observed that the Dufrin strip search was approved because the adult male was arrested for felonious assault and because he would ultimately come into contact with the general jail population. Dobrowolskyj was charged with an offense associated with weapons and other contraband, and a "combination of factors," including not only the weapons-related offense but the fact that he was going to be in contact with the general population, justified the strip search. 872 F. 2d at 1255, 1256. Here, Plaintiff Doe's alleged crime involved no weapons or contraband, and she was never placed in the general population.

> room inside a jail, can only be seen as thoroughly degrading and frightening. Moreover, the imposition of such a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event. (citations omitted).

See also, Thompson v. City of Los Angeles, 885 F.2d at 1446 (9th Cir. 1989)("The feeling of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute"); Mary Beth G. v. City of Chicago, 723 F.2d at 1272 (7th Cir. 1983)(strip searches described as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"); Kennedy v. LAPD, 901 F.2d at 711 (9th Cir. 1989)(citations omitted)(visual body-cavity searches described as "dehumanizing and humiliating" and "one of the most grievous offenses against personal dignity and common decency"); Wilson v. Shelby County, 95 F. Supp. 2d 1258, 1264 (N.D. Ala. 2000)("there is no greater expectation of privacy than that associated with our bodies; far more than any other expectation of privacy in a free society, we expect to avoid being required to strip naked, squat, spread our buttocks apart, and cough. At the very least, to intrude upon that privacy there must be some reason to do so." Id. at 1266).

And, courts are particularly sensitive to the additional harm children can suffer from strip searches. **"It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity."** Calabretta v. Floyd, 189 F.3d 808, 819 (9th Cir. 1999)(citations omitted). Thus, the Ninth Circuit held that there was no qualified immunity for the strip search of a 3-year-old child to investigate suspected child abuse, conducted without a warrant or special exigency.

Similarly, in Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988), the District Court granted summary judgment in favor of the plaintiffs, who were children detained at various facilities, including Juvenile Halls, on suspected immigration violations. The children, like

Plaintiff Doe here, were subjected to a blanket visual strip search policy without any reasonable suspicion that they were concealing weapons or contraband. The court observed:

> That plaintiffs are children under the age of eighteen is also a factor we must consider. Children are especially susceptible to possible traumas from strip searches. As the Supreme Court has noted, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). **It follows that a nude search of a child is an invasion of constitutional rights of some magnitude.** See, e.g., Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980), cert. den. 451 U.S. 1022 (1981).

681 F. Supp. at 667 (emphasis added, internal parallel citations omitted).[7]

In striking down the blanket strip search policy, the District Court noted that approximately 7,300 children were strip searched per year. In 1987, only one item of "contraband," a broken mirror, was discovered in a strip search; and only four weapons or contraband items were discovered in any searches of the children. Id. at 668.

In Doe v. Renfroe, 631 F.2d 91, 92-93 (7th Cir. 1980), cert. den. 451 U.S. 1022 (1981), the Seventh Circuit found school officials' suspicionless strip search of a junior high school student to determine whether she possessed drugs or contraband was not only unconstitutional but "outrageous under settled indisputable principles of law:"

> We suggest as strongly as possible that the conduct herein described exceeded the 'bounds of reason' by two and a half country miles. It is not enough for us to declare that the little girl involved was indeed deprived of her constitutional and basic human rights. We must also permit her to seek damages from those who caused this humiliation and did indeed act as though students 'shed at the schoolhouse door rights guaranteed by any constitutional provision.'

631 F.2d at 91.

In Smook v. Minnehaha County, 340 F. Supp. 2d 1037, 1046 (D. S.D. 2004), (*upheld on recons.*, 2005 U.S. Dist. LEXIS 1228), the minor plaintiff was arrested for a curfew violation and

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[7] Flores has been appealed on various unrelated issues. However, the defendants did not appeal the district court's order that the INS cease strip searching children unless there was an individualized reasonable suspicion that a child was concealing weapons or contraband. *See*, Flores v. Meese, 934 F.2d 991, 1014 (9th Cir. 1990).

strip searched to her bra and underwear. The court held the defendant juvenile hall's policy of requiring strip searches of all juveniles regardless of their offense, and regardless of whether there was reason to believe they had weapons or contraband, unconstitutional. The court balanced the intrusiveness of the strip search against the minimal showing of a need to conduct the indiscriminate search, and held the search of the minor unconstitutional.

Defendants incorrectly rely on Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992) to state that a strip search of a 14-year-old girl arrested for truancy and loitering supports Defendants' suspicionless strip searches of Plaintiff Doe and the other class members here. (Defs'. Brief, p. 3:15-16). To the contrary, the strip search of the plaintiff in that case was constitutional precisely because there *was* "reasonable suspicion" in that case – the officers possessed "a particularized and objective basis for suspecting [the plaintiff] of hiding contraband on her person." 961 F.2d at 194.

Reasonable suspicion is "the least protective constitutional standard." Kennedy, 901 F.2d at 716 n. 8. Certainly children such as Marie Doe and the class members should be accorded ***at least*** this modest constitutional protection before they are subjected to the extreme invasion of their bodies and privacy caused by a strip search.

III. PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIMS ARE PROPER.

Defendants incorrectly assert that Plaintiffs' substantive due process claims are "superfluous" and must be dismissed. Defendants do not address their urine testing, blood testing, sexual inquiries, and other nonconsensual medical testing and inquiries in their motion. All of that conduct was a violation not only of the Fourth Amendment, but also of the Due Process clause of the Fourteenth Amendment. "The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality. … The tests at issue in this case [blood and urine tests

for sickle cell anemia] thus implicate rights protected under both the Fourth Amendment and the Due Process Clause of the Fifth or Fourteenth Amendments." Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1269 (9th Cir. 1998).[8] "Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health." Id. at 1269 (citation omitted).

"[I]t is well established that a person's liberty interest in bodily integrity is one of the personal rights accorded substantive protection under the Due Process Clause." Johnson v. Meltzer, 134 F.3d 1393, 1397 (9th Cir. 1998)(citing Albright v. Oliver, 510 U.S. 266, 272 (1994)(substantive due process protections accorded to matters relating to marriage, family, procreation, and the right to bodily integrity).

It is premature to dismiss Plaintiffs' due process claims at this point, as they have had no discovery into the justification for and extent of the tests and inquiries, and what is done with the medical and personal information collected.

IV. DEFENDANTS REMAIN LIABLE FOR THEIR UNCONSTITUTIONAL CUSTOMS, POLICIES, AND PRACTICES.

As set forth above, Defendants' assertion that Plaintiff Doe's Fourth Amendment rights were not violated as a matter of law is both premature and legally unfounded. Defendants incorrectly assert that they cannot be held liable for their unconstitutional customs, policies, and practices if individual employees have not been found to violate the Fourth Amendment.

Defendants' strip search policy, practice, and custom, as set forth in the complaint is unconstitutional on its face, and subjects Defendants to municipal liability under Monell v.

[8] Blood tests require probable cause under Schmerber v. California, 384 U.S. 757, 769-770 (1966), which Defendants did not have in this case. Furthermore, to the extent that Defendants performed any visual body cavity searches on any of the plaintiff class members, they were required to have probable cause and a warrant beforehand. Fuller, 950 F.2d at 1448-1449; Cal. Pen. Code § 4030.

Department of Social Services, 436 U.S. 658 (1978). Fuller, supra, 950 F. 2d at 1452; Kirpatrick v. City of Los Angeles, 803 F.2d 485, 492 (9th Cir. 1986).

In addition, municipal entities can be held liable under Monell even if individual public employees are not found liable. *See,* Fairley v. Luman, 281 F.3d 913 (9th Cir. 2002); Gibson v. County of Washoe, 290 F.3d 1175 (9th Cir. 2002). In Gibson, the Ninth Circuit stated:

> The municipal defendants … assert that if we conclude, as we do, *see infra*, that the individual deputy defendants are not liable for violating Gibson's constitutional rights, then they are correspondingly absolved of liability. Although there are certainly circumstances in which this proposition is correct, *see,* City of Los Angeles v. Heller, 475 U.S. 796, 799, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986) and Quintanilla v. City of Downey, 84 F.3d 353, 355 (9th Cir. 1996), **it has been rejected as an inflexible requirement by both this court and the Supreme Court.**
>
> For example, a municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity, because even if an officer is entitled to immunity a constitutional violation might still have occurred. *See*, e.g., Chew v. Gates, 27 F.3d 1432, 1438-39 (9th Cir. 1994). Or a municipality may be liable even if liability cannot be ascribed to a single individual officer. Owen v. City of Independence, 445 U.S. 622, 652, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980) (a "'systemic' injury" may "result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.") (citation omitted). And **in Fairley v. Luman, 281 F.3d 913 (9th Cir. 2002), we explicitly rejected a municipality's argument that it could not be held liable as a matter of law because the jury had determined that the individual officers had inflicted no constitutional injury. Id. at 916.** "If a plaintiff established he suffered constitutional injury by the City, the fact that individual officers are exonerated is immaterial to liability under § 1983." Id. (emphasis in original); *see also*, Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992).

290 F.3d at 1186, f.n. 7 (emphasis added).

In Gibson, even if the individual named defendants were found to have not violated the plaintiff's rights, the County could still be liable due to its lack of appropriate policies and procedures, while ignoring an obvious need for such procedures, that should have prevented the plaintiff's death in jail. 290 F.3d at 1186-1187, 1194-1196. *See also,* Hopkins v. Andaya, 958 F.2d 881, 888 (9th Cir. 1992), cert. denied, 513 U.S. 1148 (1995).

Here, Defendants have a blatantly unconstitutional policy of strip searching and testing all children who are detained at Juvenile Hall, regardless of whether those children are suspected of concealing any weapons or contraband. Defendants remain liable for that policy under Monell.

V. PLAINTIFFS HAVE A CLAIM UNDER CAL. PEN. CODE § 4030.

As set forth above, Defendants incorrectly assert that Plaintiff was "charged with a violent crime." (Def. Brief, p. 4:13). To the contrary, the uncontroverted facts for Defendants' motion are that Plaintiff Doe was **falsely arrested** and booked on a **legally invalid and obviously factually incorrect** charge that can be either a felony or a misdemeanor. Cal. Penal Code § 245(a)(1); People v. Aguilar, 16 Cal. 4th 1023 (feet cannot be a deadly weapon).

California law requires that strip searches of minors be conducted only with prior supervisory approval, and only upon the reasonable suspicion of a "peace officer" that a minor is in possession of a weapon or contraband. 15 Cal. Code. Regs. § 1360.[9]

Cal. Pen. Code § 4030(e) provides that a person who is arrested and taken into custody "may be subjected to patdown searches, metal detector searches, and thorough clothing searches in order to discover and retrieve concealed weapons and contraband substances prior to being placed in a booking cell."

Pen. Code § 4030 only permits strip searches prior to placement in the general jail population, and only with prior written authorization of the supervising officer on duty, setting forth specific and articulable facts and circumstances upon which a "reasonable suspicion" determination was made by the supervisor, and stating the time, date, place of the search, person conducting the search, and results of the search. Pen. Code § 4030(f), (h), (i).

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[9] A custodial officer cannot have the requisite reasonable suspicion under § 4030; rather, a law enforcement officer must have and document the suspicion. Pen. Code §§ 4030(f), 831(a); Cal. Att'y Gen. Opp'n. No. 88-1201, 7/6/89, pp. 6-7.

Plaintiff Marie Doe was thoroughly searched, including having her bra searched, before she was removed from the premises of her school. At Juvenile Hall, Defendants ordered Marie to take a shower where they performed a visual strip search of her, took away her clothes, and gave her jail clothing to wear. Marie Doe was never put in the general jail population, but kept overnight in a cell by herself. **¶¶ 27, 32, 43.**

Despite the facts that 1) Defendants' thorough patdown, clothing, and shower searches of Marie revealed no weapons or contraband, 2) she was wearing jail-issued clothing, 3) she was not placed in the general population, 3) she was peaceful and non-threatening, and 4) there was no reason to suspect that she was concealing weapons or contraband, Defendants then subjected Marie to a further "squat and cough" strip search. **¶¶ 32, 37-40, 43.**

Numerous questions of fact remain as to whether Defendants' strip search of Plaintiff Doe, strip searches of other class members, and policies regarding strip searches, violate Penal Code § 4030 and 15 C.C.R. § 1360.

VI. DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFFS' CLAIMS.

When considering immunity under California law, the starting point is that **"in governmental tort cases, the rule is liability, immunity is the exception."** Robinson v. Solano County, 278 F.3d 1007, 1016 (9th Cir. 2002) (en banc), citing White v. County of Orange, 166 Cal. App. 3d 566, 570, 212 Cal. Rptr. 493 (1985). "Unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail." Michael J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 867; 247 Cal. Rptr. 504, 507 (1988), citing Ramos v. Madera, 4 Cal.3d 685, 692, 94 Cal. Rptr. 421 (1971).

A. Cal. Gov. Code § 844.6 Does Not Apply.

Defendants incorrectly seek immunity from Plaintiffs' state law claims. Cal. Gov. Code § 844.6 provides municipalities, not their employees, with immunity from state law claims for injury "to any prisoner." However, a "prisoner" is "**a *lawfully* arrested person"** who is brought into a law enforcement facility to be booked. Cal. Gov. Code § 844 (emphasis added).

In this case, Plaintiff Marie Doe was ***unlawfully*** arrested on a legally invalid charge. ¶ **31.** As a matter of law, feet cannot constitute a "deadly weapon" under Cal. Penal Code § 245(a)(1). People v. Aguilar, 16 Cal. 4th 1023. By the very terms of Cal. Gov. Code § 844, the immunity does not apply.

In Sullivan v. County of Los Angeles, 12 Cal. 3d 710, 117 Cal. Rptr. 241 (1974), the California Supreme Court held that Gov. Code § 844.6 immunity does not apply when the "prisoner" has been *falsely* imprisoned.[10] 12 Cal. 3d at 722. The court in Sullivan noted that Cal. Gov. Code § 815.6 and Bradford v. State of California, 36 Cal. App. 3d 16, 11 Cal. Rptr. 852 (1973) provide that a public entity cannot claim immunity from liability for damages arising out of its failure to perform a mandatory duty imposed by statute. 12 Cal. 3d at 715, 716.

In this case, Plaintiff Doe was falsely arrested and imprisoned, and her injuries also flow from those wrongs for which there is no immunity. Furthermore, Defendants' violations of the mandates of Pen. Code § 4030 create an independent basis of liability under Gov. Code § 815.6.

Moreover, Cal. Gov. Code § 844.6 is a general immunity statute that was enacted in 1963 and last amended in 1977. Plaintiffs' state law claims include claims for violations of detailed, specific statutory obligations set forth in statutes enacted in 1984 (Cal. Pen. Code § 4030) and in 1987 (Cal. Civil Code § 52.1), and a regulation enacted in 1997 (15 C.C.R. § 1360).

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[10] Sullivan was decided before the Legislature defined "prisoner" to limit the definition to a "lawfully arrested" person.

It is a general rule of statutory construction that "a later, more specific statute controls over an earlier, general statute." Woods v. Young, 53 Cal. 3d 315, 324, 279 Cal. Rptr. 613 (1991). *See also,* Salgado v. Garcia, 384 F.3d 769, 773-774 (9th Cir. 2004)(specific statute will not be controlled or nullified by a general one); United States v. Fish, 368 F.3d 1200, 1205 (9th Cir. 2004)("fundamental principle of statutory construction" is that "the specific trumps the general"); Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1158 (9th Cir. 2004).

Both Penal Code § 4030 and Civil Code § 52.1 set forth specific statutory mandates, and specifically provide that a person whose rights under those sections have been violated may bring "a civil action" for damages, injunctive relief, and other appropriate relief. Civ. Code § 52.1(b); Pen. Code § 4030(p). Allowing Defendants the general immunity they seek directly contravenes these specific statutory provisions and would render them meaningless.

B. There Can Be No Legislatively Created Immunity for Violations of Constitutional Rights.

The law is clear that there can be no immunity from Plaintiff's claims that are founded on provisions of the California or United States Constitutions. These claims are in cause of action III (Direct Violation of California Constitution) and IV (Civil Code §52.1, based on violation of the California and United States Constitutions).

In Fenton v. Groveland Community Services District, 135 Cal.App.3d 797, 185 Cal.Rptr. 758 (1982), *disapproved in part on other grounds*, Katzberg v. Regents, 29 Cal.4th 300, 328, 127 Cal. Rptr.2d 482 (2002), the court found that the plaintiff's direct damages claim under the California Constitution (Article II, Section 2) was **not** barred by governmental immunity under Cal. Gov. Code §§ 815 or 820.2. 135 Cal. App. 3d at 803-805 and 806-807. The California Legislature has recognized that there is no governmental immunity "where the state or federal Constitution requires liability." 135 Cal. App. 3d at 803, *citing* Leg. Committee, West's Ann. Gov. Code (1980 ed.) §815, p. 168.

See also, Young v. County of Marin, 195 Cal. App. 3d 863, 869 (1987) ("public entities … are not immune from constitutionally created claims").

In Rose v. State of California, 19 Cal.2d 713, 725 (1942), the California Supreme Court observed, "**it is … elementary that the legislature by statutory enactment may not abrogate or deny a right granted by the Constitution."** Thus, the Supreme Court held that Article I, Section 14 of the California Constitution was self-executing, and provided a damages claim that could not be barred by any immunity. 19 Cal.2d at 726, 729. The court in Rose eloquently stated:

> Immunity from suit cannot avail in this instance, and, if no statute exists, liability still exists, because as to this provision the Constitutions are self-executing.
>
> 'To hold otherwise would be to say that the Constitution itself gives a right which the legislature may deny by failing or refusing to provide a remedy. Such a construction would indeed make the constitutional provision a hollow mockery instead of a safeguard for the rights of citizens.
>
> No court has ever applied the doctrine of immunity from suit to cases like the one at bar, nor can they, for to do so would absolutely annul the provision of article I, section 17, of the Constitution.'

19 Cal. 2d at 726. There can be no immunity to Counts III or IV of Plaintiffs' Complaint.

C. Defendants Do Not Enjoy Cal. Gov. Code § 820.2 Immunity.

Defendants seem to assert, but not clearly, that they enjoy discretionary acts immunity under Cal. Gov. Code § 820.2. First of all, the only moving Defendant that might have standing to assert such an immunity is Defendant Tim Diestel, as he is the only "public employee" movant. However, Mr. Diestel does not enjoy § 820.2 immunity.

The only non-constitutional or statutory claim Plaintiffs bring is for assault and battery, for which there can be no immunity under Gov. Code § 820.2. Robinson, supra at 1016; Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 216 n.9, 285 Cal. Rptr. 99 (1991).

In McQuirk v. Donnelley, 189 F.3d 793 (1999), the Ninth Circuit held,

> The California Supreme Court still applies the analysis it set forth over thirty years ago in Johnson v. California, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (Cal. 1968), the first case in which it construed § 820.2. See Caldwell v. Montoya, 10 Cal. 4th 972, 897 P.2d 1320, 1325 (Cal. 1995). In Johnson, the court was confronted with the issue of whether a parole officer was immune from liability arising from his failure to warn foster parents of the dangerous propensities of a youth placed in their care. See 447 P.2d at 354. The court found the parole officer's decision not to warn the foster parents to be ministerial and therefore concluded that there was no immunity. See id. at 361-63. **In reaching this conclusion, the court rejected a literal interpretation of the term "discretion" in § 820.2. The California Supreme Court has since remarked, "our opinion [in Johnson] reasoned as follows: Almost all acts involve some choice among alternatives, and the statutory immunity thus cannot depend upon a literal or semantic parsing of the word 'discretion.'"** Caldwell, 897 P.2d at 1325. Instead, the Johnson court distinguished between "the 'planning' and 'operational' levels of decision-making." Johnson, 447 P.2d at 360. Only the former are immune from liability. …
>
> The [Johnson] court concluded that section 820.2 confers immunity only with respect to those "basic policy decisions" **which have been committed to coordinate branches of government**, and does not immunize government entities from liability for subsequent ministerial actions taken in the implementation of those basic policy decisions. This distinction is sometimes characterized as that between the "planning" and the "operational" levels of decision-making. [citation omitted].

189 F.3d at 798-799 (emphasis added). The critical distinction is between the official's decision to undertake an act, versus his subsequent decisions concerning **how** to act.

Likewise, in Martinez v. City of Los Angeles, 141 F.3d 1373 (1998), the Ninth Circuit recognized,

> There is no immunity "if the injury ... results, not from the employee's exercise of discretion vested in him to undertake the act, but from his negligence in performing it after having made the discretionary decision to do so." McCorkle v. City of Los Angeles, 70 Cal. 2d 252, 261, 449 P.2d 453, 460, 74 Cal. Rptr. 389, 396 (1969) (internal quotation and citation omitted). Applying this rule, the California Supreme Court has held that even if a police officer exercises his discretion in deciding to investigate an automobile accident, he may be liable for negligently conducting that investigation. Id.

141 F.3d at 1379 (emphasis added).

In refusing to apply a literal application of the term "discretionary," the Johnson Court noted, "[It] would be difficult to conceive of any official act, no matter how directly ministerial,

that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." [citations omitted]. 69 Cal.2d at 788.

In Barner v. Leeds, 24 Cal.4th 676, 102 Cal.Rptr.2d 97 (2000), the court held that deputy public defenders are not immune from malpractice lawsuits, even where their professional judgment is at issue. Thus, a deputy public defender's decisions concerning whether and how to investigate a particular case, and even whether to file a particular motion in court, while certainly calling for the exercise of professional judgment and discretion, are not "discretionary" under section 820.2. Id., at 682. "Not all acts requiring a public employee to choose among alternatives entail the use of "discretion" within the meaning of section 820.2." Id., at 684-685.

Here, obvious questions of fact remain and discovery is required as to Mr. Diestel's involvement in the operational decisions to implement strip search and medical testing policies that violate both constitutional protections and the nondiscretionary mandates of Penal Code § 4030 and 15 C.C.R. § 1360; the content of those policies; the extent of violation those policies present; and the role they played in the violations here. He does not enjoy § 820.2 immunity.

VII. DEFENDANTS ARE LIABLE FOR THE WRONGS OF THE "DOE" DEFENDANTS.

These three moving Defendants – the City and County of San Francisco, the Juvenile Probation Department, and Director of Juvenile Hall Tim Diestel incorrectly assert in the "immunity" section of their brief that they are not liable for the wrongs committed by "Doe" defendants. (Defendants' Brief, p. 7:9-11).

All that is necessary for a public entity to be liable for the wrongful conduct of its unnamed employees "will be to show that some employee of the public entity tortiously inflicted the injury in the scope of his employment under circumstances where he would be personally liable." Legis. Com. Com., West's Ann. Govt Code, foll. § 815.2; Becerra v. County of Santa Cruz, 68 Cal. App. 4th 1450, 1462, n. 5, 81 Cal. Rptr. 2d 165, 171, n. 5 (1998) (consistent with the legislative

comment to the § 815.2, identification of a specific employee tortfeasor is not required for vicarious liability of a municipality under that section); Michael J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 867, n. 2, 247 Cal. Rptr. 504, 507, n. 2 (1988); Perez v. City of Huntington Park, 7 Cal. App. 4th 817, 820-821, 9 Cal. Rptr. 2d 258, 260 (1992).

Furthermore, these Defendants remain independently liable for their unconstitutional and illegal customs, policies and practices that caused Doe defendants to violate the Plaintiffs' rights, as well as for their failure to properly hire, train, instruct, monitor, supervise, evaluate, investigate, and discipline their employees and subordinates, and for their unconstitutional orders, approvals, ratification and toleration of wrongful conduct.

CONCLUSION

For the foregoing reasons, Plaintiffs request that Defendants' Motion to Dismiss be DENIED in its entirety.

Dated: February 22, 2005

HADDAD & SHERWIN

/s/
Julia Sherwin

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DARNELL FOSTER, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants.

This Document Relates To:

JAMES TAYLOR, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants.

JIMMY RIDER, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants.

OPINION

No. C 05-3110 MHP

No. C 04-4843 MHP

No. C 05-3204 MHP

TYRONE MOORE,

Plaintiff,

v.

CITY OF OAKLAND, et al.,

Defendants.

No. C 06-2426 MHP

JEFFRIE MILLER, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants.

/

No. C 07-1773 MHP

Plaintiffs Darnell Foster, Rafael Duarte and Yancie Young have brought this action pursuant to 28 U.S.C. section 1983 against the City of Oakland ("Oakland"); Richard Word, individually and in his capacity as the Oakland Chief of Police; Oakland police officers J. Festag and William Bergeron, individually and in their official capacities as police officers; and Does 1–25, alleging that defendants violated plaintiffs' constitutional rights through a policy and practice of performing strip searches and body-cavity searches in public. Plaintiffs seek both injunctive relief and damages. Foster v. City of Oakland, Case No. C 05-3110 MHP, has been related to four similar cases pending in the Northern District of California, and this order applies to each of them.[1] Now before the court is plaintiffs' motion for partial summary judgment. After considering the parties' arguments and submissions and for the reasons set forth below, the court rules as follows.

BACKGROUND[2]

I. The Parties

The following order pertains to all of the parties in Foster and the related cases. A description of the claims brought by the three plaintiffs in Foster is included below and is representative of the claims in the related cases brought by plaintiffs James Taylor, Robert Forbes,

Jimmy Rider, Tyrone Moore, Deandre Wash, Jason Cagler, Jomal Reed, Curtis Freeman, Glenn Lovely, Jeffrie Miller, Kevin Bradley and Richard Tillman.

A. Plaintiff Darnell Foster

Plaintiff Foster is an African-American man. On February 27, 2004 Foster was visiting a friend in Oakland, California. At that time, he had served all but two months of a five year unsupervised probation sentence without incurring any violations.

At around 3 p.m. of that day, Officer Festag and another unknown officer stopped Foster outside the School Market on Oakland's School Street near Pleitner Avenue. The officers asked Foster for identification, which he showed to them. The officers also asked whether Foster was on probation or parole, which he answered affirmatively. Officer Festag then handcuffed Foster and forced him against the back of his patrol vehicle parked in front of the School Market. Foster was ordered to spread his legs and Officer Festag searched Foster's pockets. No contraband was found. Officer Festag then guided Foster into the rear of the patrol vehicle. The officers ran a warrant check and searched the area for evidence of illegal activity. The searches revealed no warrants or evidence of wrongdoing.

Foster was then removed from the patrol vehicle by Officer Festag, who forced Foster over the hood of the vehicle. Wearing a latex glove retrieved from the vehicle's trunk, Officer Festag pulled Foster's pants and underwear down to his knees. Officer Festag proceeded to search around Foster's testicles using his gloved hand. The officer also spread Foster's buttocks and visually searched Foster's anus, stating "I'm going to do a butt-crack search, see if you got crack in your butt-crack." Foster Compl. ¶ 5. No contraband was discovered.

The officers then pulled Foster's pants and underwear back up and returned him to the rear of the vehicle. Officer Festag drove about two blocks and stopped the patrol vehicle to request that Foster make an undercover drug purchase. Foster refused to work undercover for the officers and repeatedly denied wrongdoing. The officers then issued Foster a citation for loitering with the intent to sell narcotics before releasing him.

Several months later, in May, Foster received a Notice to Appear in criminal court in Oakland on the citation issued by Officer Festag. The charge was subsequently dismissed due to the absence of both the officers to substantiate the allegation against Foster. Foster filed an Internal Affairs complaint against Officer Festag in July 2004. On August 1, 2005 Foster and another plaintiff filed a complaint alleging violations of their civil rights under 42 U.S.C. section 1983.

B. Plaintiff Rafael Duarte

Plaintiff Duarte is an Hispanic-American man. On the afternoon of March 9, 2005, while driving, Duarte and a friend were forced to a stop on Oakland's Baker Street, between 62nd and 63rd Streets.

Unknown officers emerged from two vehicles and pulled Duarte from the friend's car without giving any orders. Duarte was handcuffed and forced against the hood. Duarte was then escorted by the first officer to the front of a nearby house, where several other unknown officers were also present. The first officer repeatedly pat-searched Duarte, but the search yielded no contraband.

A second officer then informed the first officer that he thought he had seen Duarte "stuff something down his pants." Foster Compl. ¶ 7. The officers pulled down Duarte's pants and ordered him to bend over. Duarte's buttocks were spread, permitting visual inspection of his anus. No contraband was found, but Duarte was placed in the rear of a police vehicle. The officers then performed a strip and visual body cavity search on Duarte's friend. That search also yielded no contraband. During the searches of the two men, a crowd had begun to gather around the scene, including some people with whom Duarte was acquainted. The individuals witnessed the searches of both men.

Duarte was taken to Oakland City Jail and cited after about two hours in custody. No charges were ever filed against Duarte. On August 1, 2005 Duarte and other plaintiffs filed charges alleging violations of their civil rights under 42 U.S.C. section 1983.

C. Plaintiff Yancie Young

Plaintiff Young is an African-American man. At approximately 11:30 p.m. on September 30, 2003 Young was pulled over by Officer Bergeron around the 2800 block of West Street in Oakland. Officer Bergeron opened Young's car door, pulled him out of the car and handcuffed him. Officer Bergeron asked Young if he was on probation or parole, which Young denied. Officer Bergeron insisted that he smelled marijuana in Young's car and suggested that Young was smuggling large quantities of the drug.

Officer Bergeron then took Young to the back of a police car. While facing Young, he pulled down Young's pants and underwear, revealing Young's genitalia. Then Officer Bergeron shined a flashlight directed at Young's genitalia, visually inspecting Young for up to a minute. Officer Bergeron next performed a pat-search of Young, ordered Young to remove his shoes and felt Young's private area through his pants. Another officer searched Young's car during the search of Young's person. No contraband was found.

Officer Bergeron seated a handcuffed Young in the back of a police car, where he sat for over one hour. During that time, Officer Bergeron, other officers and a police canine searched Young's car. That search produced no evidence of criminal activity.

No charges were filed against Young. Young subsequently filed a complaint with the Citizens' Police Review Board. The Board found that Officer Bergeron performed an unlawful strip search of Young. Young filed a complaint on August 1, 2005.

D. Defendants

Defendant Oakland is a municipal corporation, which operates the Oakland Police Department ("OPD") and employs the additional defendants named below. Defendant Richard Word is Chief of Police for Oakland. Plaintiffs have sued him in both his individual and official capacities. Defendants Brett Estrada, Steven Nowak, Chris Moreno, Leonel Sanchez, Sven Hamilton, B.J. Festag, William Bergeron, Malcolm Miller, Douglas Keeley, Douglas Aitchison, Gregory Loud, Sean Bowling, Wayne Tucker, R. Alcantar, O. Crum, J. Foreman, L. Leonis, S.

Valle and Does 1-25 were police officers for Oakland at all times mentioned herein. They have been sued in both their individual and official capacities.[3]

1. Oakland Police Department's Policy Before 2004

The Oakland Police Department's 1998 policy, entitled "Strip Searches, Visual Body-Cavity Searches, and Physical Body-Cavity Searches" appears in the OPD's 1998 Training Bulletin.[4] Defs.' Opp., Exh. A ("1998 Policy"). The policy begins by defining the terms "strip search," "visual body-cavity search" and "physical body-cavity search." Id. at 8. A strip search is "any search that requires the officer to remove or arrange some or all of a person's clothing to permit a visual inspection of the subject's underclothing, breasts, buttocks, or genitals." Id. A visual body cavity search is "a search which consists of the visual inspection of the subject's rectal cavity and, if the subject is a female, vagina. A visual body-cavity search does not include a search of the mouth." Id. A physical body cavity search is "a search which consists of the physical intrusion into a body cavity for the purpose of discovering a concealed object." Id. The policy next stipulates that four requirements must be met before a strip search or a visual body cavity search may be performed: (1) "[t]he person to be searched must be under arrest and ultimately booked;" (2) "[t]he arrest must be for an offense involving weapons, controlled substances, or violence;" (3) "[t]he person conducting the search must be of the same sex as the person searched;" and (4) "[t]he search must be conducted in a private area where it cannot be observed by persons not participating in the search." Id. Additionally, the policy specifies that a physical body cavity search requires a warrant. Id.

The Bulletin also discusses the permissible scope of pat searches and the requirements for searches incident to arrest. Id. at 2–8. To perform a search incident to arrest, three requirements must be met: (1) "[t]he arrest must be legal;" (2) "[t]he search must be contemporaneous with the arrest;" and (3) "[t]he arrest must be custodial." Id. at 7. The policy on searches incident to arrest also states that an officer may search a person for contraband with probable cause. Id.

2. Oakland Police Department's Amended Policy

In 2004 the Oakland Police Department amended its policy on strip and body-cavity searches. The amendments came in response to public concerns regarding the Department's practice

of carrying out such searches. The Department publicly identified a "long-standing and problematic practice of conducting strip searches in the field." Burris Dec., Exh. C at 4.

Similar to the 1998 Policy, the 2004 Training Bulletin defines the three types of strip searches, discusses the permissible scope of pat searches and outlines the requirements for searches incident to arrest. Id., Exh. G ("2004 Policy") at 1–6. Specifically, the 1998 requirements for performing a strip search were significantly amended in 2004. Id. at 6. In the 2004 Bulletin, the section relevant to strip searches is entitled "Strip Searches in the Field." Id. The policy stipulates that a "strip search incident to an arrest" may only be performed when: (1) "[i]t is reasonable to believe that the arrestee is concealing a weapon;" or (2) "it is reasonable to believe that the arrestee is concealing evidence or contraband;" and (3) "that evidence may be destroyed or ingested unless it is immediately recovered." Id. (emphases omitted). The policy goes on to say that warrantless strip searches "are not justified by the arrest itself," and that one must have "reasonable suspicion that the arrestee has concealed a weapon, contraband or evidence." Id. (emphasis omitted).

Additionally, the 2004 Policy states that a strip search in the field may not be performed unless the following requirements are met: (1) the officer has "reasonable suspicion to believe the arrestee is hiding or concealing evidence, a weapon, or contraband;" (2) the officer is "of the same sex as the arrestee unless there is an exigency and an officer of the same sex is not available to respond;" (3) the officer "may not have physical contact with the arrestee except contact that is reasonably necessary to search for and recover items and to control or direct the arrestee;" (4) "the search must be conducted so that the search cannot be easily observed by the public," and "reasonable efforts must be made to provide as much privacy as possible;" and (5) the officer "must document the search and the need to conduct the search in the field in the appropriate report." Id. at 7 (emphases omitted). Notably, the 2004 Policy explicitly prohibits officers from ever conducting a physical or visual body cavity search in the field. Id.

3. Oakland Police Department's Alleged Practice

Plaintiffs allege that there is a widespread practice of public strip and body cavity searches within the Oakland Police Department that deviates from the Department's recently revised policy. Plaintiffs claim that this practice occurs without regard to the privacy of subjects being searched. Subjects' genitalia, buttocks, and/or anuses are exposed, often without any screen from public view. This practice allegedly targets racial minorities—especially Hispanic- and African-Americans.

II. Procedural History

Plaintiffs Foster and Duarte filed the present action on August 1, 2005. Pursuant to stipulations, plaintiffs filed an amended complaint on September 22, 2005 adding plaintiff Young. Additionally, the following actions were related to this action: (1) Rider v. City of Oakland, No. C 05-3204 MHP, related on October 6, 2005; (2) Taylor v. City of Oakland, No. C 04-4843 MHP, related on October 6, 2005; (3) Moore v. City of Oakland, No. C 06-02426 MHP, related on July 12, 2006; and (4) Miller v. City of Oakland, No. C 07-1773 MHP, related on April 17, 2007.

Plaintiffs' motion to certify a class was denied on January 27, 2007 for failure to satisfy the requirement of numerosity. Docket No. 42. Plaintiffs now move for partial summary judgment on the following grounds: 1) declaratory relief that the 1998 Policy is unconstitutional; 2) declaratory relief that the 2004 amended Policy is unconstitutional; 3) judgment that any search in accordance with either of the policies is unconstitutional; 4) summary judgment on the issue of liability in favor of plaintiffs. Plaintiffs have not moved for summary judgment on claims related to the OPD's alleged practice.

LEGAL STANDARD

Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is

genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The party moving for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. Id.; Gasaway v. Nw. Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir. 1994). The court may not make credibility determinations, and inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991); Anderson, 477 U.S. at 249.

The moving party may "move with or without supporting affidavits for a summary judgment in the party's favor upon all [claims] or any part thereof." Fed. R. Civ. P. 56(a). "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e).

DISCUSSION

Plaintiffs seek partial summary judgment on four grounds: 1) declaratory relief that the 1998 Policy is unconstitutional; 2) declaratory relief that the 2004 amended Policy is unconstitutional; 3) judgment that any search in accordance with either of the policies is unconstitutional; 4) summary judgment on the issue of liability in favor of plaintiffs. The thrust of plaintiffs' argument is that the OPD policies should be found unconstitutional as a matter of law because the policies: 1) do not allow for individualized suspicion; 2) permit invasive searches of an arrestee's person upon less than

probable cause; 3) do not adequately protect a suspect's constitutionally protected right to physical privacy; and 4) permit warrantless searches in circumstances in which a warrant is required.

I. Fourth Amendment Requirements

The instant action presents an issue of first impression to the extent that it implicates Fourth Amendment restraints on strip searches performed outside the traditional setting of a police station or detention facility. Before addressing the constitutionality of the OPD's 1998 and 2004 strip search policies, it is useful to review the case law describing the requirements of the Fourth Amendment in similar contexts. The Supreme Court has noted that there is no precise formula for reconciling the competing interests of law enforcement and individual privacy with respect to searches and seizures:

> The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559 (1979).

"State law is also relevant in analyzing the reasonableness of a search under the Fourth Amendment." Edgerly v. City and County of San Francisco, 495 F.3d 645, 656 (9th Cir. 2007).

The Ninth Circuit has had occasion to determine the constitutionality of various strip search policies employed by law-enforcement agencies. See, e.g., Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984); Kennedy v. Los Angeles Police Dep't, 901 F.2d 702 (9th Cir. 1990); Fuller v. M.G. Jewelry, 950 F.2d 1437 (9th Cir. 1991). There are two significant differences between the policies examined in this line of cases and the policy at issue in the instant action. First, the policies considered in those cases were blanket strip search policies requiring that an arrestee be subjected to a strip search if the arrestee met certain criteria, e.g., if the arrestee was arrested on suspicion of committing a felony. See, e.g., Kennedy, 901 F.2d at 713 (holding that the Los Angeles Police Department's blanket cavity search policy for felony arrests was unconstitutional). The OPD

policies do not require that a strip search be performed at any time; they only define when a strip search is permissible. 1998 Policy at 8; 2004 Policy at 6–7. Where the Ninth Circuit has found blanket strip search policies to be unconstitutional, they have done so pursuant to the Supreme Court's balancing test articulated in Bell. To be clear, the OPD policies are not blanket strip search policies, and therefore do not risk violating the Supreme Court's balancing test on that ground. Second, the previous cases have all considered strip search policies that contemplate searches occurring post-arrest and pre-booking at a police station or other detention facility. See Giles, 746 F.2d at 617 (strip search of woman at county jail pursuant to a blanket jail policy held unconstitutional); Kennedy, 901 F.2d at 713 (strip search of woman at jail pursuant to a blanket jail policy held unconstitutional); Fuller, 950 F. 2d at 1449–50 (strip search of woman at Los Angeles Police Department central station pursuant to a blanket policy held unconstitutional). None have considered strip searches occurring in the field.[5]

The term "strip search" has been variously defined by applicable law. It is specifically defined by the California Penal Code, section 4030(c) as "a search which requires a person to remove or arrange some or all of his or her clothing so as to permit a *visual* inspection of the underclothing, breasts, buttocks, or genitalia of such person." (emphasis added). It is this definition the court uses here. In fact, the Ninth Circuit in Edgerly described California's definition of "strip search" as reasonable and instructed that it "informs our Fourth Amendment Analysis." 495 F.3d at 656.

Section 4030(d) of the California Penal Code defines other searches that are more instrusive: "(2) '[v]isual body cavity search' means visual inspection of a body cavity [defined as stomach, rectal cavity or vagina]. (3) '[p]hysical body cavity search' means physical intrusion into a body cavity for the purpose of discovering any object concealed in the body cavity."

Courts have taken note of the intrusive nature of strip searches, especially body cavity searches, on numerous occasions. The Ninth Circuit observed that "[t]he intrusiveness of a body-cavity search cannot be overstated. Strip searches involving the visual exploration of body cavities is [sic] dehumanizing and humiliating."[6] Kennedy, 901 F.2d at 711. Justice Marshall remarked in

Bell that visual body cavity searches "represent one of the most grievous offenses against personal dignity and common decency." 441 U.S. at 576–77 (Marshall, J., dissenting). The majority in Bell commented that "[a]dmittedly, this practice instinctively gives us the most pause." Id. at 558.

The constitutional requirements for performing the three types of strip searches differ. Physical body cavity searches are the most invasive, and, therefore, are subject to the strictest requirements. California Penal Codes section 4030(k) requires that a physical body cavity search be performed by an authorized medical professional. The Supreme Court has commented in the context of searches and seizures that "serious questions . . . would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse." Schmerber v. California, 384 U.S. 757, 771–72 (1966). The Ninth Circuit has found physical body cavity searches of inmates to be unreasonable where they were performed by inadequately trained medical assistants, holding that "issues of privacy, hygiene, and the training of those conducting the searches are relevant to determining whether the manner of the search was reasonable." Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988). It is clear in this Circuit that physical body cavity searches may only be conducted upon probable cause and, absent an emergency, a search warrant is ordinarily required. Fuller, 950 F.2d at 1449. In Fuller, the Ninth Circuit held that the Schmerber requirement that a warrant be obtained prior to performing a blood test on an arrestee should apply with equal force to physical body cavity searches. Id. The court concluded that "'[t]he interests in human dignity and privacy' invaded when a public official peers inside a persons's body cavity are at least as great as those invaded by a needle piercing the skin." Id. at 1449 (quoting Schmerber, 384 U.S. at 769–70).

With respect to visual body cavity searches, such searches may be conducted upon reasonable suspicion that a particular arrestee harbors weapons or dangerous contraband. The purpose of this policy is to ensure that weapons, drugs or other contraband that would pose a threat to the safety or the security of the penal institution are not introduced into the facility. Thus, the question of such a search arises when the arrestee is brought into a jail or similar institution. Here,

courts have distinguished among those being admitted into the general inmate population and those who are awaiting bail or release. See, e.g., Dobrowolskyj v. Jefferson County, 823 F.2d 955 (6th Cir. 1987) (strip search upheld where detainee was not searched until he was going to be moved to general jail population); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981) (strip search of detainee was held unconstitutional where he was not to be admitted to general jail population).

In Fuller, the Ninth Circuit noted that institutional considerations—such as the safety of the broader inmate population—justified visual body cavity searches on less than probable cause. 950 F.2d at 1447 ("[S]trip and body cavity searches of detainees may be conducted on reasonable suspicion only where such searches are necessary to protect the overriding security needs of the institution"). The court declined to extend the reasonable suspicion standard to body cavity searches for stolen property, which did not implicate these institutional concerns. Id. at 1448. Thus, in Fuller smuggling a ring into a detention facility was not considered a security concern, and, therefore, the Ninth Circuit held that probable cause was required for such a search. Most recently the Ninth Circuit reaffirmed in Edgerly that *arrestees* charged with only minor offenses may be subjected to strip searches "'only if jail officials possess a reasonable suspicion that the individual arrestee is carrying or concealing contraband.'" 495 F.3d at 656 (quoting Fuller, 950 F.2d at 1446).

Courts have not often discussed the requirements for performing strip searches that do not rise to the level of physical or visual body cavity searches. However, they often lump them all together with visual body cavity searches as the court did in Fuller, finding that such searches may be conducted in an institutional setting where there is reasonable suspicion that the arrestee possesses weapons or dangerous contraband such as drugs but that probable cause is required for body cavity searches for ordinary evidence. Most cases dealing with strip searches have involved such searches occurring at a jail, police station or other place where the arrestee will be held in custody. Courts have also made a distinction between arrestees being admitted into the general jail population and those simply awaiting bail or other custodial arrangements requiring less security concerns. Very few have involved strip searches performed in the field. Furthermore, all of the cases speak to strip searches of persons who have been arrested. Courts have authorized what is

called a "full search of the person" in the field, however, when that search has been incident to arrest. United States v. Robinson, 414 U.S. 218, 235 (1973). The extent of the search in Robinson was limited to a pat-down and examination of the *arrestee's* pockets, with the Court noting that the search was after a "full-custody arrest." Id. at 237 n.6.

What is clear from a review of the case law is that a strip search may be conducted under the following circumstances:

1) the subject has been arrested, brought to a jail or similar custodial situation and will be placed in the general custodial population or under similar housing conditions;

2) there is a reasonable suspicion that the subject is secreting drugs or weapons and that reasonable suspicion is based on the nature of the offense, the subject's appearance and conduct and the subject's prior arrest record; and

3) the search complies with the necessary privacy and health precautions discussed above.

What is not clear is the extent to which a strip search may be conducted in the field. There is no case law suggesting that such a search may be performed in the absence of an arrest. All of the cases are premised on there being an arrest, not merely a detention or a stop for questioning. An arrest must be based on probable cause and may thus justify some type of search depending on the circumstances. However, detentions and stops that are short of an actual arrest will not support a strip search or, indeed, any kind of search except for a *Terry* search when the standards of Terry v. Ohio, 392 U.S. 1 (1968), justify a *Terry* stop. Given the limits on strip searches even in a jail setting, certainly the limitations are greater when the search is in the field pursuant to a valid arrest. It is clear that the "full search" authorized by Robinson is ordinarily conducted for the officers' safety. A "full search" incident to arrest, however, does not permit a strip search or bodily intrusion. Like the searches in Fuller, the searches in the instant case are unrelated to prison security. Field strip searches by definition occur before a suspect has arrived at a detention facility. And even after the arrestee has arrived at the facility, security concerns may not be great enough to justify invasive searches upon reasonable suspicion if the detainee is not to be admitted to the general jail population or the search is merely for evidence. Fuller, 950 F.2d at 1448. Only after an arrestee has arrived at

a detention facility does institutional security become a factor, thereby permitting searches for weapons or contraband based upon reasonable suspicion. Prior to his arrival at the facility, an arrestee poses no threat to prison security, and officers in the field are adequately protected by their ability to perform security searches incident to arrest.

Therefore, the court concludes that officers in the field are generally limited to a search incident to arrest as described in Robinson and that strip and more invasive searches in the field may only be performed under exigent circumstances and with probable cause which may, consistent with the above, require a warrant. In sum, the court concludes that the Fourth Amendment requirements for the three types of strip searches performed in the field—strip search, visual body cavity search and physical body cavity search—are as follows:

1) there must be exigent circumstances;

2) the search may only be performed on persons who have been lawfully arrested on probable cause and may not be performed on anyone for whom there is no probable cause to arrest;

3) the search requires probable cause that is independent of the probable cause found for the arrest;[7]

4) the search may only be performed when there is probable cause to believe that the arrestee is in possession of weapons, drugs or dangerous contraband; and

5) additionally, physical body cavity searches require a warrant authorizing the search and must be administered by an authorized medical professional.

II. 1998 Policy

Plaintiffs contend that the 1998 OPD Policy does not pass constitutional muster for four reasons: 1) the policy fails the balancing test required by the Supreme Court in Bell; 2) the policy permits invasive searches of an arrestee's person upon less than probable cause; 3) the policy does

not adequately protect a suspect's constitutionally protected right to physical privacy; and 4) the policy permits warrantless searches in circumstances in which a warrant is required.

Plaintiffs' first argument is unpersuasive. As discussed above, only blanket policies requiring strip searches at detention centers have been found unconstitutional under Bell, and the 1998 OPD Policy contains no such requirement. See, e.g., Giles, 746 F.2d at 617; Kennedy, 901 F.2d at 713; Fuller, 950 F.2d at 1449–50. Because the 1998 Policy outlines when a strip search may be performed and requires individual determinations of suspicion, it allows for the balancing of security and privacy interests required by Bell.

Plaintiffs' second argument is that the 1998 Policy allows for strip searches on less than probable cause. Plaintiffs claim that the policy allows strip searches to be performed upon the satisfaction of only the four requirements outlined in the OPD's Training Bulletin section entitled "Strip Searches, Visual Body-Cavity Searches, and Physical Body-Cavity Searches:" (1) "[t]he person to be searched must be under arrest and ultimately booked;" (2) "[t]he arrest must be for an offense involving weapons, controlled substances, or violence;" (3) "[t]he person conducting the search must be of the same sex as the person searched;" and (4) "[t]he search must be conducted in a private area where it cannot be observed by persons not participating in the search." 1998 Policy at 8. Defendants claim that the strip search section of the training bulletin cannot be read independently of the entire bulletin; specifically, defendants claim that a strip search may be performed only after the requirements of searches incident to arrest are met. The section entitled "Searches Incident to an Arrest" of the OPD Training Bulletin, which appears on the page previous to the section on strip searches, states that "[w]hen an officer has probable cause to believe that contraband is on a person, an officer can search that person." Id. at 7. Plaintiffs provide no support for their argument that the sections of the training bulletin may be, or necessarily are, read independently of one another. The court finds that the sections of the bulletin must be read together, and therefore the 1998 OPD Policy does not violate the requirement that strip searches be performed only with probable cause.[8] The court notes, however, that pursuant to Way v. County of Ventura, 445 F.3d 1157 (9th Cir. 2006), and Edgerly, 495 F.3d at 656 n.17, this Circuit has clearly held since

2006 that the inclusion of all drug offenses, without an attempt to distinguish under the influence charges from distribution charges, would not pass muster.

Plaintiffs next argue that the OPD's 1998 Policy permits strip searches of arrestees in public, and therefore, fails to protect an arrestee's Fourth Amendment right to physical privacy. The "place in which [a search] is conducted" is one of the factors the courts must consider in determining the reasonableness of a search. Bell, 441 U.S. at 559. Plaintiffs cite to a number of cases outside the Ninth Circuit that found public strip searches to be unconstitutional for want of privacy. See, e.g., Iskander v. Village of Forest Park, 690 F.2d 126 (7th Cir. 1982); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981); Timberlake by Timberlake v. Benton, 786 F. Supp. 676 (M.D. Tenn. 1992). The issue of whether the OPD has conducted strip searches in public, and whether OPD officials interpret the policy as permitting strip searches in public, is not before the court at this time. The court must consider only whether the 1998 Policy itself violates an arrestee's privacy interests as a matter of law. The evidence suggests that an arrestee's privacy interests are adequately protected by the policy. The Training Bulletin's fourth requirement when performing strip searches clearly states that the search must be conducted in a private area, where it cannot be observed by persons not participating in the search. 1998 Policy at 8. This requirement comports with California Penal Code section 4030(m) and does not justify a finding that the policy violates privacy interests as a matter of law. However, to the extent that field strip searches are inconsistent with the principles set forth above, they are violative of the Fourth Amendment.

Plaintiffs' final argument is that the 1998 Policy is unconstitutional because it permits warrantless strip searches where a warrant is required. A warrant is required for physical body cavity searches, absent exigent circumstances. Fuller, 950 F.2d at 1449–50; Schmerber, 384 U.S. at 770. Only physical body cavity searches require a warrant; other strip searches may be performed without a warrant. See, e.g., United States v. Cameron, 538 F.2d 254, 259 (9th Cir. 1976); People v. Wade, 208 Cal. App. 3d 304, 307 (1989). Defendants' 1998 Policy plainly states that a physical body cavity search requires a warrant. 1998 Policy at 8. Therefore, the 1998 Policy is not unconstitutional on these grounds.

As an additional matter, although the 1998 Policy requires warrants for physical body cavity searches, it does not state that such searches must be performed by a medical professional. California Penal Code section 4030(k) and federal common law require that a physical body cavity search be performed by a medical professional. See Schmerber, 384 U.S. at 771–72; Vaughan, 859 F.2d at 741. Given the policy's silence on the issue, the court must conclude that the policy contains no such requirement. In this respect, the 1998 OPD Policy is unconstitutional and in violation of California law.

In sum, the OPD 1998 strip search Policy is not unconstitutional for any of the reasons put forth by plaintiffs in their motion for partial summary judgment. It is, however, unconstitutional insofar as it allows physical body cavity searches to be performed by someone other than a medical professional.

III. 2004 Policy

Plaintiffs argue that defendants' 2004 strip search Policy is unconstitutional for the same reasons they believe the 1998 strip search Policy is unconstitutional. The court considers these arguments with respect to the 2004 Policy in turn.

Plaintiffs' argument that the 2004 Policy fails to allow for individual suspicion is again unpersuasive. Like the 1998 Policy, the 2004 Policy is not a blanket strip search policy, and therefore allows for the balancing of interests as required by Bell.

Plaintiffs contend that the 2004 Policy similarly allows for strip searches on less than probable cause. While defendants contend that the field strip search section of the 2004 Training Bulletin must be read together with the requirements of the other sections, the language of the 2004 Policy is somewhat contradictory. The Training Bulletin states that "[w]hen an officer has probable cause to believe that contraband is on a person, an officer can search that person." 2004 Policy at 5. However, the section entitled "Strip Searches in the Field" states that a strip search in the field may be conducted when it is "reasonable to believe" that an arrestee is carrying a weapon or contraband. Id. at 6. This language appears to require only reasonable suspicion to conduct a strip search of an

arrestee. While reasonable suspicion is adequate to justify a strip search in the context of a detention facility when institutional security is a concern, in accordance with the above holding, it is insufficient to justify a strip search in the filed. Because the language of the 2004 policy is unclear, the court assumes that the policy requires only reasonable suspicion. In this respect the 2004 OPD strip search Policy is unconstitutional.

Plaintiffs next argue that the 2004 Policy fails to protect an arrestee's Fourth Amendment right to physical privacy. Again, the court considers the "place in which [a search] is conducted" when determining the reasonableness of a search. Bell, 441 U.S. at 559. The 2004 OPD strip search Policy differs from the 1998 Policy with respect to an arrestee's privacy. While the 1998 Policy states that a strip search must be conducted in a private area where it cannot be observed by others, the 2004 Policy states that "reasonable efforts must be made to provide as much privacy as possible given the circumstances." 2004 Policy at 7 (emphasis omitted). Although this language seems to protect an arrestee's privacy less effectively, the 2004 Policy also states that visual and physical body cavity searches may never be conducted in the field. Id. Therefore, the only type of strip search that is permitted in the field by the 2004 Policy is one that does not rise to the level of a cavity search, and that is only a rearrangement of the clothing. The test for the constitutionality of a strip search is reasonableness under the circumstances.[9] Bell, 441 U.S. at 559. Because the 2004 Policy limits field searches to strip searches and requires "reasonable efforts" to protect a suspect's privacy, the policy does not violate an arrestee's right to privacy as a matter of law.

Plaintiffs again argue that the 2004 Policy is unconstitutional because it permits warrantless strip searches where a warrant is required. A warrant is required for physical body cavity searches, absent exigent circumstances. Fuller, 950 F.2d at 1449–50; Schmerber, 384 U.S. at 770. Other strip searches may be performed without a warrant. See Wade, 208 Cal. App. 3d at 307; Cameron, 538 F.2d at 259. Defendants' 2004 Policy plainly states that a physical body cavity search requires a warrant.[10] 2004 Policy at 7. Therefore, the 2004 Policy is not unconstitutional on these grounds.

In sum, the 2004 OPD strip search Policy is unconstitutional to the extent that it allows strip searches of any kind in the field to be performed on less than probable cause.

IV. Constitutionality of Individual Searches

Plaintiffs seek summary judgment declaring any search in accordance with either of the OPD policies to be unconstitutional. The constitutionality of an individual search, however, does not turn solely on the constitutionality of the policy pursuant to which it was performed. See Kennedy, 901 F.2d at 715. The Ninth Circuit observed in Kennedy that "a search, although not supportable under an institutional policy, is not per se unconstitutional." Id. And in Fuller, the court noted that "[t]he fundamental question under the fourth amendment is whether 'the grounds for a search . . . satisfy objective standards' of reasonableness." 950 F.2d at 1446 (quoting Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 471 (1979)) (emphasis omitted). Thus, even if a policy permitting a search passes constitutional muster, an individual search must be evaluated based upon the above standards. Where a policy permits searches that may be unconstitutional, an individual search must still meet constitutional standards. Where the officer claims to rely on an unconstitutional policy, the rules regarding qualified immunity apply and liability must depend upon the facts of the particular case.

To the extent that the OPD policies are inconsistent with the foregoing standards, the court must determine the appropriate relief.

V. Liability

Plaintiffs seek summary judgment on the issue of liability in favor of the plaintiffs. As noted in the previous section, the court is presently unable to determine the constitutionality of any particular search in the instant case until further evidence is submitted. To the extent that the court has found certain policies do not meet constitutional standards, defendant Oakland must bring its policies into compliance.

VI. Objections to Related Case

Defendants argue in one sentence in a footnote that the defendants in Miller v. City of Oakland have not been served or have not yet appeared in the case, and therefore should not be

included in this motion for partial summary judgment. Plaintiffs note that defendants Oakland and Richard Word filed an answer in Miller on April 19, 2007. The court therefore finds that the parties in Miller are proper parties to this motion.

VII. Evidentiary Issues

Defendants ask the court to take judicial notice of two separate sets of documents: 1) the 1998 and 2004 OPD strip search policies, and 2) documents in this case and in Cammerin K. Boyd v. City of Oakland, Case No. 03-3391 JL (N.D. Cal.). Pursuant to Federal Rule of Evidence 201, the court takes judicial notice of the 1998 and 2004 OPD policies as they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201(b)(2); see also Hott v. City of San Jose, 92 F. Supp. 2d 996, 998 (N.D. Cal. 2000) (Fogel, J.) (holding the court may take judicial notice of relevant documents). Plaintiffs have not objected to defendants' request for judicial notice. Accordingly, the court GRANTS the defendants' request for judicial notice of the OPD policies. The court declines to take judicial notice of the second set of documents because it has not considered them here.

Defendants have submitted a separate statement of genuine issues to which plaintiffs object. Because the court has not considered this statement, the court need not address plaintiffs' objections at this time.

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CONCLUSION

For the reasons stated above, the court GRANTS IN PART plaintiffs' motion for partial summary judgment with respect to the request for declaratory relief that the 1998 and 2004 OPD policies are unconstitutional in certain respects, and DENIES the motion for summary judgment on liability and declaratory relief on the individual searches at issue.

The parties shall arrange a case management conference with the court to discuss the remedies necessary to comply with this order and for further proceedings in this and the other related cases.

IT IS SO ORDERED.

Dated: March 27, 2008

MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. The four related cases are Taylor v. City of Oakland, C 04-4843 MHP; Rider v. City of Oakland, C 05-3204 MHP; Moore v. City of Oakland, C 06-2426 MHP; and Miller v. City of Oakland, C 07-1773 MHP.

2. Unless otherwise noted, all facts are taken from the first amended complaint (the "Complaint" or "FAC").

3. This list of defendants includes defendants from Foster v. City of Oakland, Case No. C 05-3110 MHP; Taylor v. City of Oakland, C 04-4843 MHP; Rider v. City of Oakland, C 05-3204 MHP; Moore v. City of Oakland, C 06-2426 MHP; and Miller v. City of Oakland, C 07-1773 MHP.

4. The words "Training Bulletin," "Bulletin" and "policy" are used interchangeably in this order.

5. The court understands "in the field" to mean a search conducted outside the privacy of a police station or detention center, contrary to plaintiffs' repeated implication that "in the field" is synonymous with "in public." Former OPD Chief Richard Word's internal communication indicates that an appropriate place for a field search would be inside an unoccupied private or public restroom; it would be a stretch to characterize a search conducted in such surroundings as a search "in public." Nisenbaum Dec., Exh. A at 33.

6. Since, as can be seen from this sentence, the term "strip search" has been used to denote a wide variety of search practices varying in their degree of intrusiveness, this court, as stated above, uses the California Penal Code definitions.

7. In some rare instances, the probable cause for the arrest will also provide probable cause for the invasive search.

8. Despite the contradictory language with respect to the requisite level of suspicion in the 2004 Policy discussed below in section III of this order, the 2004 Policy more clearly suggests that the separate sections of the Training Bulletin must be read together by defining the requirements for "strip searches *incident to arrest*." 2004 Policy at 6 (emphasis added). This suggests that strip searches may only be performed when the requirements for searches incident to arrest are met. While the 1998 Policy does not make this clear on its face, plaintiffs have presented no evidence to the contrary, and the court accepts defendants' argument that the sections must be read together.

9. While the Fourth Amendment requirement for conducting a strip search is reasonableness under the circumstances, California Penal Code section 4030(m) appears to require strict privacy: "[a]ll strip, visual and physical body cavity searches shall be conducted in an area of privacy so that the search cannot be observed by persons not participating in the search."

10. The 2004 OPD Policy notes in the same sentence that a physical body cavity search can only be conducted by an authorized medical professional. 2004 Policy at 7.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES TAYLOR, et. al.,

Plaintiffs,

vs.

CITY OF OAKLAND, et. al.,

Defendants,

AND ALL RELATED CASES

JIMMY RIDER, (Case No. C-05-3204 MHP)

Plaintiff,

vs.

CITY OF OAKLAND, et. al.,

Defendants,

DARNELL FOSTER AND CLASS MEMBERS, et. al.,

Plaintiffs,

vs.

CITY OF OAKLAND, et al.,

Defendants,

(Case No. 3:05-cv-3110 MHP)

Related Case No. C-04-4843 MHP

Hon. Marilyn Hall Patel

PLAINTIFFS' PROPOSED STRIP SEARCH POLICY

JOINT CAPTION CONTINUED ON NEXT PAGE

TYRONE MOORE, et al.,

Plaintiffs,

vs.

CITY OF OAKLAND, et. al.

Defendants,

(Case No. C-06-2426 MHP)

JEFFRIE MILLER, et. al.,

Plaintiffs,

vs.

CITY OF OAKLAND, et al.,

Defendants.

(Case No. C-07-1773 MHP)

WARD, et. al.,

Plaintiffs,

vs.

CITY OF OAKLAND, et al.,

Defendants.

(Case No. C-07-4179 MHP)

SMITH, et. al.,

Plaintiffs,

vs.

CITY OF OAKLAND, et al.,

Defendants.

(Case No. C-07-6298 MHP)

Plaintiffs, by and through their counsel, HADDAD & SHERWIN and THE LAW OFFICES OF JOHN L. BURRIS, hereby submit the following proposed strip search policy in response to Defendants' proposed policy (Foster, 07-4179 MHP, Dkt. No. 30-2):

[NOTE: Sources for policy language are listed at the end of each clause in brackets as follows: Oakland Police Department [OPD]; International Association of Chiefs of Police [IACP]; Lexington, KY, Police Department [LEX]; Plaintiffs in consultation with their police practices experts [PLFS] or as underlined below].

STRIP SEARCHES INCIDENT TO ARREST

I. PURPOSE

The purpose of this policy is to provide officers with guidelines for determining if and under what conditions the use of strip searches and body cavity searches are legally permissible outside of jail, and to establish guidelines for the appropriate conduct of such searches. [IACP]

II. DEFINITIONS

"Strip search" means a search that requires a person to remove or arrange some or all of his or her clothing so as to permit a visual inspection of the underwear, brassiere, breasts, buttocks, or genitalia of such a person. [OPD]

"Body cavity" means the rectal cavity of a person, and vagina of a female person. The ear canals, nostrils, and throat are not body cavities. [OPD]

"Visual body cavity" search means visual inspection of a body cavity (rectum or vagina). [OPD]

"Physical body cavity" search means physical intrusion into a body cavity for purpose of discovering any object concealed in the body cavity. [OPD]

"Exigent circumstances," for purposes of this policy, exist only where an officer has probable cause to believe the arrested subject can defeat the restraint mechanism (including handcuffs and vehicle seat belts) and use a weapon/contraband or ingest drugs hidden in or around the subject's underwear, brassiere, breasts, buttocks, or genitalia, causing a threat to officers, others, or to the subject. [PLFS]

III. POLICY

A. Strip Searches.

A strip search in the field may only be conducted incident to a lawful arrest supported by probable cause or a warrant, and only when:

1. (a) there is probable cause to believe that the arrestee is concealing a weapon in or around their underwear, brassiere, breasts, buttocks, or genitalia, and that the weapon will be recovered by a strip search; **or (b)** there is probable cause to believe that the arrestee is concealing controlled drugs or dangerous contraband in or around their underwear, brassiere, breasts, buttocks, or genitalia, and that the drugs/contraband will be recovered by a strip search; [OPD/PLFS]

AND

2. There is probable cause to believe exigent circumstances require the immediate recovery of the weapon, controlled drugs, or dangerous contraband and that the search cannot wait until the prisoner is transported to the Jail. For the purposes of this policy, exigent circumstances exist only where an officer has probable cause to believe the subject can defeat the restraint mechanism (including handcuffs and vehicle seat belts) and use the weapon/contraband or ingest the drugs, causing a threat to officers, others, or to the subject. [OPD/PLFS]

AND

3. ALL of the following requirements are also met:

a. Prior to conducting the strip search, the officer must obtain the authority to conduct the search from a supervisor on duty as described more fully below. [OPD]
b. The officer shall secure the prisoner with proper handcuffing techniques prior to beginning a search; [LEX]
c. The search shall be conducted by an officer of the same gender as the prisoner [LEX], unless threat of serious harm to the officer, citizens, or the arrestee is imminent [OPD];
d. The search shall be witnessed by a second officer that is also of the same gender as the prisoner; [LEX]
e. The search shall be conducted in an area of privacy so that the search cannot be observed by persons not participating in the search. [Cal. Pen. Code § 4030(m)] (the "V" of the car door does not provide adequate privacy, and will almost never be a permissible location to conduct a field strip search except in the most extreme, life-threatening situations, and with specific prior approval from a supervisor); [PLFS]
f. The search shall be limited only to the location on the body of the prisoner where the officer conducting the initial pat-down felt the presence of a weapon, drugs, or contraband; [LEX]
g. Only clothes required to obtain access to the weapon, drugs, or contraband shall be loosened and/or removed in order to retrieve the item; [LEX]
h. You may not have physical contact with the arrestee except contact that is reasonably necessary to search for and recover items and to control or direct the arrestee; [OPD]
i. You must document the search and the need to conduct the search in the field in the appropriate report as described more fully below. [OPD/PLFS]

Warrantless strip searches *are not justified by the arrest itself.* You must be able to articulate probable cause that the arrestee has concealed a weapon, controlled drugs, or contraband, and probable cause that an exigency exists such that the search cannot wait for the arrestee to be searched in the Jail. [OPD/PLFS]

Warrantless strip searches solely to recover evidence (as opposed to potentially dangerous weapons, drugs, or contraband) are never permitted, unless the evidence is of a nature that would be likely to pose a serious threat of death or serious injury if handled by the subject (such as certain controlled drugs), **and** there is probable cause to believe exigent circumstances require the immediate recovery of the evidence. [PLFS]

Officers may seek to obtain a warrant to conduct a private strip search of an arrestee where the officer has probable cause to believe that the arrestee is concealing a weapon, drugs, evidence, or contraband in or around their underwear, brassiere, breasts, buttocks, or genitalia, and that the item(s) will be recovered by a strip search, and provided all requirements of any warrant and of subsection A.3, above, are also followed. [PLFS]

Before conducting any strip search, officers shall seek authorization from a supervisor of the need to make a strip search of a prisoner. The officer shall fully inform the supervisor of the facts constituting probable cause to believe the subject is concealing weapons, drugs, or dangerous contraband in a private place on his or her person, and the facts constituting probable cause to believe that exigent circumstances require the strip search to be conducted outside of the jail. The officer shall also inform the supervisor of the private location where the strip search is to be conducted. In the event the prisoner's actions warrant an immediate search, the supervisor shall be notified immediately following the search and apprised of the circumstances.

Following a strip search, the officer performing the search shall submit a written report to the supervisory authority that details, at a minimum, the following:

a. Time, date and place of the search; [IACP]
b. Identity of the officer conducting the search; [IACP]
c. Identity of the supervisor who authorized the search; [PLFS]
d. Identity of the individual searched; [IACP]
e. Identity of those present during the search; [IACP]
f. A detailed articulation of the probable cause required to conduct the search, including all exigent circumstances; [PLFS]
g. A detailed description of the nature and extent of the search; [IACP]
h. A complete listing of any weapons, drugs, or contraband found during the search. [IACP]

The immediate supervisor of the officer initiating a strip search shall review the documentation forwarded by the officer.

The documentation shall be maintained at the Bureau level with a copy forwarded to the Bureau of Internal Affairs. [LEX] The Bureau of Internal Affairs shall maintain a database record of all searches governed by this policy and prepare administrative reports based on the data on an as-needed basis. [LEX]

When officers have probable cause to believe that a suspect has ingested a controlled drug, the suspect may be charged with tampering with physical evidence. Officers shall obtain emergency medical attention for the arrestee. [LEX]

B. Physical and Visual Body Cavity Searches.

Officers shall *never* conduct a visual body cavity search (i.e., visual inspection of the rectum or vagina) without a warrant or extreme exigency involving imminent threat to life. [PLFS]

Officers shall *never* conduct physical body cavity search (i.e., physical penetration of the rectum or vagina) [OPD] A search warrant or an extreme exigency is required for a physical body cavity search and can only be conducted by an authorized medical professional and only at a medical facility or other approved facility. [OPD]

Strip and visual body cavity searches may, depending on the circumstances, be conducted in conjunction with the booking and incarceration process at the jail (Penal Code § 4030), or when authorized by a proper warrant and otherwise done in accordance with all requirements of subsection A.3, above. [OPD/PLFS]

Respectfully submitted,

Dated: June 16, 2008

Haddad & Sherwin

____/s/_____
Michael J. Haddad
Attorney for all Plaintiffs in all related cases

IV. Settlement of Police Misconduct Cases with Fee Claims

Materials:

Avoiding the Roll of the Dice: Strategies for Settlement
Richard A. Soble and Mary R. Minnet

Presenters:

Richard Soble, Soble Rowe Krichbaum, Ann Arbor, MI
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CHAPTER 20

Avoiding the Roll of the Dice: Strategies for Settlement

Richard A. Soble and Mary R. Minnet

I. INTRODUCTION

Statistics tell us that as many as 95 percent of all cases settle before verdict. Thus, while we spend much of our time preparing a case for trial: researching the law, conducting our investigation, and taking lay, expert and medical depositions, we rarely get a chance to use the information we have uncovered at trial. Our training is in the trial of cases, but our usual practice is to settle them.

The purpose of this article is to outline, from a practitioner's viewpoint, an approach to settlement of police misconduct claims. If negotiations were a science, all we would need to do is to insert the variables of litigation into an equation that would give both sides a predictable result. While the authors are working on such an equation, it was not ready in time for this article.

Instead, we will describe the art of negotiation. Like many other art forms, there are principles to follow but in the end it takes discipline, preparation, advocacy and experience to become proficient. Every lawyer cannot become a great negotiator but every lawyer can become a competent one.

A. Reasons to Consider Settlement

There are several reasons why settlement of a 1983 claim, rather than trial, is in your client's best interest.

Settlement achieves a certainty of result. Section 1983 cases seek redress where a citizen has been abused by the power of the state. The use of state power is a wild card for both parties. The defendant fears that the jury, as the conscience of the community, will speak out in strong monetary terms to express its outrage. After all, the jury cannot fire, reprimand

or retrain the police officers; it can only award money. Plaintiff, on the other hand, fears that the jury will approve the use of force and find the officer's conduct reasonable.

Your client has only one case: he or she cannot average out a loss the way the defendant can. The client's resources are more limited than those of a municipality. If you try the case, in all likelihood a favorable verdict will be appealed by the defendant, who remains in control of the money.

The defendant often elects to settle cases because of fears that the verdict will exceed the plaintiff's settlement demand and publicity generated by a trial. That publicity exposes wrongdoing on the part of the police force and in the process encourages more lawsuits as well as negatively affects the public's confidence in and perception of the police department.

A settlement that is agreeable to both parties means that neither side needs to gamble with a jury verdict. It provides the plaintiff with compensation more quickly and with fewer litigation costs for both sides.

B. A View of the Negotiation Process

The negotiation and settlement of a case must be treated with the same energy and focus as your preparation for trial. As with trial, the better your preparation, the better the result.

There is a difference between settlement and "settling." Negotiation is not a singular event nor is it a matter of splitting the difference. Rather it is a process that begins with the initial client interview and ends when you have received a settlement offer that is a reasonable compromise of the case's verdict potential.

C. "What Is My Case Worth?"

You will need to orient your client's expectations regarding the value of his or her case. In all likelihood, the client will have heard or read about police misconduct cases involving large jury verdicts. The client will not, however, be as aware of the number of defense verdicts in these cases and the fact that defendants win far more often than is reported in the press. It is no wonder that clients have a skewed view of the value of their cases.

When your client asks what his or his or her case is worth (and the question is usually raised) tell the client that you are not yet in a position to make such a determination. Tell the client that there are many factors that go into the evaluation of a case: the judge assigned to the case, the composition of the jury, the evidence that will be presented, including information about the client's other damages that is still developing, and the legal and factual defenses to the case. All these factors will be assessed as the case proceeds to trial and the assignment of a dollar value or even a range of figures at the initial interview would be inappropriate.

II. PREPARATION FOR SETTLEMENT

Preparation for settlement is no different from preparing for oral argument. You are not ready until you have learned all that you need to know to make an effective presentation. Adequate preparation requires the gathering of sufficient information before you are able to assess the value of the case. Only then will you be in a position to persuade the defendant to adequately compensate your client. Your compilation of that information begins with the client interview and continues as you search for the records and evidence that support and lend credibility to your client's case.

A. Client Interview

1. Focus of the Interview

Your client is a major source for factual information about the case. The data he or she provides will be the starting point for your investigation. While the collection of this information is generally viewed as necessary for trial preparation, it is especially useful for your settlement preparation. You can significantly increase the value of the settlement by thoroughly exploring and developing information that reflects well on your client and illustrates the client's special qualities.

You will develop this material in two ways. First, begin by asking the client about his or her personal background, try to discover distinctive qualities. Those qualities which you believe make your client special are those which will motivate the defendant and the jury to like your client. Second, ask your client about people or places which can provide corroborative or other useful information about him or her. Follow up by obtaining relevant documentary and physical evidence. Insofar as these records document or corroborate various aspects of your client's life, they will provide you with another body of information about your client.

2. Checklist for Factual Information

You may find it helpful to work from the following checklist:

1. Name, age, social security number.

2. Marital history: if divorced, find out about custody arrangements and child support; your client's continued relationship with and support of his or her children will speak volumes about your client.
3. Children/other dependents: find out about your client's children: their names and ages, the activities in which they participate; you are looking for an anchor in the client's life to strengthen credibility, e.g., religious activity, sports, school.
4. Medical history:
   (a) Names, dates of treatment and conditions treated for; addresses of all doctors and hospitals client has seen during his or her lifetime, including treatment for the present injury;
   (b) All medications client has taken for injury and the name and address of the pharmacy filling these prescriptions; and
   (c) Names and addresses of all therapists, including physical therapists, psychologists, vocational rehabilitationists and occupational therapists.
5. Employment: get the names of all employers, dates of employment, type of work, rate of pay, and reason for leaving. Also, ask your client if he or she underwent a pre-employment physical, suffered any work-related injuries and/or filed a related workers' compensation claim and what your client's record was in terms of absences, sick time, and vacation time.
6. Education: find out the names of all the schools your client has attended, dates of graduation, degrees received, and any special interests, activities, or honors; also, ask about any on-the-job training or specialized vocational education in which your client has been a participant.
7. Special interests: what interests your client—ask about his or her activities, hobbies, participation in sports, family activities and involvement, social, political or union activism, or church work. These interests are often an integral part of your client's life and will provide a great deal of insight into what makes your client unique.
8. Military service: find out your client's branch of service, dates of enlistment, and discharge rank, military job performance, and service awards.
9. Prior arrests/convictions/lawsuits: no matter how minor or insignificant, ask about all prior convictions and incarcerations anywhere. Explain to the client that the police will know of any prior encounters the client has had with the criminal justice system and will use such encounters to undermine and impeach his or her credibility. You should also inquire into your client's involvement in prior lawsuits: find out the nature of the litigation, where and when it was filed and how the case was resolved.
10. Applications made for insurance, unemployment compensation, or other governmental benefits: the dates and places of any such applications should be determined as well as the result of these applications.

B. Attorney Investigation

1. Obtain All Relevant/Corroborative Records

Obtain copies of all records that are likely to contain information about the case. A careful review of those records serves two purposes. It will help you flesh out and corroborate your client's past, and you will learn of any negative facts that are documented and probably available to the defense.

The information contained in the records will be useful in corroborating the client's claim and the extent of his or her damages. If the records do not confirm your client's statements it will be much easier to make the appropriate disclosures with an explanation rather than have your client get caught in a misstatement because the defendant obtained these background records and you did not. The records will also help you form impressions about and get a sense of your client's history, as well as his or her life, values, priorities, and dreams.

a. Medical Records

(i) Records of the injury. The primary value of medical records is their documentation of the complained-of injury. The history given by the client in this record should be checked to determine how it squares with the account the client gave you about the incident. Were any physical findings such as bruises or abrasions noted by the examining physician? These may corroborate a claim of use of excessive force.

If admission to the hospital was required, additional medical records are generated. Look at the admitting history and physical, nurse's notes, medication records, and laboratory and x-ray findings. The discharge summary will provide you with an overview of the entire hospitalization. It will summarize the most important aspects of the client's medical condition and provide a final diagnosis at the time of discharge.

You should also look at the records to determine and evaluate the permanency of your client's injury as well as the potential for latent effects. If your client was struck in the head by the police, is there any potential for post traumatic epilepsy that may emerge later in his or her life? If your client fractured his or her ankle, will your client develop arthritis in the future?

(ii) Prior medical records. The state of your client's health prior to the injury is important in determining the impact of the injury. If the records show your client has a life-shortening illness or disability, the extent of future damages caused by the defendant may be diminished. Arthritis, heart conditions, nervousness, and psychological problems are examples of medical conditions a client may have had prior to the injury. Documentation of increased symptoms, medication, and medical visits subsequent to the injury are all indications that a preexisting condition has worsened.

b. Police Records. Obtain all reports and investigation records arising from the incident that precipitated the misconduct claim and note any inconsistencies between the records, the client's statements, and the accounts given by the defendants. The defendant will have difficulty attacking its own records. Thus, any inconsistencies in records and statements that tend to corroborate your client's version of the events will considerably weaken the defendant's case.

Secure mug shots of your client to establish the presence and extent of any physical injuries. If the client has been transported to the hospital or otherwise detained by the police, injury reports or conveyance slips may also provide helpful information. Subpoena any physical evidence seized by the police, such as clothing. Torn or bloody clothes may help to substantiate elements of the claim. If appropriate, take photos of the client at the initial interview.

Lastly, obtain personnel records and all internal affairs information about the defendant officers and any other claimed and/or litigated allegations of misconduct ever made against them.

c. Employment records. Your client's work history is the equivalent of his or her curriculum vitae. A long-term employment history enhances your client's credibility. Review your client's employment records for reports of medical problems or work-related injuries, attendance, special training or awards, advancement within the company, and the names of supervisors or coworkers who can talk about your client in a favorable light.

d. School records. School records provide information about the kind of student your client was, whether your client experienced any disciplinary problems, what his or her particular areas of achievement and interests were, and will provide the results of any medical (vision, hearing), personality, intelligence, or aptitude testing. These records can also be a source for your development of the symbols of your client's sense of responsibility.

e. Other records

(i) Pre-employment and life insurance applications. These applications and the examinations done in connection with them serve as a general indicator of the client's prior health. They also generally include extensive checklists that are instructive regarding the client's personal habits and life style.

(ii) Military records. These records should be obtained to determine your client's rank, branch, years of service, job and any service-connected injuries. Also helpful will be records relating to medical examinations and history, psychological testing, aptitude assessments, earned awards/citations, promotions, and reasons for discharge.

(iii) Prior criminal proceedings. If criminal proceedings arising out of the police misconduct were filed against your client, obtain the entire file, including transcripts of any testimony. Also, follow up on and obtain those records pertaining to your clients's prior criminal record.

2. FOIA Requests

In those states that have a Freedom of Information Act, a FOIA request will provide you with access to certain public records. In a police misconduct case, FOIA requests are useful to obtain information about your client's criminal records and records and logs relating to the incident in question.

C. Considerations in Filing Suit/Early Settlement

Generally, if your client's damages are serious, you will want to start suit. A lawsuit will be necessary to access formal discovery and to more accurately evaluate your client's injuries. You may, however, wish to consider an early settlement if there are extenuating circumstances. These might include a situation where your client has a decreased life expectancy or where your client's financial condition dictates early resolution.

Another factor to consider is the willingness of defense counsel to defend the case. Early on, defense counsel may be reluctant to get into the case either because of the strength of your case, counsel's dislike for his or her client, or counsel's schedule. The prospect of having to conduct or attend a number of depositions, wade through a series of documents, or involve expert witnesses may strike counsel as particularly unappealing if the case can be settled instead. If you pick up on any of these signals, make every effort to resolve the case at this juncture because defense counsel's motivation to settle will disappear once the depositions are taken, the records requested, etc.

In cases where your client is not seriously injured, consider whether to file the suit at all. If suit is filed, certain litigation costs may be unavoidable. If you incur $2,500 in costs for investigation, depositions, and medical records and reports, it will be very difficult to settle a case whose value is $5,000. Alternative forums that will minimize these costs should be explored. These include taking the client's case before the civil rights commission, a city ombudsman, or a small claims court (depending on the jurisdictional amount).

D. Wrongful Death Cases

If your state's Wrongful Death Act permits recovery for the loss of the decedent's love, society and companionship, the case will involve some special consideration on your part. Your investigation should focus on two clients—the decedent and his or her heirs.

The decedent cannot help you establish the facts of the incident. What will be important, however, is the decedent's past. Is the decendent's history consistent or inconsistent with what the police have said about him or her? The decendent's background will also be a key in answering the question, "did the decedent deserve to die?" The information and records you obtain and compile about the decedent will flesh out your answer to that question.

The second client in a wrongful death case is the decedent's heirs. It is the heirs whom the jury will hear and it is the heirs whom the jury must want to compensate. They may be the decedent's spouse, children, or parents. In any event, the jury must be able to connect with them. You need to meet with them to determine their relationship with the decedent and whether they appear sympathetic or overreaching.

If there are six heirs who can claim under the wrongful death act, then there are six separate losses. Each requires and deserves separate development. In your negotiations with defense counsel, talk about the value of the loss of *each* of the heirs: do not lump them together. The defendant will try to focus the discussion around a single number, thereby negating the individuality of each of the claims. A damage chart detailing the claims of each of the heirs will be helpful in focusing the defendant's attention on the full extent of the loss.

III. TIMING AND SEQUENCE OF NEGOTIATIONS

A. Preliminary Considerations

As your case proceeds to trial, you will have a number of opportunities for settlement discussions to occur. These opportunities will occur at various meetings and depositions where you and defense counsel will be present, at mediation or some other form of alternate dispute resolution and at the settlement conference or pre-trial meeting between the parties and the judge.

Do not engage in any such discussions until you are ready to do so. Defense counsel may initiate settlement discussions after a motion or deposition. Defense counsel may ask you what you are looking for to settle the case. You will not be ready to answer that question until your factual and legal research into the case is complete, the issues have been narrowed and framed, and you are focused on settlement. And, if you are not ready, there is no harm in telling defense counsel that you have more work to do on the case or that you prefer to take the matter up later, when you can sit down with counsel and discuss the case at length. The hallway of a court house is not the place to have serious settlement discussions unless you are there for trial.

Know that once you give the defense a settlement demand you will be asked to compromise that demand at each subsequent juncture. You must give yourself room to negotiate. Thus, settlement demands are never to be made in an off-the-cuff fashion or without consideration of the effects the demand will have on future discussions.

B. Pre-Suit Resolution

Settlement discussions with an insurance adjuster or risk manager will rarely be successful. They should be avoided unless you have a case that has generated a significant amount of publicity and is so highly charged that the defendant will take the discussions seriously. Absent that, the best policy is to file suit and proceed with your case as if it will be tried.

C. Post-filing and Discovery

1. Development of Theories of Liability

The information you need to conduct settlement negotiations is the same information you need to prepare your case for trial. You will also want to elicit some additional information that is designed to assist you in the negotiation process.

You will first need to develop the factual and legal basis on which to base your theory of liability. The discovery you conduct on these issues will include interviews with witnesses, interrogatories designed to identify sources of factual and recorded information about the incident and background information about the defendants, requests to produce documents and other pertinent records, depositions of the parties and all other relevant actors, meetings with and depositions of treating doctors

and the retention of expert witnesses. There should be no difference in the way you prepare the factual and legal issues of the case for settlement versus trial. In fact, you will always get more money in the settlement of the case if you assume the case will be tried rather than settled and you prepare accordingly.

2. Addressing Damages

Once you address the issues of liability and causation, you will want to focus on damages. The monetary recovery in a § 1983 case includes economic and noneconomic damages, punitive damages, and attorney fees.

a. Economic damages

(i) Lost wages. If your client was employed at the time of his or her injury and as a result missed so many days of work, a simple mathematical calculation will yield the total income lost. Normally, a business record from the client's employer will suffice to establish this claim. If, however, you cannot document such a claim because your client did not pay taxes on his or her wages or if your client was not working at the time of the injury, do not put in a claim for lost wages. Attempting to prove that your client worked for undeclared income will have a negative impact on his or her credibility and may be viewed as overreaching. Social Security records can provide you with a list of your client's employers if there is any doubt as to whether taxes were paid.

(ii) Loss of earning capacity. Loss of earning capacity becomes important if a disability temporarily or permanently limits your client's ability to work. It is in this area that your client's life becomes an open book. While you stress the positive aspects of your client's life (work history, education, initiative), the defendant will stress those factors which would have impaired your client's earning capacity independent of the injury (absenteeism, alcoholism, arrests, convictions, imprisonment, poor work record). Do not abandon this claim simply because your client is human and not perfect. Remember that everyone is capable of earning something.

(iii) Medical expenses. Medical expenses that are reasonable and necessary and are incurred as a result of the injury are another element of economic damages. These expenses will include bills for hospitals, doctors, medications, in-home nursing care, therapy, travel costs, rehabilitation, modification to house or car, and medical equipment including prosthetic devices, crutches, canes, walkers, and cervical collars. The total expenses will provide you with a hard number that establishes the baseline value for this portion of the case.

Where the client will require future medical care, the following information should be elicited from the physician: the nature of future medical care, frequency, if it is elective, the probability of it being necessary, and the cost. Future medical care increases the defendant's jury verdict exposure because the jury can take these expenses into account in awarding damages provided evidence of the necessity of such care is provided.

b. Noneconomic damages

(i) Pain and suffering. Once you have developed the client's economic damage picture, you will want to turn to noneconomic damages. This category of damages includes those areas of damages in which there have been physical or emotional changes in your client's life as a result of the police misconduct and generally include pain and suffering and psychological harm. Where there is an objective basis to correlate injury with pain, jurors are more likely to adequately compensate your client for this element of damage. Without objective medical corroboration, the testimony of your client and of lay witnesses are of key importance. Pain becomes an issue of credibility and the information you have discovered about your client's background will be very instructive.

(ii) Emotional distress. Whether they be categorized as emotional distress, outrage, humiliation, or embarrassment, these elements of damage must be considered. The emotional impact of fracturing an arm when falling on an icy sidewalk is fundamentally different than the same injury incurred from a police nightstick. The police are not only assaulting the person's arm; they are assaulting his or her dignity. Note: this area of damages is considered suspect by defense counsel because of its subjective nature. If the claim is that your client now has a fear of the police, the extent of his or her prior contact with the police should be explored.

Many times, the client is not the best person to recount the impact of the police misconduct on his life. Family members, teachers, coworkers, ministers, and business associates may be in a better position to talk about the changes in your client's life. You should also consider having a psychologist examine your client. The psychologist could then explain to you (and a jury) the nature and extent of the client's behavioral or emotional difficulties following the injury and the client's prognosis.

c. Punitive damages. Punitive damages can be a powerful weapon in the § 1983 case. These damages may provide the largest avenue of recovery for the person who may be otherwise limited in calculable compensatory damages such as lost wages or medical expenses.

The focus of punitive damages is on the defendant's conduct; they will be assessed when the conduct is shown to be prompted by evil motive or intent or when it involves reckless or callous indifference to the constitu-

tionally protected rights of others. If defense counsel doesn't like his or her client, if the defendant was disciplined for his or her conduct by the police department or there are corroborating eyewitnesses as to the egregiousness of defendant's conduct, punitive damages will become a real part of the negotiation process. You should determine at the outset, however, whether the municipality will pay a judicially imposed punitive damages award against the officer.

Settlement negotiations on the issue of punitive damages will shift the focus of the negotiations away from your client's injury, which the defendant may feel is of little value, to the conduct of the defendant. You will be able to talk about how the jury will view defendant's conduct and the manner in which the jury may respond, as the conscience of the community, to punish the conduct and to deter similar conduct in the future. Thus, a case on which defense counsel placed a settlement value of $2,500 may increase significantly when the potential for punitive damages is factored into the equation.

d. Attorney fees. Attorney fees may be awarded in a § 1983 case, if, through settlement or trial, you achieve the benefit sought on any significant issue. The attorney fee will be determined by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate.

Attorney fees are particularly significant in the settlement of the smaller case because the fees can be used to shift the focus away from the client's injuries while still increasing the defendant's exposure in the case. For example, the defendant may feel that your case would render a verdict of $500 at trial. However, if the case indeed proceeds to trial, the defendant may also incur $10,000 additionally in attorney fees awarded to you. A reasonable compromise of that figure could produce a settlement acceptable to both parties.

In discussing attorney fees with the defendant, it is helpful to develop a chart that details those fees, costs and expenses incurred to date along with the anticipated future fees, costs and expenses through verdict. While both counsel may agree that the jury will return a low verdict for the client, the defendant now has a disincentive to face you at trial. It is here that you can persuade the defendant of the economic foolhardiness in trying a small case.

e. Role of experts. The experts generally used in a police misconduct case are the police expert to address the appropriateness of the defendant's conduct; the medical doctor to detail the medical history, diagnoses and prognoses; the psychologist to discuss your client's emotional damages; the vocational rehabilitation counselor to talk about the impact of the injury on your client's previous career choice and what accommodations

are now necessary in that regard; and the economist to explain your client's wage loss and projected loss of income.

If the damages warrant, retain the experts and get them involved in the case. This is a strong signal to defense counsel that you believe the case to have significant value. In effect, you have put your money where your mouth is. And, the better the case and the better your case is prepared, the better the settlement.

3. "Settlement" Discovery

a. Information about the defendant. In addition to developing the basic elements of your cause of action through traditional forms of discovery, you will want to use the discovery phase of litigation to elicit additional information to help in the negotiation process. This will include information about the named defendants, their attorney, and with whom you will be negotiating when the times comes. Just as the defense wants to know about your client, you want to know everything there is to know about the individual defendants. Find out about their work record and history, education, and whether they have been the subject of citizen complaints or lawsuits alleging police misconduct.

b. Information about defendant's view of the case. Take a critical view of the defendant's case: look at the witnesses and experts they will be relying on to defend their actions and to attack your client's credibility and damages. Also, listen to defense counsel to get a sense for what he or she feels are the weaknesses in the case. Just as you tend to talk about the cases's weaknesses with your client, so does defense counsel. And it is that weakness that will motivate the defendant to settle.

c. Information about defense counsel. Learn as much as you can about the defense attorney on the case. Find out what you can about his or her experience and trial record. But, perhaps more importantly, get to know a little about the attorney at a personal level. Ask about his or her family and whether the attorney has any special hobbies or interest.

Find out what is going on with the defense attorney's schedule: is he planning a vacation? how has his trial schedule been? what is his caseload like? Learn, if you can, how defense counsel feels about the defendant: does he like the defendant? Does he have the "stomach" to defend the case? The goal is to connect with the attorney on as many levels as possible because you want defense counsel to be your advocate with the decisionmaker at the time of negotiations.

d. Information about the settlement decisionmaker. Depending on the value of the case, the decisionmaker may be the attorney, a committee consisting of the defendant's insurers, or a city council. In any case you need to give the decisionmaker the information needed to evaluate the case and your access comes through defense counsel. In the appropriate case you may want to address the decisionmaker personally. No one can make as effective a presentation as you. If the defendant agrees to the meeting, it signals a willingness to change his or her past position.

D. Before the Filing of Dispositive Motions

Dispositive motions on governmental immunity and other issues are being filed and won with increasing frequency. This is especially true at the federal level given the conservative nature of the bench.

Defense counsel may ask you if the case can be settled before such a motion is filed. You should first determine if the defendant is serious about negotiating at this time. Look for language from defense counsel that he or she has "authority to settle" or wants to "resolve the case" before the motion is filed.

You should then evaluate the likelihood of the defendant prevailing on the motion because you must take this into account before you make a demand. If you believe the defendant has little chance of winning the motion, give the opening demand you would have made absent the filing of a dispositive motion. Avoid reducing your demand if the defense counters that you are not taking the motion into account. Remember you have taken the motion into account but made a determination that it is unlikely to be successful. You will have difficulty increasing your demand with credibility when the defendant, in fact, loses the motion, because you expected them to lose.

If, on the other hand, you feel the defendant has a 50/50 chance of prevailing on the motion, reduce your demand accordingly and let the defense know you have done so. Should the defendant lose the motion, you will then be able to increase your demand with credibility because your initial demand took into account an assessment of the motion's success.

E. Alternate Dispute Resolution

There are some police misconduct cases that are very difficult for one or both of the parties to evaluate. Because the judge does not have the time or inclination to work at settlement, another third party may be useful in helping to resolve the case. While there are many formats available, e.g., mediation, arbitration, binding versus nonbinding, summary jury trials, live testimony versus summaries, etc., any agreed upon process will bring you closer to settlement. The fact that a defendant agrees to an alternative dispute resolution mechanism reflects their desire to resolve the case.

One example of alternate dispute resolution is a mediation where the parties have a role in selecting the mediators and pay them for their time in working on the case. The fact that both sides participate in molding the environment in which the mediation takes place and are there on a voluntary basis will increase the likelihood that a settlement will result. Each side will be able to select not only the mediators but the others who will be present at the hearing (clients, lienholders, claims adjusters) and the type and format of information that will be presented. Keep in mind that the greater effort you can get the defendant to expend on this form of dispute resolution, the greater the likelihood the hearing will produce a settlement figure that is acceptable to both parties.

F. Use of Polygraph Examination

Consider the polygraph examination as another possible tool for settlement of your client's case. This approach is particularly helpful in the small damage case where continued expenditure of litigation costs will make settlement very difficult.

These examinations are often used by the police department to determine whether criminal charges should be filed in a case and, thus, the defendant considers them to be helpful in limited circumstances. While the defendant officers will not be required to submit to such an exam, your client's offer to do so will say a great deal to defense counsel. Before suggesting this approach to defense counsel, make sure your client has taken a polygraph and passed.

Determine the areas of factual dispute between your client and the defendant(s). Propose to defense counsel that both clients be polygraphed on the agreed-upon factual disputes. If your client passes, and the defendant does not, the case would then settle for a predetermined sum. If your client fails and the defendant passes, the case would be dismissed. As a practical matter, the defendant will not agree to be polygraphed and therefore your client will be the only one submitting to the test. Therefore, the settlement will only depend on whether your client passes.

G. Cases You Cannot Win

At some point, you may come to the conclusion that it will be extremely difficult to win your case if it proceeds to trial. This does not mean, however, that the case cannot be settled.

Tell defense counsel your assessment of the case but give him or her the flip side. Tell counsel that they have a case they cannot lose. If everything goes as it has so far in terms of the facts, the evidence and the law, the defendant will win.

This discussion puts defense counsel in an awkward position because no one wants to try a case they cannot lose. The reason: there is one chance in a million he could very well lose it. Use transaction costs, time and effort, attorney fees, and potential professional embarrassment as leverage to get your client a settlement.

IV. SETTLEMENT PRESENTATION

A. Prepare for Your Presentation

1. Keep Your Goals in Mind

Your settlement presentation should work at two levels. First, you need to give the defendant a reason to want to settle the case, whether it be reducing his or her transaction costs or limiting his or her exposure to a sum certain. Second, you need to expand the plaintiff's verdict potential. You will maximize your recovery by humanizing your client and persuading the defendant as to the nature and extent of your client's injuries. The information you have obtained thus far becomes the key to reaching your settlement goals.

2. Compare to Opening Argument

Again, the key to obtaining an effective settlement is preparation. You should prepare to give your opening demand as you would prepare for your opening argument at trial. If you truly intend to reach your settlement goal, it will be your job to persuade and motivate defense counsel to be your advocate with his or her client. This means you must be in command of the facts of the case; you must know specific details about the case and have learned the "language" of the case. You will know about your client, his or her background and the damages he or she has suffered because of the defendant's misconduct. You will also know the names and ages of your client's spouse and his or her children, the name of the defendant, the height and weight of the parties (if relevant), and the names of all witnesses and treating doctors.

Learning the language of the case includes being well versed on relevant case law and recent jury verdicts in your area as well as knowledge of the applicable technical and medical terms and jargon. For example, you should be able to relay what treating doctors have told you about your client's injuries in the terms used by the doctors. It is more persuasive to talk about back pain that is a result of an L4 radiculopathy than to talk about back pain itself, and to refer to your client as experiencing post-traumatic vascular headaches rather than simply headaches. Using such language with defense counsel tells him or her that you are competent and well prepared.

3. Proceed Only When Ready

a. Make the first demand. You will give the defense an opening demand when you are ready. By making the first demand in the case, you will set the point of reference as well as the tone for further negotiations. Try to present that demand at a face-to-face meeting with defense counsel. The location of the meeting is not as important as the fact that it is a personal meeting. Such a meeting allows you to pick up on defense counsel's nonverbal cues and signals; a telephone conversation will distance you from those additional pieces of information.

b. Determining what your opening demand will be. The opening demand will be a reasonable compromise of the case's verdict potential. Tell the other side what a jury could potentially award in your case and why your demand represents a compromise of that verdict. If the demand equals or exceeds the verdict potential, you have created no incentive for a counteroffer: your demand had not created any risk for the defendant. Thus, the demand must be a compromise, but remember: the defense expects the demand to be inflated and will view it as such. Rarely is an offer accepted without a counteroffer. A realistically high initial demand will start negotiations; an unrealistically high demand will shut them off.

Unfortunately, there is no arithmetic equation to get you to a compromise figure. Instead, it will be based on your experience and your knowledge of the case. Some factors that will affect the settlement value of the case include your competence as an attorney; the likability of your client; the extent of your client's damages; the likability of the individual defendants; venue; and publicity. Unlike other personal injury cases, insurance coverage will not place an artificial cap on settlement discussions.

There may be a small group of lawyers in your community specializing in police misconduct cases. A few phone calls to them will give you a range at which the case is likely to settle.

It is up to you, however, to show the defendant why the average settlement value for your type of case should represent the floor rather than the ceiling.

c. Justify your demand. Once the demand is made you must be able to justify the figure to the person with whom you are negotiating. A settle-

ment figure that is explained has a lot more power behind it. It is here where you must use your knowledge and skill to persuade defense counsel to accept your figure as reasonable.

If the defendant responds to your demand telling you to be more realistic, or if he or she asks you what you will "really" take, you must make a disciplined response. Ask: why is the demand too high? Engage him in discussion. Defend your figure. Do not be tempted to give out another, lower figure without a response from the defendant. You must refrain from making a demand if the other side has not made an offer in order to avoid creating a situation where you are negotiating against yourself.

B. Presenting Your Opening Demand

1. Increase the Defendant's Exposure

a. Uncertainty of trial. Part of your settlement presentation will be geared to the course the case will take if it should proceed to trial. Let the defense know you can try the case. You may discuss the strength of liability, the outrageousness of defendant's conduct, or the favorable jury pool where the case will be tried. Or, perhaps given the lack of an adequate settlement offer by the defendant, you have no real alternative but to put your case before a jury, i.e., the client does not have much to lose by going to trial. Also, remind defense counsel that in addition to the jury verdict, the defendant will be responsible for paying your client's attorney fees as well as counsel's own fees and costs (if applicable) if he or she must prepare for and try the case.

b. Motivation of jury to help your client. You can then talk about those facts in your case that will motivate the jury to help your client. Examples might be your client's appearance and credibility or his or her documented medical injuries, or facts showing outrageous conduct by the police such as an aggravated assault, or the police's failure to obtain medical treatment for your client. Talk about elements of your client's injuries that may appear in the future and that the jury will be free to consider such as traumatic arthritis, epilepsy, or closed head injury.

2. Humanize Your Client

It is your job to give the case an aura of importance and uniqueness. If you have prepared your case well, the defense will have already gotten a sense that you are taking this case seriously and with every intent of proceeding to trial should you not obtain a reasonable settlement. Thus, you

have already set the tone for the manner in which the negotiations are to proceed.

a. Fight against categorization. You must then put together what you have learned about your client and his or her case to maximize the settlement recovery. Fight against categorizing your client and his or her injuries. The case should not be discussed in general terms, such as "a shooting case," or "a false arrest case," and your client's damages should not be loosely defined as one involving "a fractured elbow" or "an eye out." Instead, you must talk about how your client and his or her case are different and, therefore, worth much more.

b. Stress your client's uniqueness. The defense needs to know what your client was like before the injury. Talk about your client's family, work history, and his or her lack of a criminal record or difficulties with the police. Talk about how your client's life has changed as a result of his or her encounter with the police.

It is a difficult task to describe the impact of an injury where your client has not suffered a dramatic and obvious physical change, such as paralysis or loss of a limb. If your client's injury permits him or her to return to work, but leaves him unable to do other activities of daily living, such as gardening, knitting, playing basketball, playing with children, reading, etc., your task is made even harder.

It is at this point that you will reap the dividends from your earlier effort to know defense counsel on a personal basis. Your knowledge about his or her interests, hobbies, and family can permit you to draw linkages between aspects of his or her life and that of your client, so that you can "personalize" your client's loss. Perhaps defense counsel is an avid bicyclist or golfer: ask them to imagine the impact on the quality of their life if they were unable to enjoy these interests, even though they could otherwise perform work tasks.

c. Turn weaknesses into strengths. Know too that the defense views certain facts as buttons it will be sure to press before a jury. These might include evidence that your client was intoxicated at the time of his or her arrest, was in possession of a weapon, or unjustifiably resisted arrest. Be able to counter these facts with some positive information about your client—exemplary probation record since the incident or success in a drug treatment program.

d. Use physical evidence. Where you have photographs of your client and his or her injuries, use them. A photograph of bruises or a scar will have more impact than a verbal description. Other important pieces of physi-

cal evidence might include x-ray studies, emergency room records, or autopsy reports. The defendant's own internal documents can also be used to highlight your presentation. The advantage of using selected pieces of physical evidence is that this evidence can then be used by the settlement decisionmaker to get a better sense of your client and the strength of his or her case.

V. RESPONDING TO DEFENDANT'S OFFER

By touching on both the uncertainty of trial and those unique facts about your client and his or her case which justify your settlement demand, you will have provided defense counsel with sufficient information to permit an offer to be made. You must now assess the settlement offer that follows your demand and respond accordingly.

A. Factors to Consider Before Responding

1. Make Sure Further Negotiations Are Possible

You should not reduce your demand in response to defendant's offer unless you have made a determination that negotiations will continue. Otherwise, you will be in a position of bargaining against yourself.

For example, suppose that shortly before trial you make an initial demand of $75,000. Defendant's counsel responds, saying that defendant will not pay more than $20,000. This is *not* an agreement to continue negotiations. If you respond to this statement by reducing your demand, you have only succeeded in lowering the settlement ceiling (to your disadvantage) and have obtained no compromise from the defendant. Thus, if you had reduced your demand from $75,000 to $50,000 and the defendant never countered your last demand, the judge would be negotiating the difference between $20,000 and $50,000 rather than $20,000 and $75,000.

If you are at an impasse, you can try to separate the lawyer from his or her client for purposes of continuing the negotiations. Tell defense counsel that you understand he or she does not have authority to offer more money and that you do not have authority from your client to accept less than your demand but that you would like to keep talking because the two of you may come up with a number that both could recommend to your respective clients. This approach allows negotiations to continue with a commitment from counsel to work towards settlement but also gives the parties an out should the negotiations not proceed as you had anticipated.

2. Look At Where You Are In the Case

Settlement discussions are most likely to occur near the end of the case. The last stage of negotiations will be with the court. It will be the judge's role to help the parties settle the case. You should plan your negotiations so that the judge has some room within which to conduct these negotiations. This cannot occur if you have already given the defendant your bottom line figure. Thus, you should leave room in your demand to negotiate in the event the case is not resolved before you meet with the judge.

3. Review What You Have Learned About the Case

Your settlement discussions with defense counsel will provide you with information about the defendant's view of your case as well as the manner in which he or she will be conducting the defense of the case. You will get a feel for those parts of your case that counsel accepts as strong and those he or she believes are suspect. You should get a corresponding sense of those factors the defense will stress (or minimize) in presenting its case.

When the defendant presents its offer do not simply reject it, but rather ask defense counsel to justify the offer that has been made. Listen closely to defense counsel's explanation, for it will suggest his or her perceptions of the strengths and weaknesses of your case. If there is a way to provide counsel with additional information or to redirect his or her thinking on a particular issue, do so in your next discussion.

4. Evaluate the Offer Itself

The offer itself will tell you a great deal about defendant's view of the case. Remember, the defendant expects your demand to be inflated. At the same time, the mid-point between your demand and the defendant's initial offer may signal the figure defendant is looking to as the settlement figure.

If defendant meets your demand with a nuisance offer, the defendant is telling you to try the case. For example, suppose you receive an offer of $2,500 in response to your $100,000 demand. While you should determine if further negotiations are possible, it is likely they are not. At this point, you should break off negotiations but note the reasons given by defense counsel for the offer. There may be issues in the case you have not previously considered or developed; you should now take the time to focus on these issues.

On the other hand, an offer of $100,000 to your demand of $1,250,000 may not be a nuisance offer, but it may be an offer to which you should

not respond. Defense counsel may ask you to come down, or tell you that your demand is unreasonable. Tell him that you believe your figure is more realistic and that this is not a case where splitting the difference will do it. Present your arguments on liability and damages again and help defense counsel with any issues he or she has expressed difficulty in accepting. Get the defendant to make the first move up. If the defendant does so and moves up to $250,000, the midpoint is $625,000. However, if the defendant declines to move, the midpoint stays at $550,000 and you have not lost any ground.

An offer of $20,000 to a $100,000 demand may seem low but it may be no farther away from your goal of $60,000 than you are. Such a response tells you that settlement is possible and worth continuing.

B. Presenting Your Response

Your response to defendant's initial offer should test your assumptions about where you are going in the case. Therefore, the figure you give in response should exceed the figure you have set as your settlement goal.

You will give the defendant that figure after revising your previous settlement presentation in two ways. First, you will reaffirm the strengths of your case and, second, you will respond to the arguments raised by defense counsel. Acknowledging and accepting some of the defendant's arguments allows you to decrease your original demand with credibility, i.e., you have reduced your demand in consideration of these factors. Thus, in the previous example where you made a demand of $100,000 and defendant offered $20,000 and assuming a settlement goal of $60,000, your next demand may be $85,000.

The defendant's response to your counter-demand will be significant because it will tell you if negotiations should continue or break off. The defendant has three choices in responding to your counter-demand. It can increase its offer by less than you have decreased your demand (a counteroffer of $30,000); it can increase its offer at the same amount (a counteroffer of $35,000); or it can increase its offer in an amount that exceeds the decrease in your demand (a counteroffer of $40,000).

At this point, you will probably have as much information as you will ever have about your case. You will know the strengths and weakness of the case as well as the defendant's position on these same issues. The question then becomes whether you can reach or exceed your settlement goal given the defendant's response to your counter-demand.

If the defendant comes back at $30,000, the likelihood of your reaching your goal is low because there has been a departure from the symmetry of the negotiations. You should freeze the negotiations at these figures, i.e., $85,000 and $30,000. Tell defense counsel that settlement looks unlikely given where the clients appear to be. At this point it is important to

determine whether your goal of $60,000 can be reached. While acknowledging that the clients are far apart, try to determine whether the lawyers can agree to $60,000, even if clients may ultimately reject it. This permits an exploration of obtaining your goal while still maintaining your formal demand of $85,000 in the event that negotiations terminate.

You must be able to leave a negotiating session without reaching an agreement if a break in negotiations is warranted. There will be other opportunities to resolve the case. These opportunities may be naturally occurring given the litigation process or they may be brought about by a change in circumstances that allows you to take up defendant's concerns at another session.

In those cases where the defendant tracks your counter-demand, you want to stop the negotiations from marching ahead. Tell defense counsel that if the negotiations continue to follow its course it will be difficult for you to settle the case at that figure. While the two of you are not far off, tell counsel that the $60,000 is inadequate for the case and tell him or her why.

Counsel's response will then signal you as to whether a settlement of more than $60,000 is possible. If there are any signals from defense counsel that he or she is grappling with your frame of reference, you should be able to settle the case for more than $60,000.

If you decide that you want to resolve the case at $60,000, be careful to bring the defendant to that point without conceding the figure. Indicate that you would recommend the figure to your client if counsel could do the same. Let them know that you understand that they do not have authority for that figure but get counsel to work to get you that amount.

When the defendant increases its counteroffer in greater proportion than your counter-demand, it is a signal that the defendant has given your arguments more merit than you have given theirs. This is also a situation where you may want to freeze the negotiations. The symmetry of the negotiations tells you that the mid-point is $62,500. The question is whether you can obtain more than that figure. You do so by telling defense counsel that this is not a case where "splitting the difference" will do it. Tell defense counsel that your figure is closer to the value of the case than his figure. You must then listen to defense counsel's response to determine whether you will be able to exceed your settlement goal.

C. Closure

Reaching closure in settlement negotiations requires you to balance getting the last available dollar against taking the defendant's last offer. Factors that go into the balance are your client's needs, and the recognition that the facts and/or the law can change at any time and those changes will impact on your negotiations. As a general rule, you should

take the figure offered by the defendant if you truly believe it to be the defendant's last best offer and is otherwise acceptable to your client.

VI. CONCLUSION

No competent lawyer would ever try a case unprepared or without a detailed game plan. So too with the negotiations.

We have attempted to detail an approach to negotiations that works for us. While the percentage of cases you settle may not increase, you will increase the overall settlement value of your cases by applying the principles outlined here.

V. Investigating a Deadly Force Case

Materials:

Investigating Wrongful Death in Police Shootings
David Robinson

Presenter:

David Robinson, David A. Robinson & Associates PC, Southfield, MI

INVESTIGATING WRONGFUL DEATH IN POLICE SHOOTINGS

BY ATTORNEY DAVID A. ROBINSON

1. STATE OF THE LAW

A. Police use of deadly force standard from the United States Supreme Court

Brosseau v. Haugen, 125 S. Ct 596 (2004) Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

FACTS: The officer was attempting to arrest the victim, who had locked himself in his vehicle. The victim ignored the officer's commands, issued at gun point, to get out of the vehicle. The officer shattered the driver's side window by hitting it with her handgun. She unsuccessfully attempted to grab the keys and struck the victim on the head with her gun. The victim, still undeterred, succeeded in starting the vehicle and began to move away. The officer fired one shot through a window of the vehicle, hitting the victim in the back. She later explained that she shot him because she was fearful for other officers she believed were in the immediate area on foot, as well as for the occupied vehicles in the victim's path and any other citizens who might have been in the area. The Supreme Court held that the appellate court was wrong on the issue of qualified immunity. Case law clearly showed that this area was one in which the result depended very much on the facts of each case. Furthermore the cases suggested that the officer's actions fell in the hazy border between excessive and acceptable force and did not clearly establish that the officer's conduct had violated the Fourth Amendment

B. Police use of deadly force standard in the Sixth Circuit

Sample v. Bailey, 337 F. Supp 2d. 1012 (2005) In reviewing a claim for qualified immunity, the United States Court of Appeals for the Sixth Circuit employs a three-step inquiry: First, the court determines whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred. The second step of the qualified immunity analysis is whether the constitutional right at issue was clearly established. **If the law at that time was not clearly established, an official could not fairly be said to "know" that the law forbade conduct not previously identified as unlawful.** The constitutional right cannot simply be a general prohibition, but rather the right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: **The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.** This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law **the unlawfulness must be apparent.** The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. In inquiring whether a constitutional right is clearly established, the United States Court of Appeals for the Sixth Circuit must look first to decisions of the United States Supreme Court, then to decisions of the court and other courts within its circuit, and finally to decisions of other circuits.

Third, the court determines whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights. Qualified immunity must be granted if the plaintiff cannot establish each of these elements.

FACTS: While attempting to make an arrest during a burglary, the police officer shot the

arrestee several times while the arrestee was hiding in a cabinet. The arrestee filed suit under §§ 1983, alleging that the officer used excessive force. On appeal of the district court's judgment denying the officer summary judgment, the court affirmed. The arrestee's rights under the Fourth Amendment were violated because his mere action of moving his arm to grab the top of the cabinet in attempting to climb out would not cause a reasonable officer to perceive a serious threat of physical harm to himself or others. The factual context of the case, the darkness, the unfamiliar building, the arrestee's intoxication and unresponsiveness, was sufficiently similar to the court's body of case law applying the Robinson rule so as to give the officer fair warning that shooting a suspect who was not perceived as posing a serious threat to the officer or others was unconstitutional. It was objectively unreasonable for the officer to order the arrestee to remove himself from the cabinet and then to perceive the arrestee's movement of his right arm outward as a threat that necessitated the use of deadly force.

Sova v. City of Mt. Pleasant, 142 F. 3d 898 (1998). *Sova*, supra, maintains that police officers are afforded qualified immunity for their discretionary functions...provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Discovery in *Sova* clearly demonstrated that the two sides did not agree on the facts which gave rise to the death of Mr. Sova. In that case the officers' claimed Mr. Sova threatened to get a gun and then charged at them through a kitchen door with knives drawn. Sova's parents deny what the officers stated and argue that their son never said anything about a gun and was shot before their son ever stepped out of the kitchen door frame. The 6th Circuit determined that its resolution of the case turned upon whether it was proper for the District Court to grant the officers qualified immunity in the face of such a factual dispute. The Court argued that "qualified immunity in cases involving claims of deadly force is difficult to determine on summary judgment because liability turns upon the 4th Amendment's

reasonableness test....the proper application of 4th Amendment reasonableness requires careful attention to the facts and circumstances of each particular case, including severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "This is an objective test, to be judge from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...In a civil suit arising from the use of deadly force, the police will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have shot the victim." *Id* at 902. The court went on to say "this Court has established that summary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force. When the legal question is completely dependent upon which view of the facts is accepted by the jury, the District Court cannot grant a defendant police officer immunity from a deadly force claim....this is because the reasonableness of the use of deadly force is the linchpin of the case. If the jury determines the officer shot the suspect without a reasonable belief that he posed a significant threat of death or serious physical injury to the officer or others, then the officer's actions were legally unreasonable under the 4th Amendment." The *Sova* Court reversed the trial Court's grant of summary judgment and held, "Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge must determine liability."

FACTS: Defendant police officers shot and killed son within fifteen minutes of arriving on the scene of his attempted suicide. The lower court granted summary judgment because it ruled that the officers had acted reasonably, as a matter of law, because the threat son posed to himself justified the use of deadly force. The court agreed that parents failed to show that any government policy or custom caused the injury and that the officers had been properly trained.

However, it found there was a jury issue as to whether the officers who actually shot the son had qualified immunity. Although qualified immunity was a threshold issue, the use of deadly force required a showing that the police had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officers or others, as viewed by the officers at the time. Because there was a dispute as to the facts which occurred, it was for the jury and not the judge to determine liability.

Leong v. City of Detroit, 151 F. Supp. 2d 858 (2001) The law does not require that a suspect pose a direct, imminent, and unmistakable threat of serious injury or death before an officer may use deadly force in defense of himself or others.

FACTS: After the officers signaled for the decedent to stop due to a traffic violation, the decedent led them on a chase. Upon cornering the decedent, he fired his shotgun into the roof of his truck and emerged from his vehicle with the weapon. The decedent disregarded repeated warnings that he put down his gun, and instead racked his gun and invited the officers to shoot him. The officers shot and killed the decedent. In the estate representative's civil rights action, the court granted defendants' summary judgment motion because the officers were entitled to qualified immunity for their reasonable use of deadly force. The officers had probable cause to believe that the decedent posed a threat of serious physical harm to the officers. The court determined that the law does not require that a suspect pose a direct, imminent, and unmistakable threat of serious injury or death before an officer may use deadly force in defense of himself or others. The representative's arguments regarding the positions of the decedent and the officers did not raise an issue of material fact as to the reasonableness of the officers' use of deadly force.

C. Qualified Immunity

Saucier v. Katz, 533 U.S. 19 (2001) Under the qualified immunity analysis, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a

right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. The right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.

FACTS: At about the time the Vice President of the United States began speaking at a public gathering, respondent protestor raised a banner and walked toward the speakers' platform. Petitioner officer arrested the protestor and shoved him into a van. The protestor sued the officer, alleging excessive force. The district court denied the officer's summary judgment motion on the grounds of qualified immunity. The appellate court affirmed, finding that qualified immunity was duplicative in an excessive force case. On certiorari, the Supreme Court reversed because the inquiries for qualified immunity and excessive force remained distinct and the officer was entitled to qualified immunity. The initial inquiry should have been whether the facts alleged showed the officer's conduct violated a constitutional right. The next question should have been whether the right was clearly established in the context of the case. In the circumstances presented to the officer, which included the duty to protect the safety and security of the Vice President, there was no clearly established rule prohibiting the officer from acting as he did.

2. OVERCOMING THE *MISTAKE OF FORCE* EXCUSE IN YOUR WORK UP OF THE CASE TO AVOID QUALIFIED IMMUNITY

In order to overcome the leeway given the offending police officer by the Courts the plaintiff must demonstrate the police officer’s articulation for his use of deadly force to be incredible, or not really possible, given that which is alleged by the officer to be the conduct of the deceased prior to the seizure.

I. Live witness who saw and can dispute the version of the shooting officer(s)

In the cases that survive SJ the Courts tend to rely on the testimony of live witnesses who dispute the plaintiff or deceased posed any threat to the police officer at the time of the seizure. These witnesses must clearly dispute the officer's articulation that he was in fear of his life or the life of another. This is the best evidence to dispute the officer's excuse for the use of deadly force**. This type of evidence is often rare.** Officers can rely on their version being given great weight if there are no witnesses and the deceased can not speak. **If no live witness to dispute the officer's version the next best evidence is the forensic.**

II. Forensic and other evidence in order to dispute the version of the shooting police officer(s)

a. Ballistics

b. Gun shot residue

c. Scene of shooting

d. Photos

e. Autopsy

f.. Scene sketch/diagram

g. Incident reports

h. Department policy

I. Officer's background

j. Department investigation into the use of deadly force

k. Training in deadly force and firearms

a. Ballistics testing concerns the scientific and non scientific examination of the involved firearm, spent bullets, live rounds, spent cartridges, magazine or chamber, holster and clothing. In investigating all cases of the use of deadly force where the police shoot a person, whether the

person lives or dies, justification must be established for each bullet fired from an officer's gun. An account of each bullet should be made by the use of deadly force police investigators. Often, this is not done. It must be done by the plaintiff.

EXAMPLE:

Ballistics also concerns the path the bullet takes once fired from the gun. This is called trajectory. In the case of Cora Bell Jones the path the bullet took was depicted to demonstrate the relative positions of the shooter and the deceased at the time he shot. This illustration demonstrates a scenario consistent with the physical condition of an elderly women who suffered from arthritis, dementia and other diseases at the time she was shot by the young spry officer. The officer attempted to claim the elderly women was a threat to the other officers present at the time he shot Ms. Jones.

In the Leong case an illustration of the scene was used to depict the officers versions of what actually took place. The examination of the scene suggested the position of the officers when they shot Mr. Leong was not supported by where the spent shell casings were found. The ejection pattern of the Glock weapon is to the right and to the back. By examining the evidence technicians scene depiction the spent shells were collected and marked. Microscopic examination of the tool markings on the casings matched the casing to the officer's gun. Comparing this to the officer's version of where he claims he was did not match.

b. Gun shot residue is the deposit of stippling left on an object after a gun discharges. The amount of stippling can determine distance of the muzzle to the target. It can also be used to suggest if a person handled a weapon at the time the weapon was fired. A caveat is that residue spreads and can deposit easily. So one can be affected without having fired a weapon if they are in the zone of coverage.

c. Scene of shooting. Evidence at shooting scene is to be preserved. The exact state of things at the time of the seizure is to be preserved in order to recreate and corroborate the justification for the use of deadly force. Where it is apparent things were not preserved a question may be raised as to the version given by the officer.

d. Photos are taken by the evidence technicians to also document justification or corroboration. Careful examination of photos is important as a picture can be worth a thousand words.

e. The autopsy is used to document the manner and cause of death. The examiner attempts to portray the entrance and exit wounds, bullet paths, injury types, and other signatures of the offense.

f.. Scene sketch/diagram is another way of documenting justification.

g. Incident reports by the officer are summaries of the purpose for the officers actions.

h. Department policy can be used to determine if the officers actions are consistent with law and shooting policy.

I. Officer's background is helpful to determine pattern and notice to the department.

j. Department investigation into the use of deadly force should be examined for whether the department looks objectively at it's officers claims for the use of deadly force.

k. Training in deadly force and firearms should be regarded to determine the department's overall attitude toward the officers use of force.

3. PRACTICAL CONSIDERATIONS IN ANALYZING LIABILITY IN ANY POLICE SHOOTING

In every police shooting circumstance, police have the benefit of 20/20 hindsight. While

the courts limit the plaintiff's analysis of the use of deadly force to the officer's perspective at the time of the shooting, the courts condone the officer's use of 20/20 hindsight in justifying a person's death. ["This is an objective test, to be judge from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...*Sova*, supra. Therefore, it is imperative that in analyzing a claimed use of deadly force you resist the temptation to buy into the police officers version of events. A rule of thumb is to distinguish the "constants" from the "variables." The constants are the immutable things that you can rely on in your search for the truth. The variables are the things that may or may not be true. What the officer writes in his report is a variable. Consider that within minutes of the shooting the officer will have the benefit of support personnel in the form of the union Stewart, the union attorney, a sympathetic supervisor and a partner. In the case where the person shot is deceased and there are no witnesses, this becomes even more critical. In general, the shooting officer will not make any account of what took place in the shooting event until huddling with his group of co-horts. Scenarios are played out before the official report or version is documented. Officers are protected under the 5th amendment following any use of deadly force. As a formal protocol a department attempts to take a recorded statement in which the shooter is advised by counsel not to make a statement. When the variable his been played out and practiced, then the officer will come forward and make his formal statement. Often days to weeks have passed since the time of the shooting. The old adage, "if you tell yourself something long enough you will begin to believe it," becomes true . This is what happens. Even when the official interview takes place the so called shooting examiners ask questions with a blue tint. In a real case the deceased was shot in the back. At the Garrity statement interview of one of the police officer witnesses the following exchange took place:

> Officer: I honked the horn. My partner moves to the side. I start proceeding up here were I'm going to stop the cruiser and get out and continue the chase. At that point he starts reaching in his waistband what I believe is going to be a weapon. He had the elbows out chains(sic) going down he starts pulling something out what I can't see is the weapon but I am pretty sure he's pulling something out to harm me
>
> Examiner: From your years of experience on the street in situations like this
>
> Officer: Exactly

It was no search for the truth. It was a sympathetic examiner seeing through blue spectacles in an effort to determine the outcome of the shooting.

It becomes ever so important that you look for the constants. Sometimes constants can be found in the officers reports. If, for instance, all officers to the shooting agree on a point that helps your case, that fact becomes a constant. Other examples of constants are evidence. The forensics don't lie. In a real case where all the shooting and witness officers agreed the three shooting officers shot standing up and from a distance, the forensic evidence demonstrated that one of the 14 shots to the deceased was a contact shot. This evidence clearly disputed the officers' version and could not be challenged. In order to exploit such a point an illustration depicting the officers' version came in handy. In this case there were two constants. The agreement of the officers and the forensic evidence.

Prove your case through the constants and don't buy into the attempting to prove your case by disproving what most likely is a fairy tale version of what took place.

i. Cops are human beings first.

A fundamental flaw in judging police is the assumption that they are supermen. Police dodge bullets, which clearly is a hazardous occupation. However, to suggest that in doing so they

are not scarred, just as you or I would be, is a mistake. Cops are given hero status by juries and by judges. In analyzing use of deadly force cases a rule of thumb is to presume the cop who shot was "scarred." Being scarred and being in fear of his life are two different things. However, even when the cop is actually scarred he can always claim in his report that he, "feared for his life." This incantation becomes the script after the fact. This is not a distinction without a difference. Scenario: B& E run. Cop has his gun out. Suddenly, 15 year old kid pops out and startles the cop who shoots the kid. No gun is found or other dangerous weapon. In this scenario the cop does not admit he was scarred and that's why he shot. Nor is it likely the cop would say the discharge was accidental. In the report you will find incantations such as, " I shouted to the suspect to put his hands so that I could see them and he refused;" " As I looked at the suspect he had a look which lead me to believe he had been drinking or using drugs;" "The suspect refused to remove his hand from beneath his shirt." If the officer admitted he shot because he was scarred it was a wrongful use of deadly force by 4th amendment standards. If the officer was in fear of this life it was a justified shooting. The courts condone the officers' use of these incantations which become the excuse to an officer who, in reality, is scarred with rhetoric in decisional law which says, "officers must make split second decisions." So, if in reality, there was actually an interval of time, no matter how brief, which should have been used which would have preserved the constitutional rights of this individual then that interval of time should not have been avoided. The officer knows of himself, of this interval of time. Shooting review boards fail to seek this interval of time. They are in the best position to find the interval. They can ask the right questions and get the real answers. They don't. At least, they don't document it. Look to the officers training in your analysis. Cops tend not to think outside of the training regimen box. Departments may not train to make an officer think his way around the

"split second" phenomenon. In that case the officer defaults to what ever training he has received.

VI. Ask the Experienced Trial Lawyer: Panel Discussion

Materials:

Representative Recent Appellate Cases
Michael Avery

Sample Discovery Request
Psychological Evaluation Report (§1983 wrongful conviction case 02/2008)
Jury Consultant Outline of Services (wrongful conviction trial 02/2008)
Full set of jury instructions submitted to jury, wrongful conviction trial 02/2008 [§1983 False Arrest, Malicious Prosecution, Brady Violation cause of action]
Julie Hurwitz

Ensuring Rights for All: Realizing Human Rights for Prisoners
Deborah LaBelle

Why I Call Defendants First
Amos Williams

Presenters:

Michael Avery, Professor, Suffolk University Law School, Boston, MA
Julie Hurwitz, Goodman & Hurwitz, P.C., Detroit, MI
Deborah LaBelle, Law Offices of Deborah LaBelle, Ann Arbor, MI
Amos Williams, Amos E. Williams, P.C., Detroit, MI

Representative Recent Appellate Case

Arrest and Detention

Stufflebeam v. Harris, 521 F.3d 884 (8th Cir. 2008) (Arkansas law does not permit arrest for refusing to identify oneself where person is not suspected of other criminal activity and identification is not necessary to protect officer safely or to resolve whatever suspicions prompted the officer to make a *Terry* stop).

Jewett v. Anders, 521 F.3d 818 (7th Cir. 2008) (reasonable suspicion existed for detention of person who peered out of door of store where murder suspect was thought to be and then ran when approached by police).

Mondragon v. Thompson, 519 F.3d 1078 (10th Cir. 2008) (applying *Wallace v. Kato* the court remands false arrest/malicious prosecution claim to find whether plaintiff ever received legal process that justified his imprisonment in order to determine when claim accrued; court expresses doubt, but does not decide, that forged arrest warrant constitutes legal process).

Seymour v. City of Des Moines, 519 F.3d 790 (8th Cir. 2008) (where officers had no reason to suspect criminal actions by father that might have caused child (who ultimately died from Sudden Infant Death Syndrome) to stop breathing, detention of father at home rather than permitting him to go to hospital violated his 4th Amendment rights, but officers entitled to qualified immunity).

Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008) (*Terry* stop was justified where plaintiffs matched radioed description of stolen vehicle suspects; officer's brandishing of firearm and holding plaintiffs handcuffed on ground for brief period was not justified although they originally failed to comply with command to lie down, but officer's mistake was reasonable, entitling him to qualified immunity).

Tekle v. United States, 511 F.3d 839 (9th Cir. 2007) (handcuffing eleven year old boy who was unarmed and not resisting in the presence of 23 officers rendered unreasonable his detention for 15-20 minutes during arrest of his father, detention of children raises particular concerns that must be taken into account with other circumstances; officers not entitled to qualified immunity).

Brockinton v. City of Sherwood, 503 F.3d 667 (8th Cir. 2007) (analyzing failure to conduct an adequate investigation as a due process violation, court requires evidence that failure to investigate was intentional or reckless, thereby shocking the conscience).

Peet v. City of Detroit, 502 F.3d 557 (6th Cir. 2007) (Exculpatory evidence gathered by police post-arrest does not vitiate probable cause that existed at time of arrest, nor does it trigger obligation to release suspect from custody).

Sands v. McCormick, 502 F.3d 263, 269 (3d Cir. 2007) (allegation that officer knew statute of limitations on criminal offense had expired is not sufficient for claim of false arrest; statute of limitations is an affirmative defense and due to potentially disputed issues in applying statute of limitations, plaintiff's claim "would place far more responsibility on police officers than is required by their calling").

Powers v. Hamilton Co. Public Defender, 501 F.3d 592 (6th Cir. 2007) (affirming certification of class and recognizing plaintiff had cause of action for claim that his due process rights were violated by public defender's policy of failing to seek indigency hearings on behalf of defendants facing jail time for unpaid fines; court finds claim not barred by *Heck v. Humphrey*, not barred by *Younger* abstention doctrine, not barred by *Rooker-Feldman* doctrine, public defender acted under color of law).

Sides v. City of Champaign, 496 F.3d 820 (7th Cir. 2007) (appropriate standard for determining whether keeping plaintiff standing against his hot car on a hot asphalt parking

lot for one hour during an investigation violated his rights is not whether officers were deliberately indifferent to his serious medical needs, but whether the seizure of the plaintiff was objectively reasonable; court concludes that deliberate indifference standard applies only to convicted prisoners, also concludes that plaintiff's discomfort was not so extreme as to render the detention unreasonable).

Zellner v. Summerlin, 494 F.3d 344 (2d Cir. 2007) ("'arguable' probable cause must not be misunderstood to mean 'almost' probable cause, citing *Jenkins v. City of New York*; 20 or 30 second conversation between activist and police officer in charge of the scene could not reasonably objectively be interpreted as an obstruction of governmental administration).

Logsdon v. Hains, 492 F.3d 334, 343 (6th Cir. 2007) (in assessing probable cause an officer must consider the totality of the circumstances, including both the inculpatory and exculpatory evidence known to him; "officers initially assessing probable cause to arrest may not off-handedly disregard potentially exculpatory information made readily available by witnesses on the scene").

Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007) (under *Wallace* statute of limitations for false arrest claim begins to run at the time of the arrest; court recognizes that *Wallace* abrogates previous circuit precedent to the contrary, *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999); court recognizes that malicious prosecution claim does not accrue until favorable termination of the criminal proceeding).

Reeves v. Churchich, 484 F.3d 1244 (10th Cir. 2007) (where plaintiffs ignored officers pointing guns at them and issuing verbal commands by running away or pushing gun away, they were not seized within meaning of Fourth Amendment).

McClish v. Nugent, 483 F.3d 1231 (11th Cir. 2007) (deputy who reached through plaintiff's open doorway to pull plaintiff, who was completely inside house, out to porch to arrest him

without a warrant, violated *Payton's* "firm line" at threshold of home, but officer was entitled to qualified immunity because issue had not been previously decided).

Coercive Interrogation

Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007) (use of coerced statement against accused in bail hearing violates his Fifth Amendment right to be free from self-incrimination).

Complaint

Reese v. Herbert, 527 F.3d 1253 (11th Cir. 2008) (district court did not abuse its discretion in denying leave to amend after the close of discovery and after dispositive motions had been filed).

Harris v. Bornhorst, 513 F.3d 503 (6th Cir. 2008) (court uses a "course of the proceedings" test to determine whether defendants in a § 1983 action have received notice of plaintiff's claims where complaint is ambiguous, court finds questions asked by plaintiff's counsel during a deposition were sufficient to put defendants on notice of claim).

Iqbal v. Hasty 490 F.3d 143, 157 -158 (2d Cir. 2007) (These conflicting signals create some uncertainty as to the intended scope of the Court's decision. FN6 We are reluctant to assume that all of the language of Bell Atlantic applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases. FN7 Some of the language relating generally to Rule 8 pleading standards seems to be so integral to the rationale of the Court's parallel conduct holding as to constitute a necessary part of that holding. See Pierre N. Leval, Judging under the Constitution: Dicta about Dicta, 81 N.Y.U. L.Rev. 1249, 1257 (2006) ("The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition

played in the reasoning that led to the judgment.")

Jorge T. v. Fla. Dep't of Children & Families, 250 Fed. App. 954, 955-956 (11th Cir. 2007) ("Because the district court dismissed Jorge T.'s § 1983 claim on qualified immunity grounds, however, we must also apply a heightened pleading requirement. *GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998) (citing *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (1992) (overruled on other grounds)). Accordingly, while Fed. R. Civ. P. 8 gives plaintiffs considerable leeway in framing complaints, we require that, in response to the qualified immunity defense, a § 1983 complaint allege its supporting facts with some specificity. *Id.*").

Deadly Force

Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008) (although officers claimed decedent was attempting to run them over with his vehicle, under plaintiff's version that decedent was slowly driving around officers and had stopped vehicle before officers began shooting, officers would be liable for use of excessive deadly force and not entitled to qualified immunity).

Davenport v. Causey, 521 F.3d 544 (6th Cir. 2008) (citing *Scott v. Harris*, there are no rigid rules to determine when deadly force is permissible; officer who shot motorist stopped for traffic infraction behaved reasonably where suspect was a large man who resisted officers, was not felled by taser, and who struck officers rapidly and repeatedly with close-fisted blows that knocked one officer down and appeared to be defeating second officer with blows to head).

Floyd v. City of Detroit, 518 F.3d 398, 406-407 (6th Cir. 2008) (where neighbor had told officers that plaintiff threatened him earlier while armed with shotgun, one officer claimed he thought plaintiff had a handgun, other officer claimed he believed plaintiff had shot first officer, taking facts in light most favorable to plaintiff qualified immunity is denied on

summary judgment where plaintiff alleged that officers fired at him in his backyard while he was unarmed; officer who fired at plaintiff and missed was liable for seizure where plaintiff was not fleeing and "halted in his tracks" when officer fired, officer was also liable for seizure caused by second officer's shot which felled plaintiff, because first officer's shot "escalated the situation by unambiguously signaling that such force was called for").

Moore v. Indehar, 514 F.3d 756 (8th Cir. 2008) (bystanders are not seized for Fourth Amendment purposes when struck by an errant bullet, but summary judgment was inappropriate where there was a factual dispute about whether plaintiff was officer's target).

Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255 (10th Cir. 2008) (officer entitled to qualified immunity for shooting plaintiff's decedent where he had already threatened violence against himself and others, officers were responding to emergency call late at night, decedent was armed with a knife with a blade over a foot in length, officers repeatedly told him to put down the knife but he refused to do so, decedent held the high ground vis-a-vis the officers, he raised knife blade above his shoulder and pointed tip towards officers and took a step toward officer who shot and the distance between decedent and officer was between 7 and 20 feet).

Long v. Slaton, 508 F3d 576 (11th Cir. 2007) (citing *Scott v. Harris*, court concludes that *Tennesee v. Garner* provided examples of when deadly force is permissible, but did not establish rigid rules; officer's decision to fire at emotionally disturbed decedent who was not violent but was driving away in officer's cruiser was a reasonable use of force in order to protect the public; dissent argues there was no imminent threat of harm in the rural area where incident took place).

Hathaway v. Bazany, 507 F.3d 312 (5th Cir. 2007) (shooting was justified where officer stated that car accelerated towards him, driver had a "determined look," officer realized he could

not get out of the way, decided to fire, unholstered his gun, was struck, and fired his weapon, all so quickly that officer could not remember whether he fired his gun before, during, or after he was struck; court distinguishes cases holding it was unreasonable to fire at automobiles after they had clearly passed by officer allegedly threatened by them).

Williams v. City of Grosse Pointe Park, 496 F.3d 482 (6th Cir. 2007) (where police blocked vehicle containing people suspected of tampering with cars, but driver collided with cruiser, then drove away from officer who pointed gun at driver through side window, knocking officer down, second officer was reasonable in firing at vehicle as it accelerated away).

Beshers v. Harrison, 495 F.3d 1260 (11th Cir. 2007) (citing *Scott v. Harris*, court concludes that even assuming officer intentionally rammed decedent's vehicle to force it off road, such use of deadly force was reasonable where decedent was believed to be intoxicated, was driving erratically, forcing other cars off the road and thus causing a serious danger to others).

Ngo v. Storlie, 495 F.3d 597 (8th Cir. 2007) (facts were sufficient to conclude officer violated plaintiff's clearly established rights when he shot plaintiff plainclothes officer, who was already the victim of shooting by civilian, several times as he was lying in street, having dropped his weapon, with sweatshirt pulled down off his shoulders partially revealing bullet-proof vest and microphone hanging from it, despite his knowledge that there was a plainclothes officer in area and defendant officer took no time to assess situation and gave no warning he was about to fire).

Abney v. Coe, 493 F.3d 412 (4th Cir. 2007) (relying on *Scott v. Harris*, assuming deputy intentionally rammed decedent's motorcycle, use of deadly force was reasonable where decedent's driving during eight mile chase put lives of other motorists at risk).

Excessive Force

Johnson v. District of Columbia, 528 F.3d 969 (D.C. Cir. 2008) (repeatedly kicking prone and submissive subject in the groin violated his clearly established rights).

Reese v. Herbert, 527 F.3d 1253, 1272 (11th Cir. 2008) (even de minimus force will violate Fourth Amendment if officer is not entitled to arrest or detain plaintiff).

Hadley v. Gutierrez, 526 F.3d 1324 (11th Cir. 2008) (punching plaintiff in stomach when he was handcuffed and not resisting constituted excessive force; plaintiff's conviction for resisting arrest would not bar claim if he was not resisting at time he was punched).

Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008) ("it would be apparent to a reasonable officer that the use of force adequate to tear a tendon is unreasonable against a fully restrained arrestee").

Gregory v. Co. of Maui, 523 F.3d 1103 (9th Cir. 2008) (officers' use of force against trespassing subject who died of heart attack, caused in part by narrowed arteries and marijuana use, after encounter was reasonable, even assuming they should have recognized he was in excited state of delirium, where force was proportionate to threat that decedent posed by holding pen in threatening manner and resisting officers).

Orem v. Rephann, 523 F.3d 442 (4th Cir. 2008) (excessive force claim by one under arrest and being transported to jail in police cruiser is analyzed under due process clause, which requires infliction of "unnecessary and wanton pain and suffering"; reasonable juror could concluded that use of taser against woman who was handcuffed and hobbled, locked in back seat cage of cruiser, was wanton, sadistic and not a good faith effort to restore discipline; "torment without marks" inflicted by taser was not a de minimus injury).

Jones v. City of Cincinnati, 521 F.3d 555 (6th Cir. 2008) (officers not entitled to qualified immunity on motion to dismiss excessive force claim where plaintiff alleged that officers beat decedent with batons without provocation and without giving him any opportunity to comply with their demands, chemically sprayed him while handcuffed and used their combined weight to hold him prone on ground after he stopped struggling, and failure to provide medical attention claim where officers failed to provide CPR when he stopped breathing).

Gilbert v. Cook, 512 F.3d 899 (7th Cir. 2008) (prisoner's claim based on allegation that guards used excessive force against him *after* he punched them was not barred by *Heck v. Humphrey* and *Edwards v. Balisok*).

Richman v. Sheahan, 512 F.3d 876 (7th Cir. 2008) (morbidly obese man who had been held in contempt of court died from positional asphyxia when deputies attempted to remove him from courtroom and sat on his back while he was in prone position, court cites cases and articles for proposition that reasonably trained officers would have known compressing morbidly obese person's lungs could kill him, hence officers required to use care and avoid unnecessary haste in taking him into custody; whether this was an 8th Amendment or 4th Amendment violation depends upon whether deputies were punishing him or merely attempting to remove him from courtroom).

Holmes v. Village of Hoffman Estate, 511 F.3d 673 (7th Cir. 2007) (that plaintiff suffered only minor injuries does not preclude an excessive force claim).

Tekle v. United States, 511 F.3d 839 (9th Cir. 2007) (eleven year old boy who was unarmed, handcuffed and not resisting entitled to trial with respect to excessive force claim based on evidence that officers pointed a gun at his head and pointed guns at him for duration of incident during which they arrested his father; officers not entitled to qualified immunity).

Casey v. City of Federal Heights, 509 F.3d 1278, 1286 (10th Cir. 2007) (use of taser was unreasonable against alleged misdemeanant who was being tackled by another officer although he was not violent and not resisting arrest; court concludes, "it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force-or a verbal command-could not exact compliance.").

Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007) (citing *Scott v. Harris*, court concludes it need not credit plaintiff's version of facts on summary judgment where it is contradicted by video).

Torres v. City of Madera, 524 F.3d 1053 (9th Cir. 2008) (officer seized plaintiff, already handcuffed and in patrol car, "through means intentionally applied" even though she accidentally shot him with her Glock rather than the taser she had intended to pull from its holster; reasonableness of use of force depended upon "(1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training").

Henry v. Purnell, 501 F.3d 374 (4th Cir. 2007) (officer seized plaintiff "through means intentionally applied" even though he accidentally shot him with his Glock rather than the taser he had intended to pull from its holster; court articulates same five reasonableness factors later relied upon in *Torres*).

Jennings v. Jones, 499 F.3d 2 (2007) (court reverses judgment of qualified immunity entered after jury verdict in plaintiff's favor - following general verdict facts must be viewed in light most favorable to verdict; clearly established rights were violated where officer applied "ankle turn control technique"

and increased force after he stopped resisting and told officer he was hurting a previously injured ankle).

Excessive Force – substantive due process

Williams v. Berney, 519 F.3d 1216, 1224 (10th Cir. 2008) (business license inspector who struck and pushed business owners without provocation did not violate their substantive due process rights where he was not authorized to use force in his position and he did not leverage or abuse his position to further the assault; requisite abuse of power in excessive force claims requires that "(1) the harm results from misconduct by a government official; (2) the official has some authority over the victim but is not authorized to use force as a part of the official's position; (3) the official abuses that authority to further the attack; (4) the abuse exceeds run-of-the-mill negligent conduct, rising to the level of reckless or intentional conduct; and, finally, (5) the injury is 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'").

Failure to Protect

Leary v. Livingston County, 528 F.3d 438 (6th Cir. 2008) (jail officer who told other inmates that plaintiff was in custody for raping nine-year old girl was deliberately indifferent to plaintiff's clearly established right to safety).

Price-Cornelison v. Brooks, 524 F.3d 1103 (10th Cir. 2008) (officer's failure to enforce plaintiff's permanent restraining order because she was a lesbian violated her rights to equal protection of law; where officer ordered plaintiff not to return to her property upon pain of arrest, thus allowing her domestic partner to take her property, he sufficiently aided in the deprivation of her property to violate her Fourth Amendment rights).

Burella v. City of Philadelphia, 501 F.3d 134 (3d Cir. 2007) (under *Castle Rock* abused wife did not have procedural due

process right to police protection under state Protection from Abuse Act and protection orders issued by court, despite mandatory language requiring arrest in statute; equal protection claim failed because evidence failed to demonstrate unlawful custom or discriminatory motive).

Mudrow v. Re-Direct, Inc., 493 F.3d 160 (D.C. Cir 2007) (affirming jury verdict against halfway house for recklessly allowing vulnerable juvenile with mental health problems who had previously been threatened and beaten to leave facility unsupervised).

Familial Relationship

Lowery v. County of Riley, 522 F.3d 1086, 1092 (10th Cir. 2008) (under *Trujillo v. Bd. of County Comm'rs,* 768 F.2d 1186, 1189 (10th Cir. 1985), "an allegation of *intent* to interfere with a particular relationship protected by the freedom of familial association is required to state a claim under section 1983").

First Amendment

Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008) (plaintiff was arrested based on statements written on his van, including "I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST;" court holds statements were political hyperbole and not threats, arrest violated plaintiff's First Amendment rights, but officers were protected by qualified immunity because previous case law would not have put them on notice that this language was protected by First Amendment).

Beck v. City of Upland, 527 F.3d 853, 862 (9th Cir. 2008) (with respect to First Amendment retaliatory prosecution claims, previous case law describing factors that could rebut presumption of independent judgment by prosecutor are overruled in light of *Hartman*, plaintiff need only show retaliatory motive on part of official urging prosecution and absence of probable cause to rebut presumption of regularity and overcome defense of independent intervening cause; with

respect to Fourth Amendment claims, court notes that *Hartman* may be inconsistent with previous law but does not overrule the latter in this case because plaintiff overcame presumption of independent judgment by prosecutor under previous case law where such presumption could be rebutted where prosecutor was pressured by police or was given false information, the police "act[ed] maliciously or with reckless disregard for the rights of an arrested person," the prosecutor "relied on the police investigation and arrest when he filed the complaint instead of making an independent judgment on the existence of probable cause for the arrest," the officers "otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings", or the evidence to overcome the presumption was not available because of an assertion of privilege by the government; and once plaintiff introduces evidence to rebut presumption, burden remains on defendant officer to prove that an independent intervening cause cut off his tort liability).

Purtell v. Mason, 527 F.3d 615 (7th Cir. 2008) (resident placed tombstones on his front yard insulting neighbors by name and referring to their fictional deaths; officer who ordered resident to remove them upon pain of arrest violated First Amendment because tombstones did not amount to "fighting words" because they merely inflicted emotional injury but did not provoke an immediate breach of peace; but officer was entitled to qualified immunity because he could reasonably have been mistaken about post-*Chaplinsky* developments in the law)

York v. City of Las Cruces, 523 F.3d 1205 (10th Cir. 2008) (law was clearly established that loudly saying "bitch" in parking lot, where comment was not directed to anyone in particular and plaintiff was several parking spaces away from driver to whom the word made reference, did not constitute disorderly conduct).

Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008) (taking facts in light most favorable to plaintiff, including evidence that protestors were peaceful and witness who stated it was

police response not drumming that was inciting the crowd, police did not have probable cause to arrest him for disorderly conduct for drumming during anti-war protest; law requires probable cause that plaintiff in particular violated the law, not merely that he "was a participant in an antiwar protest where some individuals may have broken the law").

King v. Ambs, 519 F.3d 607 (6th Cir. 2008) (in questionable opinion and over thoughtful dissent, court concludes officer did not violate First Amendment rights of plaintiff arrested for disorderly conduct for obstructing officer in performance of his duty, based on plaintiff's repeated statements to third party being questioned by officer that he did not have to speak to officer).

Harris v. Bornhorst, 513 F.3d 503, 519 (6th Cir. 2008) (court reverses dismissal of claim that prosecutor, allegedly in retaliation for civil suit filed against her by plaintiff, told Marine Corps she still suspected juvenile plaintiff of murder and there were no other suspects, despite reversal of plaintiff's conviction on grounds that confession was involuntary; court finds that plaintiff's filing and maintenance of suit did not undermine 1st Amendment claim, "First, the issue is whether a person of ordinary firmness would be deterred, not whether [the plaintiff] himself actually was deterred … Second, if subsequently challenging [the state action] *ipso facto* demonstrated that the challenged action was not sufficiently adverse to undermine constitutional rights, no case alleging retaliation for exercising First Amendment rights could ever be brought.")

Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007) (detaining, interrogating, fingerprinting, photographing and searching Muslim U.S. citizens upon return from Islamic conference in Canada placed a burden on associational rights sufficient to implicate First Amendment protections, even though some Muslims expressed a willingness to attend future conference, where others who had not attended conference were not subject to such measures, but means adopted constituted

least restrictive means to achieve government's compelling interest in protecting nation from terrorism where government had information that individuals associated with terrorism would be at conference, even though it had no individualized suspicion that plaintiffs were engaged in terrorist activity).

Logsdon v. Hains, 492 F.3d 334, 346 (6th Cir. 2007) (arresting anti-abortion protestor on public sidewalk based upon the content of his speech would violate his First Amendment rights).

Becker v. Kroll, 494 F.3d 904, 926 (10th Cir. 2007) (recognizing cause of action for retaliatory prosecution against official who influences bringing of prosecution by withholding exculpatory evidence from prosecutor in retaliation for plaintiff's exercise of First Amendment rights).

Steidl v. Fermon, 494 F.3d 623 (7th Cir. 2007) (officers who suppressed exculpatory evidence post conviction may be held liable for *Brady* violation even though they were not involved in the trial, where evidence was known to state at time of trial).

Malicious Prosecution

Beck v. City of Upland, 527 F.3d 853, 862 (9th Cir. 2008) (with respect to First Amendment retaliatory prosecution claims, previous case law describing factors that could rebut presumption of independent judgment by prosecutor are overruled in light of *Hartman*, plaintiff need only show retaliatory motive on part of official urging prosecution and absence of probable cause to rebut presumption of regularity and overcome defense of independent intervening cause; with respect to Fourth Amendment claims, court notes that *Hartman* may be inconsistent with previous law but does not overrule the latter in this case because plaintiff overcame presumption of independent judgment by prosecutor under previous case law where such presumption could be rebutted where prosecutor was pressured by police or was given false information, the police "act[ed] maliciously or with reckless

disregard for the rights of an arrested person," the prosecutor "relied on the police investigation and arrest when he filed the complaint instead of making an independent judgment on the existence of probable cause for the arrest," or the officers "otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings"; and once plaintiff introduces evidence to rebut presumption, burden remains on defendant officer to prove that an independent intervening cause cut off his tort liability).

Wilkins v. DeReyes, 528 F.3d 790 (10th Cir. 2008) (§ 1983 cause of action for malicious prosecution may be based on procedural due process violations, or violations of other constitutional rights, not merely Fourth Amendment violations) (Treatise cited).

Wilkins v. DeReyes, 528 F.3d 790 (10th Cir. 2008) (whether nolle prosequi constitutes favorable termination for malicious prosecution depends upon stated reasons for dismissal as well as surrounding circumstances)

Kjellsen v. Mills, 517 F.3d 1232, 2008 WL 451882 (11th Cir. 2008) (plaintiff had been arrested for DUI and state's original blood analysis showed alcohol level of .10, sufficient for a "per se" violation; state analyzed the samples on two subsequent occasions and got results below the per se threshold, but did not reveal results to defense; at trial on cross of gov't expert he revealed subsequent results for first time and trial court granted directed verdict on per se charge and jury returned verdict of not guilty on DUI; court holds that first results were sufficient to supply probable cause, a complete defense to plaintiff's 4th Amendment malicious prosecution claim and that later results did not vitiate the probable cause required to continue the prosecution because scientific evidence shows that blood levels most often decrease, rather than increase, over time).

Mondragon v. Thompson, 519 F.3d 1078 (10th Cir. 2008) (10th Circuit recognizes a procedural due process constitutional claim for malicious prosecution).

Harris v. Bornhorst, 513 F.3d 503, 521 (6th Cir. 2008) (under Ohio law a conviction, even though subsequently reversed, is a complete defense to malicious prosecution unless obtained by fraud or unlawful means; court finds that failure to disclose exculpatory evidence suffices to establish fraud; malice required for malicious prosecution may be inferred from lack of probable cause).

Holmes v. Village of Hoffman Estate, 511 F.3d 673 (7th Cir. 2007) (probable cause on one charge will defeat a false arrest action with respect to all charges brought against plaintiff, but a malicious prosecution action may go forward for any charge on which there was no probable cause; case involved Illinois state law claim for malicious prosecution, but and court concludes Illinois would follow cases cited from across the country for this proposition).

Becker v. Kroll, 494 F.3d 904 (10th Cir. 2007) (where plaintiff was neither arrested, incarcerated or otherwise placed under the direct physical control of the state, although she was charged criminally, she was not "seized" and could not make a 4th Amendment malicious prosecution claim; court declines to accept Justice Ginsburg's "continuing seizure" analysis, citing cases from other circuits that have rejected the theory).

Novitsky v. City of Aurora, 491 F.3d 1244 (10th Cir. 2007) (10th Circuit uses common law elements of malicious prosecution as the "starting point" of its analysis, but ultimate question is whether plaintiff has proved the deprivation of a constitutional right).

Pitt v. District of Columbia, 491 F.3d 494 (D.C. Cir. 2007) (police officers may be held liable under § 1983 for malicious prosecution to the extent defendants' actions caused the plaintiff to be "seized" without probable cause in violation of

the Fourth Amendment (in accord with decisions from other circuits listed), but officers not liable in this case because right had not been clearly established in D.C. Circuit; police were liable for common law malicious prosecution where they had no probable cause for prosecution because the two victims of a mugging told police plaintiff was not the person who had robbed them; malice may be "established from the existence of a willful, wanton, reckless, or oppressive disregard for the rights of the plaintiff" (504); evidence of malice was sufficient where arrest report and affidavit submitted to prosecutors contained material misstatements and omissions, including no mention of the negative identifications; intentional infliction of emotional distress verdict against District of Columbia was justified by officers' omissions and false statements in their affidavit and other evidence of evidence tampering; under D.C. law plaintiff's wife could recover for IIED only if she were present, in the sense of physical proximity, when the outrageous conduct took place; punitive damages awards against in the amount of $1000 each are affirmed).

Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007) (noting that 6th Cir. recognizes a § 1983 claim for malicious prosecution under the 4th Amendment, although its contours remain uncertain).

Becker v. Kroll, 494 F.3d 904, 915 (10th Cir. 2007) (rejecting "continuing seizure" theory, court hold that plaintiff who was neither arrested nor incarcerated in connection with Medicaid fraud charges was not "seized").

Medical Needs

Sides v. City of Champaign, 496 F.3d 820 (7th Cir. 2007) (appropriate standard for determining whether keeping plaintiff standing against his hot car on a hot asphalt parking lot for one hour during an investigation violated his rights is not whether officers were deliberately indifferent to his serious medical needs, but whether the seizure of the plaintiff was objectively reasonable; court concludes that deliberate indifference standard applies only to convicted prisoners, also

concludes that plaintiff's discomfort was not so extreme as to render the detention unreasonable).

Gish v. Thomas, 516 F.3d 952 (11th Cir. 2008) (officer was not deliberately indifferent to risk of suicide of pretrial detainee he knew to be suicidal, transported in police cruiser with hands cuffed in front of him, with loaded firearm on front seat, where officer was under erroneous impression that security screen between front and back seats was locked and detainee shot himself with that gun when officer stepped out of cruiser).

Privacy

Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008) (publication of driver's personal identifying information on web site in connection with traffic citation, leading to victimization by identity theft, did not violate a fundamental right to privacy, a reputational interest in credit rating recognized as fundamental, or any property interest in personal information; Eighth Circuit limits right to privacy based on release of personal information to cases where it might cause bodily harm, or where information is of a sexual, personal and humiliating nature).

Procedural Due Process

Brown v. Miller, F.3d , 2008 WL 509078 (5th Cir. 2008) (laboratory technician may be held liable for a due process violation for obtaining a conviction based on information he knew was false, and is not protected by qualified immunity, for knowingly creating a misleading and scientifically inaccurate serology report and for suppressing exculpatory blood test results).

White v. McKinley, 519 F.3d 806 (8th Cir. 2008) (evidence was sufficient to hold officer liable for procedural due process violation for suppressing exculpatory evidence, circuit precedent requires bad faith and evidence here showed that officer suppressed information based on his relationship with

complainant, whom he later married; officer not entitled to qualified immunity).

Kjellsen v. Mills, F.3d , 2008 WL 451882 (11th Cir. 2008) (plaintiff had been arrested for DUI and state's original blood analysis showed alcohol level of .10, sufficient for a "per se" violation; state analyzed the samples on two subsequent occasions and got results below the per se threshold, but did not reveal results to defense; at trial on cross of gov't expert he revealed subsequent results for first time and trial court granted directed verdict on per se charge and jury returned verdict of not guilty on DUI; court holds that first results were sufficient to supply probable cause, a complete defense to plaintiff's 4th Amendment malicious prosecution claim and that later results did not vitiate the probable cause required to continue the prosecution because scientific evidence shows that blood levels most often decrease, rather than increase, over time; plaintiff also alleged that failure to disclose exculpatory results violated his 6th Amendment right to compulsory process; court holds that evidence was not "material" because plaintiff was acquitted at trial and hence disclosure could not have changed the result, reasoning that materiality must be determined post-trial; court notes in fn. that plaintiff did not claim a *Brady* due process violation for failure to turn over exculpatory evidence).

Johnson v. Dossey, F.3d , 2008 WL 364590 (7th Cir. 2008) (plaintiff alleged that defendants who prosecuted her for arson had suppressed exculpatory report of County Fire Investigation Task Force; court holds that cause of action based on due process *Brady* violation accrued upon acquittal under *Heck v. Humphrey*, not upon appearance before magistrate under *Wallace v. Kato*; accrual date for state causes of action is determined by state law, unaffected by *Wallace*).

McGhee v. Pottawattamie Co., Iowa, 514 F.3d 739 (8th Cir. 2008) (prosecutors who obtain, manufacture, coerce and fabricate evidence before filing of charges may be held liable for violating the substantive due process rights of suspects;

court rejects defendants' argument that there is no liability for gathering evidence, only for its introduction in evidence and they have absolute immunity for introduction of evidence).

Harris v. Bornhorst, 513 F.3d 503 (6th Cir. 2008) (vacating dismissal of *Brady* claim against county based on prosecutor's failure to disclose exculpatory evidence).

Becker v. Kroll, 494 F.3d 904 (10th Cir. 2007) (plaintiff cannot make a claim based on a failure to disclose exculpatory evidence where she does not go to trial, the right is a fair trial right, plaintiff cannot establish materiality where the case does not go to trial).

Wray v. City of New York, 490 F.3d 189 (2d Cir. 2007) (suggestive identification procedure does not itself violate suspect's constitutional rights, the introduction in evidence of suggestive identification is the constitutional violation; officer is not liable for introduction of identification in evidence absent evidence that he misled or pressured the prosecution or trial judge, the constitutional violation is caused by acts of prosecutor and judge; with questionable reasoning, court concludes that error by judge in admitting improper identification is not reasonably foreseeable and not the "legally cognizable result" of the investigative misconduct).

Becker v. Kroll, 494 F.3d 904 (10th Cir. 2007) (no claim for *Brady* "fair trial" violation where criminal case does not go to trial because plaintiff cannot establish materiality unless suppression of exculpatory evidence affects outcome of trial).

Porter v. White, 483 F.3d 1294 (11th Cir. 2007) (without determining whether failure to disclose exculpatory evidence is a procedural or substantive due process violation, court concludes officer's mere negligent or inadvertent failure to turn over *Brady* material to prosecution does not amount to a "deprivation" in the constitutional sense and does not provide a basis for a § 1983 action).

Wilkins v. DeReyes, 528 F.3d 790 (10th Cir. 2008) (fabricating evidence by coercing false statements from witnesses and using them to support arrest and prosecution of plaintiffs would constitute malicious prosecution in violation of plaintiffs' Fourth Amendment rights not to be arrested and detained without probable cause) (Treatise cited).

Search and Seizure

Cuevas v. De Roco, 531 F.3d 726 (9th Cir. 2008) (officers may not enter home to search for parolee without a warrant unless they have probable cause to believe that he lives there).

Michael C. v. Gresbach, 526 F.3d 1008 (7th Cir. 2008) (social worker's visual observation of children's stomach and legs under their clothing to investigate child abuse, without consent of principal or parents, violated their clearly established Fourth Amendment rights).

Archuleta v. Wagner, 523 F.3d 1278, 2008 WL 1875195 (10th Cir. 2008) (officers violated plaintiff's clearly established rights when they strip searched her at jail despite fact they knew she did not match description of person sought and she had been patted down, was not to be placed in general population and was not charged with a weapons or drug offense; charge of domestic violence harassment did not itself justify strip search).

Bates v. Harvey, F.3d , 2008 WL 565774 (11th Cir. 2008) (warrantless entry into third party's home to execute a civil commitment warrant for her friend's son violated resident's Fourth Amendment rights; exigent circumstances were not present although affidavit stated subject presented substantial risk of immediate harm because it also stated he resided at different address and did not say he could be found at this home; officer entitled to qualified immunity because law did not clearly establish that affidavit did not create exigent circumstances).

DeMayo v. Nugent, 517 F.3d 11, 18 (1st Cir. 2008) (officers lacked exigent circumstances to enter home without warrant during controlled delivery of package believed, on basis of dog sniff, to contain drugs, absent case-specific evidence justifying claim of exigency; warrant requirement for home was clearly established and "The fact that the doctrine of exigent circumstances is evolving, however, does not necessarily mean that every situation implicating the subject touches upon the supposed nebulous borderline of acceptable conduct.").

Eidson v. Owens, 515 F.3d 1139 (10th Cir. 2008) (consent to search premises was coerced when procured by an officer to had recently represented the property owner and who advised her that she would be detained until a warrant could be obtained and that the judge would go harder on her if she insisted that they seek a warrant, but officer was entitled to qualified immunity because no previous case had presented the combination of circumstances present here).

Redding v. Safford Unified School Dist. No. 1, 531 F.3d 1071 (9th Cir., en banc, 2007) (self-serving and uncorroborated information from other student did not provide reasonable grounds for strip search of thirteen-year-old student to look for pills and search was not reasonable in scope; student's right to be free from strip search was clearly established).

Campbell v. Miller, 499 F.3d 711 (7th Cir. 2007) (strip search for drugs including visual anal examination conducted in back yard in view of houses was unreasonable in its execution, jury verdict for officer reversed).

Bruce v. Beary, 498 F.3d 1232 (11th Cir. 2007) (plaintiff's allegations were sufficient to warrant trial on claim that extensive "administrative search" of auto body shop violated constitution where it had earmarks of criminal raid).

Walczyk v. Rio, 496 F.3d 139 (2d Cir. 2007) (failure to disclose in warrant affidavit that suspect had not resided in mother's

home for seven years was fatal to probable cause to search her home as a matter of law).

Substantive Due Process

Amrine v. Brooks, 522 F.3d 823 (8th Cir. 2008) (reviewing cases since *Lawrence County* and holding that reckless investigation standard was not met here).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K[redacted] S[redacted],
Plaintiff,

vs.

DERRICK ANDERSON, CAROL NICHOLS, TERRENCE SIMS, PATRICK JONES, ARTHUR COPELAND and MAURICE McCLURE, Jointly and Severally and in their Individual Capacities and CITY OF DETROIT,
Defendants.
_____/

Case No. 05-71199
Honorable Bernard A. Friedman
Magistrate Judge R. Steven Whalen

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(313) 237-3018

_____/

T[redacted] G[redacted] U[redacted],
Plaintiff,

vs.

CITY OF DETROIT DETECTIVE SERGEANT DERRICK ANDERSON, badge no. S-1262; SERGEANT CAROLYN NICHOLS, badge no. S-831; OFFICER TERRENCE SIMS, badge no. 3711; OFFICER PATRICK JONES, badge no. 689; OFFICER ALAN COPELAND, badge no. 534; and OFFICER MAURICE McCLURE, and the CITY OF DETROIT, jointly and severally,
Defendants.
_____/

Case No. 05-73725
Honorable Bernard A. Friedman
Magistrate Judge R. Steven Whalen

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_____/

CONSOLIDATED PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

CONSOLIDATED PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

NOW COME consolidated Plaintiffs, KI[redacted] S[redacted], by and through her attorney, LAW OFFICES OF JULIE H. HURWITZ**,** P.C., by Julie H. Hurwitz, and T[redacted] G[redacted] U[redacted], by and through her attorney, THOMAS M. LOEB, pursuant to Fed. R. Civ. Pro. 26(a)(1)(D), 26(e)(2), 34, and hereby request that Defendants produce complete, clear, accurate, legible and authentic copies of any and all of the following documents and tangible things in the possession, custody or control of Defendants, within thirty (30) days, and as otherwise required by Fed. R. Civ. Pro. 34 and all other applicable provisions of law. If Defendants choose not to produce any particular document or thing, please produce a log, citing each specific exclusion and specific reason, as required by law.

Except as stated otherwise, the relevant time period of these requests is 2002 to the present.

Definitions and Instructions

A. As used herein, "Individual Defendants" shall refer, individually and collectively, to named Defendants.

B. As used herein, "Defendant CITY" shall refer to Defendant CITY OF DETROIT.

C. As used herein, the terms "person" or "persons" include natural person, private corporations, governmental entities, partnerships, associations and joint ventures. The singular and plural forms are used interchangeably as are the masculine and feminine forms.

D. "You" or "your" as used herein shall refer to the Defendant and any person acting on her behalf, including but not limited to her attorneys or other persons acting on behalf of the attorneys representing the Defendant.

E. "Document" shall have the same meaning as in FR Civ P, 34 and shall mean and include without limitation, all writings of any kind, including the original and all identical copies,

whether different from the originals by reason of any notation made on such copies, or otherwise (including without limitation correspondence, emails, memoranda, notes, diaries, contracts, statistics, letters, telegrams, minutes, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, intra-office and inter-office correspondence, offers, notations of any sort of conversation, meetings or other communications, bulletins, printed matter, computer printouts, teletype, telefax, invoices, purchase orders, worksheets, and all graphs, alterations, modifications, changes and amendments of any of the foregoing), graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotaped recordings, video footage, motion pictures) any electronic, mechanical or electrical records or representations of any kind (including without limitation, tapes, cassettes, disks and recordings) in your possession and/or control or known by you to exist.

F. If you contend that any document requested is exempt from discovery because it falls within the attorney-client privilege, it was prepared in anticipation of litigation or in preparation for trial, or is so exempted by any other privilege or section, you are to provide the following information in lieu of producing the document:

i. Privilege or protection which you contend applies;

ii. The nature of the document in which the information is contained;

iii. The author or recipient, and date of this document;

iv. The subject matter of the information which you contend is privileged or protected from discovery;

v. Any other additional description, if necessary, in order to provide the basis for bringing a proper motion to compel production of documents pursuant to Fed R Civ P 34.

DOCUMENTS TO BE PRODUCED

1. All documents reviewed, referred to or utilized by anyone in answering Plaintiffs' original Complaints and Plaintiffs' First Amended Complaints.

2. All documents reviewed, referred to or utilized by anyone in answering Plaintiffs' First Sets of Interrogatories to Defendants.

3. All documents and records arising from the investigation of the armed robbery that took place at the offices of Sprint PCS, 19191 Telegraph, on or about March 7, 2002, the

arrests of Plaintiffs and the respective criminal charges brought against them, prepared by any agent, servant, or employee of the Detroit Police Department, including but not limited to:

a. Police reports and PCR's;

b. Incident Reports;

c. Progress Sheets;

d. Narrative Reports;

e. Activity Log Sheets;

f. Transporting Log Sheets;

g. Witness Statements;

h. Detective Bureau Reports;

i. Arrest Book entries;

j. Warrant Requests;

k. Arrest Warrants;

l. Arrest Cards;

m. Search Warrants;

n. Evidence Records;

o. Complaints and Witness Lists;

p. Prisoner Receipt Book entries;

q. Duty Assignment Sheets;

r. Property Book entries;

s. Inventory Forms or receipts;

t. Interrogation Sheets;

u. Notes;

v. Transcripts of any radio logs or radio runs;

w. Breathalyzer or chemical test results, or the like.

4. All original notes in the possession of any or all Defendants, their agents, or employees,

made by any police officers before they prepared the above-requested documents, if any.

5. All original Sprint store surveillance videotapes regarding 07 March 2002 robbery and subsequent investigation.

6. Every edited, enhanced, altered or otherwise manipulated version of the Sprint store surveillance videotapes referred to in Request #4 above. As to each version of the videotape, please identify the purpose and use of each version. This request applies to all forms of the videotape, whether tape, DVD, captured stills, digitalized, or any other medium.

7. All documentation of custody logs documenting the chain of evidence or custody of each original, copy, edited, enhanced, altered or otherwise manipulated version of the Sprint store surveillance videotapes referred to in Request Nos. 5 and 6 above, including but not limited to name, title, address and telephone number, and location of these videotapes.

   a. This request includes documentation of all videotapes (original or otherwise), documents and things in your possession or under your control that were turned over to or produced by any officers, agents or employees of the Michigan State Police, including but not limited to Sgt. Everett Torley and/or State Trooper William Gurdy.

8. All evidence gathered or obtained by Defendants during the course of the investigation of the March 7, 2002 robbery at the Sprint PCS Store, 19191 Telegraph, including but not limited to:

   a. Evidence Tag #691093, as recorded by Defendants Sims or Nichols in Progress Sheet, dated 3/7/2002, Case Number 02-170, Incident No. 02-032644;

   b. The original Sprint moneybag recovered from the Sprint safe after the robbery on

March 7, 2002, at the Sprint store, 19191 Telegraph, Detroit. If you do not possess that original bag, produce a comparable Sprint moneybag.

9. All statements, admissions, or confessions, if any, made by the Plaintiffs or either of them, regarding the criminal charges brought against them.

10. All statements made by any of the witnesses to the acts complained of in this lawsuit, if any.

11. All photographs, video-taped recordings, or motion pictures of any subject or persons involved in the Sprint store robbery on March 7, 2002, the locale or surrounding area of the site of the Sprint store robbery on March 7, 2002, or any matter or things involved in the Sprint store robbery on March 7, 2002, if any.

12. A copy of any and all rules, regulations, general orders, guidelines, policies and procedures, training bulletins, personnel policies, or the like utilized by Defendant City of Detroit that were in effect on March 7, 2002, which governed the actions, duties or obligations of its police officers, including the following areas:

a. Commercial robbery investigations;

b. Taking statements from witnesses;

c. Identifying and contacting witnesses;

d. Fingerprint lifting from scene of crime;

e. Procuring and securing evidence from scene of crime;

f. Other scene investigation procedures.

13. A copy of all rules, regulations, general orders, guidelines, policies and procedures,

training bulletins, personnel policies, or the like utilized by defendant City of Detroit and that are currently in effect, which governed the actions, duties or obligations of its police officers, including the following areas:

a. Commercial robbery investigations;

b. Taking statements from witnesses;

c. Identifying and contacting witnesses;

d. Fingerprint lifting from scene of crime;

e. Procuring and securing evidence from scene of crime;

f. Other scene investigation procedures.

14. All documentation, whether in the form of acknowledgment forms, signature sheets, receipts, or in any other form, indicating that any members of the Detroit Police Department received copies of the materials identified in Request Nos. 12 and 13 above, during the period from 1998 up through and inclusive of 2002.

15. All documents that mention, discuss, refer to, describe, or relate to each Plaintiff.

16. All documents, items, tangible objects, or exhibits that may be introduced by you at trial.

17. The complete personnel files of each individual Defendant, including but not limited to:

a. The portion that includes his or her complete training and disciplinary record, if any, including all records, interviews, memoranda, or other documents contained in or made part of his or her personnel record;

b. All complaints concerning his or her conduct as a police officer or law enforcement officer;

c. All disciplinary or internal law enforcement reviews of his or her activities as a police officer or law enforcement officer; and

d. All performance evaluations.

18. All documentation of training that each individual Defendant received by or through Defendant CITY from their respective dates of hire up to and including March 7, 2002.

19. All documentation, including, but not limited to, incident reports, investigations and dispositions pertaining to all citizen complaints, grievances, disciplinary actions, internal investigations, anything and everything in your possession pertaining to any and all claims against the Detroit Police Department or any individual Detroit Police Officer alleging malicious prosecution, false arrest, unlawful detention, based on inadequate or improper investigative practices, during the period 1997 to the present, inclusive.

20. Any and all documentation, including but not limited to incident reports, investigations and dispositions pertaining to all citizen complaints, grievances, disciplinary actions, internal investigations, anything and everything in your possession pertaining to any and all claims against the individual Defendants in this matter.

21. Any and all documentation, including full and complete citations, of all other court actions in which any of the individual Defendants were named parties.

Respectfully Submitted,

JULIE H. HURWITZ, P.C.

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THOMAS M. LOEB

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Dated: September 26, 2006

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2006, I served the foregoing Consolidated Plaintiffs' First Request for Production of Documents on all Defendants, through their attorney, as listed below, by U. S. Postal Service and by e-mail:

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_s/Julie H. Hurwitz____
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December 19, 2007

PSYCHIATRIC REPORT – PERSONAL AND CONFIDENTIAL

Ms. Julie Hurwitz
Goodman & Hurwitz, P.C.
1394 E. Jefferson Avenue
Detroit, MI 48207

Re: Kimberly [redacted] v Derrick Anderson, et al

Dear Ms. Hurwitz:

This is the report of the independent examination of Ms. K[redacted] who is currently in a lawsuit against Derrick Anderson and other individuals including the City of Detroit. Ms. [redacted] was referred to me for an independent psychiatric evaluation for the purpose of determining whether, and to what extent, she has emotional injuries related to having been falsely accused, tried and incarcerated for a March 7, 2002 robbery of which she was a victim.

I conducted a mental status examination over the course of four separate sessions with her between September 17 and December 3, 2007. A mental status examination involves the basic sciences of psychopathology and psychodynamics in delineating the psychological significance of specific emotional conflicts. It is a systematic attempt to understand her attitude and behavior toward the interview process, her stream, form and content of thought processes, her emotional reaction, sensorium, mental grasp, insight, and judgment. Further, it is a non-judgmental application of clinical skills of observation and interpretation toward formulating diagnostic impressions.

Ms. [redacted] was administered the Minnesota Multiphasic Personality Inventory (MMPI-2). It was scored by licensed psychologist, Edward Czarnecki, Ph.D., who had no contact with Ms. [redacted]. This is a personality test which provides independent objective data about the subject including attitude towards the evaluation, level of distress, and presence of psychopathology. It is useful in detecting malingering and other less obvious motivation. It can also be useful in detecting tendencies toward distortion and misperception of reality. In general, it provides an objective assessment of the general personality structure.

I reviewed the following records and found them pertinent to my analysis:

1. Records of Sprint PCS.
2. Plaintiff's First Amended Complaint for Damages, Declaratory Relief and Jury Demand dated August 30, 2006.
3. Opinion of State of Michigan Court of Appeals.
4. Detroit Police Request for Warrant.
5. Letter from Motor City Casino to Sgt. Carolyn Nichols dated March 20, 2002.
6. Witness Statement of Kimberly [redacted] dated March 7, 2002.
7. Detroit Police Preliminary Complaint Report.
8. Constitutional Rights Certification of Notification dated May 11, 2002.
9. Fax to Sergeant Derrick Anderson from Traci Richards dated May 31, 2002.
10. Affidavit of Shaun M.J. Neal dated June 26, 2002.
11. Medical records of Henry Ford Health System/Behavioral Health.
12. Medical records of Amir & Associates.
13. Letter from Julie Hurwitz to Krystal Crittendon dated September 5, 2007.
14. Deposition transcript of Kimberly [redacted] dated July 25, 2005.
15. Trial testimony of Kimberly [redacted] dated October 8, 2002.

I reviewed a DVD of the security tapes of the actual robbery. I saw Ms [redacted] on four occasions September 17, 2007, November 10, 2007, November 15, 2007 and December 3, 2007.

After reviewing all of the records and having several contacts with Ms. [redacted] it is my opinion that she is a victim of a Posttraumatic Stress Disorder as a direct result of having been falsely accused of a crime she did not commit – a crime of which she was in fact a victim. My diagnosis and opinion agrees with the objective data discerned from the MMPI-2 evaluating her personality strengths and weaknesses. In other words, she is certainly damaged and continues to have challenging encounters and difficulty with maintaining her composure. Her religious experience appears to help bind her anxiety and depression by indoctrinating her to be forgiving as expectant of Christians. At any rate, it is my opinion that her injuries are emotional and affect potential occupational endeavors. These damages were directly caused by her experience with the Detroit Police Department.

HISTORY AS REPORTED BY K[redacted]Y S[redacted]

At the onset of the evaluation, Ms. [redacted] was informed of the nature of the evaluation and the fact that I would be required to report my findings and might be required to provide testimony at a deposition or at trial in the future. Ms. [redacted] indicated that she understood the limited confidentiality involved in the evaluation and that the evaluation was not an evaluation for purposes of treatment. She indicated that she would proceed. The independent medical examination was not audio or video taped.

Ms. [redacted] whose date of birth is December 13, 1978, presented as a 28-year-old black female. She has never been married. She has resided for the past six years with her mother at 14160 Piedmont in Detroit. Her parents are alive and well. Her mother is age 60 and her father lives in Chicago. They were never married. She is the youngest of six siblings and was raised with her 39-year-old sister. Ms. [redacted] graduated from high school in 1997. She attended Wayne State University for two and one-half years right after high school, in a computer science curriculum. She stopped her college training due to financial problems, despite having a GPA of 3.0. She maintains a Christian affiliation. Up until May 2002, she had been consistently working or attending school and volunteering for her church. As a child she had dreams of becoming a teacher or lawyer. However, because her father was not available to her and provided no support for her, she realized that she had to be self-reliant and had to be able to support

herself for career goals which would be the most profitable and most rewarding.

Ms. [redacted] stated that she has had sleep disturbances over the last five years, since the robbery and her arrest and prosecution. Her additional medical symptoms relate to her allergies. She related that since her wrongful prosecution and conviction, she has lost contact with friends and has not dated. She considers herself practicing her faith by not being sexually active due to the Pentecostal strict doctrines against premarital sex. She denied that she was ever a victim of childhood sexual or physical abuse. The only time she has ever been arrested was for the incident of March 7, 2002 where she had worked full-time at the Sprint store franchise that was robbed by two unidentified burglars. She denied substance abuse and bankruptcies. She stated the only job she has ever been fired from was the Sprint store where she was falsely accused by the police of filing a false police report and larceny, arising from the robbery.

Ms. [redacted] started working at Sprint PCS January 1, 2001. Her last day of record working there was May of 2002. Her position was initially greeter and then she was promoted to a technical server. At the time of her termination, she was a service representative earning $13.00 per hour. This was the highest paying job she had ever had and she had every intention of staying with and moving up in the Sprint PCS company. She worked at the 7 Mile and Telegraph Roads location. She described that she liked working at Sprint and liked the co-workers and the management.

On March 7, 2002, the day of the robbery, she recalled that her shift started at 8:00 a.m. She was scheduled to work that morning with Tevya Urquhart and Kimberly Holmes. She was in the parking lot, with Ms. Urquhart and Ms. Holmes, waiting for the cleaning crew that usually came in the mornings to the store to clean. Then she and the other female employees would usually enter the building with the cleaning crew before the store officially opened. That morning, the cleaning crew was late and they decided to go into the store without waiting any longer.

When they entered the store, they had trouble closing the door behind them because of a prior problem they had been having with maneuvering the lock on that door. At that point, Ms. [redacted] noticed two men walking down

the street toward the store. They looked like they were going to pass but when they reached the store, they pushed on the door of the Sprint PCS store and then hit the door when Ms. [redacted] said the store was closed. They then announced that this was a robbery. They pushed opened the door, pushed past her and ordered them all to go to the back room. She stated that they appeared to have guns. She stated the money was kept in a room in a safe in the back of the store. Ms. [redacted] stated that Brinks would come daily to pick up the money. She recalled that the bags of money had either $14,000, $27,000 or $47,000.

They were all told to lie down on the floor in the hallway outside the room where the safe was. After learning that [redacted] knew the combination to the room and the safe, the robbers ordered [redacted] to get up, go in the room and open the safe. T[redacted] then tossed a bag of money to one of the robbers. During this time, Ms[redacted] and Ms. Holmes were outside the room on the floor. They were warned not to call the police or "we'd be gotten". Ms. [redacted] stated that she could have described them at the time "but at this time I don't know because I try to erase them from my mind so I cannot recall what they looked like".

Ms. [redacted] stated that immediately after the robbery she went on a medical leave, while the police investigated the robbery. Ms. [redacted] stated that Lanese Carter, her store manager, told her to take the week off a couple days later after the robbery. "She called me to come back before the week ended". Ms. [redacted] stated she did not feel she was ready. She was so upset and shaken by the robbery she felt too much anxiety and fear to return to the store. She said she would do what she had to do. Her health insurance referred her to Dr. Joseph Limpicki, a psychotherapist, whose office is located at Henry Ford Hospital in Dearborn. She stated she had seen him once and he extended her medical leave of absence for the entire week. Then she saw Donald Cushingberry at that point. He had been hired by Sprint to talk to the store employees about the robbery. She saw Dr. Cushingberry two times per week after that until June. She did not return to work because he extended her medical leave of absence indefinitely, and then she was terminated in May as a result of her false arrest. She was fired by Jerry Seay, her store manager's boss. A letter was sent to her via Federal Express and she received it the day after she was arrested as an accomplice in this robbery. She never went back after that.

Ms. [redacted] recalled that her symptoms immediately after the robbery were primarily depression, anxiety, insomnia and a diagnosis by Dr. Cushingberry of Posttraumatic Stress Disorder. She recalled that she had never been robbed before. She noted that her home had been broken into but she had never been confronted by the robbers. She recalled now that subsequent to her arrest, she had a dream of getting ready for work and she opened the door and someone tried to slit her throat.

Ms. [redacted] stated to make matters worse the robbers were never found. The Detroit Police did not even look for them, which adds to both her fears from the robbery and her feelings of being victimized by the police.

Ms. [redacted] was arrested May 11, 2002. She stated the police came to her home and Sgt. Anderson, Officer McClure and an unidentified female officer arrested her. She received a phone call 10 minutes before they arrested her. Her mother answered the door and was told that there was an arrest warrant for Ms. [redacted] She stated she put on her gym shoes and Officer McClure followed her to handcuff her. Her mother said that it was not necessary. Her mother said she was going to the police station to get to the bottom of what was going on. She had been led to believe that she was going to be allowed to come home that day. She was taken to the 6th Precinct where they took her identification and personal property, and they held her overnight without explaining anything to her. On both days that she was in custody, Sergeant Anderson and Officer McClure interrogated her. She stated that Anderson asked what happened during the robbery. He was interested in why she was under the table. He asked about what Ms. Holmes had said to her while she was under the table. Ms. [redacted] stated that she explained to them that Ms. Urquhart who was pregnant and had thrown up, and Ms. Holmes, were hysterical after the robbers left. The robbers warned them not to say anything and Ms. [redacted] felt that they could still come back to the store to harm them. She was the one who called 911 feeling that she was most focused on getting help for this chaotic and hysterical situation. She stated that Officer McClure was very demeaning and verbally abusive toward her during these interrogations, calling her names, using profanity, telling her that she was a criminal, and that she would never get married or have any children. This continues to haunt her to this day.

Ms. [redacted] recalled that during the interrogations, she was questioned why Ms. Holmes had gone back into the safe. Ms. [redacted] stated she did not know why Ms. Holmes went back into safe. She recalled telling the police at some point that she saw Ms. Holmes toss the something into the safe. The police falsely reported that the security video showed the women tossing the money under the table where they were hiding and dividing the money between Holmes, Urquhart and herself. These false statements were part of the flawed police investigation causing the police not to search for the obvious robbers seen on the videotape.

At the time of her arrest in May of 2002, and being jailed overnight, Ms [redacted] described crying and feeling tremendous disbelief. She could not believe that this was really happening to her. That feeling of disbelief and powerlessness continued throughout the preliminary exam in July 2002, and her jury trial in October 2002. At the end of her trial, which lasted four days, where she believed the police officers testified dishonestly, she was convicted. She was immediately remanded to jail for a total of two and one-half months. She was sentenced to ninety days in jail and two years of probation. She was ordered also to pay restitution. She stated she was in jail from October 10 to December 5, 2002.

Ms. [redacted] experience in jail was one of a fear of harm and anger. She prayed constantly and she was visited by her pastor and mother. She recalled first going to the county jail. Her sister informed her to sleep with toilet tissue in her ears with the covers over her head because of the rodents and roaches. She recalled feeling her freedom was totally gone. She could not perceive the end of her predicament. She recalled crying for most of the time that she was incarcerated. Later when she was transferred to Dickerson she was given the day when she would be released.

After her wrongful conviction, she was recommended to an appellate attorney, George Chapman. She appealed her conviction and in May 2004, after serving her jail time, the Court of Appeals overturned all the charges and found that there was no evidence to support her being convicted of any crime.

Ms. [redacted] is suing the City of Detroit, Sergeant Anderson, Officer McClure and Sergeant Nichols, because these police officers falsely reported

the facts, withheld important information that would have been helpful to her defense and did not bother to really investigate this crime. She believes that the officers persuaded the jury that she was the culprit instead of the victim. She feels relieved that she has been cleared. However, in the meantime it has been hard for her to go back to work again and she is suspicious of all police and fearful of being falsely accused again.

Ms[redacted] was not able to work from the time of her arrest in May 2002, until approximately September 2006. For the last sixteen months, however, Ms.[redacted] has been employed as a part-time assistant manager at Rainbow, an apparel-clothing store, on Shaffer in Dearborn.

MENTAL STATUS EXAMINATION

Please recall that this is a summary of the mental status examination provided by the contacts with Ms.[redacted] on September 17, November 10, November 15 and December 3, 2007. Ms.[redacted] always appeared promptly and alone for the interactions for this evaluation. While she appeared distressed, and became tearful at times, she remained calm and spoke in an even toned and soft-spoken voice. She maintained good eye contact. At the initial interview, rapport was established to permit her tearfulness and horror as she revealed the events of the past five years. She spoke of the horror of being robbed and her being shocked that the police would not follow up on finding the robbers and concluding as a rush to judgment that she was capable of colluding in a robbery. Her religious belief system, her background and the facts themselves would be conspicuous and obvious enough to vindicate her of any wrongdoing. Her faith was what continued to offer her strength. She spoke in an articulate voice with an above average level of intelligence. She appeared to have halting and blocking during her stream of consciousness. There did not appear to be any internal cues such as psychosis. She often had a stone face without grimace and affect. Her affect would be described as deeply depressed and constricted. She appeared to present herself as holding most of her feelings inside and trying not to betray her belief that her religion should protect her and heal her from the events that had overwhelmed her for the past several years. This dichotomy of expressing feelings polarized by her belief that religion should calm her fears would be presented as someone who might appear distant and detached from the events.

However, at all times Ms. [redacted] was logical and showed no evidence of malingering. Ms. [redacted] appeared to minimize the events that had affected her but spoke plainly that they were in fact tortuous, tormenting and difficult times that challenged her faith and caused her to be isolated and alone. She tried not to be hopeless but certainly focused on her helplessness. She began to talk about her distrust of the police and her distrust of a system meant to protect citizens from such ravages at the hands of robbers. In her current state, she felt robbers and police were equal in the victimization of her situation. She had no speculation on the innocence or guilt of Ms. Holmes but knew that all the facts had not been brought out during the trial or were pursued by the police.

Ms. [redacted] had no evidence of auditory or visual hallucinations. She denied current suicidal or homicidal ideations. (She did at one point express that she had had suicidal feelings while all of this was going on, but she no longer has such feelings.) The contact with Ms. [redacted] during this independent medical examination were consistent with Posttraumatic Stress Disorder in that she experienced sleep disturbance, restlessness, agitation, flashbacks of the robbery and preoccupation with feelings of distress caused by the police. She felt she could not have persuaded them any further except to give the straightforward events as they occurred during the robbery. She was amazed and shocked that giving the true answers that she did in her interrogation were used to indict her as having the same alibi corroborated by the stories and facts offered by Ms. [redacted]

Sensorium and mental grasp appeared to be consistent with someone of above average intelligence. Her current insight into her state of mind appeared to be appropriate. Her treatment with the therapist appeared to be a reasonable attempt at trying to reconstitute her ego strengths. However, immediately after the robbery and continuing to the present time she was experiencing embarrassment, disorientation, distrust and alienation from participating in a socialized or safe environment. Unfortunately, because she lost her health coverage when she was fired from Sprint, she has not been able to afford continued treatment since June 2002. Definitely, there was no evidence of paranoid psychosis but there was suspiciousness of her safety in all surroundings. She had easy startled responses and a shutdown or inhibited expression of her feelings for fear that her statements about

conditions might be interpreted as harmful and ultimately used against her. As a result, she feels obsessed and compulsive about avoiding work situations where she is either entrusted with money or alone, for fear of again being falsely accused. She fears she needs assurances where others could be there to protect and witness her non-involvement in situations that might be misconstrued as illegal or dangerous. Such preoccupations appear to be reactions consistent with Posttraumatic Stress Disorder.

DIAGNOSIS

Axis I: Posttraumatic Stress Disorder and Major Depression related to robbery and subsequent false accusations/prosecution/conviction.

Axis II: Paranoid and depressive personality traits

Axis III: Allergies, by history.

Axis IV: Multiple psychosocial stressors related to previous false incarceration.

Axis V: Global Assessment of Functioning (GAF) 50. Highest over past year 50.

A GAF of 50 represents serious symptoms or any serious impairment in social, occupational or school functioning.

REVIEW OF RECORDS

The review of records support the history provided by Ms.[redacted]. The employment history indicates that Sprint PCS was the highest paid job Ms.[redacted] has held to date. A May 10, 2002 record indicates that John Seay terminated Ms.[redacted] effective May 10, 2002. In a workers' compensation executive summary from Jerry Seay to June Broderson of Sprint PCS based on the police investigation states that the Detroit Police do not believe that there is any truth to Ms[redacted] story. It further insists that the robbery was staged based on information received exclusively from Sgt. Anderson. The

employment records also state that "the police are confident that the money was taken by the three employees". The examination during the trial testimony referred to the robbers as "so-called robbers". The focus of the examination was on a presumption that the three women were under the table dividing the money instead of waiting for the police. This formed a key false testimony to the jury.

OPINION

Ms. [redacted] is an individual who had no criminal background. She had obtained two and one-half years of college before returning later on to get additional training at Henry Ford Community College. She was interested in becoming a lawyer or a teacher. Trying to find finances to pay off her school loans she worked at Sprint PCS. It was robbed on March 7, 2002. Since that time she had engaged in psychotherapy to help her deal with the shock and trauma of the incident. To her amazement, she was interrogated by the police as a suspect instead of a victim. She denied colluding with anyone to rob the store and felt that she herself was in danger of being killed. Such evidence of fear of loss of integrity or fear of near fatal events is consistent with Posttraumatic Stress Disorder.

Ms [redacted] difficulty in seeking employment or working after she was released from Dickerson caused her to feel that her future hopes of building a life would be difficult. Her association with her church has added strength and comfort but she feels herself at times hopeless and helpless in not being able to conform to the church's doctrines. She nevertheless remained faithful in these endeavors and has hopes now of becoming a minister. This may therefore be the explanation of how she attempts to be wise, constrained and expectant of suffering though attempting to comply and overcome her past experience with the police which caused her to continually doubt her future sense of self-integrity. The diagnosis of Posttraumatic Stress Disorder is consistent with the MMPI-2 and the several contacts examining her mental status examination. She remains in a pattern of needing to help her anxiety and having difficulty sleeping. There is no evidence of alcohol or substance abuse indicating that she has not tried to be in anyway self-treating or in a state of denial.

It is my opinion that Ms. [redacted] state of mind, her psychiatric and emotional injuries, her current work habits and future potential occupational pursuits have been irreparably damaged by the disregard, treatment and management of this case by the Detroit Police Department and particularly Officer Anderson.

The main experiences of psychological trauma are disempowerment and disconnection from reality. Recovery is based upon the empowerment of the survivor and the ability to create new occupational, social and supportive connections. This formula is a normal, reasonable and rational sequence of events. It is important to note that recovery cannot take place in isolation, distrust, avoidance of suspicious criminal behavior by association, unwitting of financial responsibilities subject to blame and accusations. Ms. [redacted] has restricted herself from any subtle insinuation that she may again be falsely accused. Such limited responsibility will affect her future job assignments. This will limit her income and cause non-use of the pathway of leadership qualities she had acquired pre-morbidly. She formerly depended on fulfillment of her executive advancement in the workplace.

The normal and reasonable reaction of a traumatized victim of a robbery is to call the police to not only rescue her but to protect her from further harm by apprehending the burglars. Ms. [redacted] did the reasonable thing in spite of her fear for her safety should the burglars come back as the burglars threatened they would "be gotten". Recovery from this tragic trauma, as a survivor starts with the psychological faculties that were damaged or deformed by the traumatic experience. These faculties include the basic capacities for trust, autonomy, initiative, identity, competence, assertiveness and intimacy. As a result, of the Detroit police officers' acting falsely, Ms [redacted] not recovered from the trauma. Her prognosis is poor and guarded.

The poor and guarded prognosis not only involves the trauma but has been compounded by the betrayal of the police/helpers/rescuers whose duties included protection. The Detroit police officers instead of protecting her, victimized her even more by causing her to be falsely arrested and tainting her as being complicit with the robbery. For the Detroit police officers non-investigation into the trauma, Ms. [redacted] was portrayed as the perpetrator and not the victim of the robbery of. The Detroit police officers

proceeded without considering the fundamental injustice of Ms. [redacted] traumatic experience. In a reasonable tragedy there is need for a resolution that restores some sense of justice. The Detroit police officer's role abandoned both intellectual and rational rules, without insight or empathic connection. The emotional injuries by any person in authority would be further deformed by the experience of disbelief and error. For this reason, Ms [redacted] traumatic attitude has an intense life or death quality unparalleled in ordinary experience of terror. The greater Ms. [redacted] emotional connection of helplessness, suicidal ideation, isolation and abandonment, the more desperately she finds herself in a devastated deteriorated course of recovery. She fears law enforcement, the justice system and any situation that may cause her responsibility to perform in a financial position.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

Rosalind Griffin, M.D.

ca/

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JANUARY 11, 2008

VIA E-MAIL
JULIE HURWITZ- jhurwitz@goodmanhurwitz.com
TOM LOEB – VIA FACSIMILE 248 851 2020

IT WAS A PLEASURE SPEAKING WITH ALL OF YOU TODAY REGARDING THIS CASE. IN ANSWER TO YOUR QUERY, THERE ARE A NUMBER OF CASE SPECIFIC RESEARCH AND DEVELOPMENT SERVICES THAT I PROVIDE IN PREPARATION FOR TRIAL, THE JURY SELECTION PROCESS AND BEYOND. THE FOLLOWING ARE THE KEY AREAS OF TRIAL SUPPORT WITH SOME GENERAL GUIDELINES FOR COSTS AND FEES.

TRIAL SIMULATION - PROJECT OVERVIEW:

- COORDINATION, FACILITATION AND EVALUATION OF FULL SPECTRUM JURY PROJECTS INCLUDING FACILITY APPROPRIATION, SCREENING AND RECRUITMENT OF DEMOGRAPHICALLY SPECIFIED MOCK JURY PARTICIPANTS, DIGITAL OR VIDEO DATA PRESERVATION, ANALYSIS AND REPORT.

- PRESENTATION ASSISTANCE: RECOMMENDATIONS FOR SUMMARIZING PLAINTIFF AND DEFENDANT PRESENTATION OF CASE MATERIALS IN ORDER TO PROVIDE JURORS WITH A BALANCE OF COMPREHENSIVE THEMES AND EVIDENCE ON WHICH TO BASE DECISIONS.

- ADVICE ON DESIGN AND PRODUCTION OF VISUAL DEMONSTRATIVE EXHIBITS TO BOLSTER PARTICIPANT UNDERSTANDING OF ISSUES.

- PREPARATION OF SUPPLEMENTAL FOCUS QUESTIONNAIRES, VERDICT FORMS AND CONFIDENTIALITY AGREEMENTS AND INSTRUCTIONS.

- OBSERVATION OF CASE PRESENTATION AND DELIBERATION PROCESS FOLLOWED BY JUROR FOCUS SESSIONS

- DETAILED ANALYSIS OF THE PROJECT WITH REPORT ON INDIVIDUAL RESPONSES AND DELIBERATION GROUP RATIONAL (WRITTEN AND VERBAL) TO ESTABLISH ISSUES FROM THE JUROR'S PERSPECTIVE AND DEFINE TRIAL THEMES AND STRATEGIES.

- EVALUATION OF PRESENTATIONS WITH COMMUNICATION SUGGESTIONS FOR THEMES, ANCHORS, LINGUISTICS AND TRIAL EXHIBITS.

- FORMULATION OF JUROR PROFILES, VOIR DIRE STRATEGIES.

Supplemental Trial Questionnaires

- Draft and advise on proposal, composition, administration and evaluation of pre-trial juror questionnaires based on research results

Case Presentation

- Assessment of language, appearance and presentation style of attorney or witnesses
- Assistance with development or evaluation of opening and closing statements for themes, continuity, point of view and communication features for juror understanding and impact
- Recommendations regarding exhibit form, content and usage
- Assistance with witness order or examination strategy.

Pre-selection Evaluation and Jury Selection strategy

- Evaluation of jury pool based on content, demographics and composition of juror questionnaires including the use of graphic projection techniques to provide personality and motivation information and leadership potential.
- Development of case specific areas of inquiry for voir dire designed to identify and draw out reluctant jurors and impenetrable bias. Organize information in a usable form for selection process.

Voir Dire at Trial

- Assistance with fortifying the interview process
- Observation of verbal and behavioral clues for incongruent responses, receptivity.
- Leadership evaluation
- For-cause and peremptory challenge guidance

Post Voir Dire and Opening Statements

- In cases where the juror questionnaires are available and assessed, we provide behavioral profiles of impaneled jurors that include recommendations for explicit themes, linguistics and presentation strategies.
- Analysis of the oppositions opening statements for closing themes.

Debriefing

- Conduct post-trial interviews of consenting jurors to determine verdict rationale.

FINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY SYKES,

Plaintiff(s),

v.

DERRICK ANDERSON, CAROL NICHOLS, and MAURICE McCLURE,

Defendant(s).
_____/

Case No. 05-71199

Honorable Nancy G. Edmunds

AND

TEVYA GRACE URQUHART,

Plaintiff(s),

v.

DERRICK ANDERSON, CAROL NICHOLS, and MAURICE McCLURE,

Defendant(s).
_____/

Case No. 05-73725

Honorable Nancy G. Edmunds

JURY INSTRUCTIONS

Dated: February 21, 2008

Faithful Performance of Duties;
Jury to Follow Instructions

Members of the jury, the evidence and argument in this case have been completed and I will now instruct you as to the law.

Faithful performance by you of your duties is vital to the administration of justice.

The law you are to apply in this case is contained in these instructions, and it is your duty to follow them. You must consider them as a whole and not pick out one or some instructions and disregard others.

Following my instructions and the arguments of counsel you will go to the jury room and deliberate and decide on your verdict.

Instructions Apply to Each Party

Unless I state otherwise, you should consider each instruction given to apply separately and individually to each Plaintiff and to each Defendant in the case.

Facts To Be Determined From Evidence

It is your duty to determine the facts from evidence received in open court. You are to apply the law to the facts and in this way decide the case. Sympathy or prejudice must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

All Persons Before the Law - Individuals

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar situations in life. All persons stand equal before the law and are to be treated as equals.

Admission of Evidence

The evidence you are to consider consists of testimony of witnesses [and exhibits offered and received ~~(and your view of the [premises/scene/object])~~]. The admission of evidence in court is governed by rules of law. From time to time it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings, and you must not consider [any exhibit to which an objection was sustained or] any testimony [or exhibit] which was ordered stricken.

Attorneys' Statements Not Evidence;
Admission by Attorney

Arguments, statements and remarks of attorneys are not evidence, and you should disregard anything said by an attorney which is not supported by evidence or by your own general knowledge and experience. However, an admission of fact by an attorney is binding on his or her client.

Admission of a Party

One type of evidence is known as an admission of a party. The admission may be a statement made in the pleading filed in the case, a statement on the record during testimony, or a statement in a written exhibit. Attorneys may also make an admission on behalf of their clients.

Stipulation of Facts

When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard the fact as proved. You are not required to do so, however, since you are the sole judge of the facts.

Evidence Introduced for a Limited Purpose

Whenever evidence was received for a limited purpose or limited to [one party/certain parties], you must not consider it for any other purpose or as to any other [party/parties].

Judge's Opinion as to Facts Is to Be Disregarded

I have not meant to indicate any opinion as to the facts by my rulings, conduct, or remarks, during the trial; but if you think I have, you should disregard it, because you are the sole judges of the facts.

If you inadvertently overheard comments made at sidebar, disregard those comments, as I did not intend in my discussions with the attorneys to express an opinion on the merits of this case.

Jury to Consider All the Evidence

In determining whether any fact has been proved, you shall consider all of the evidence bearing on that fact without regard to which party produced the evidence.

Direct and Circumstantial Evidence

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

It is not necessary that every fact be proven directly by a witness or an exhibit. A fact may be proven indirectly by other facts or circumstances, from which it usually and reasonably follows according to the common experience and observation of mankind. This is called circumstantial evidence, which you are to consider along with other evidence in the case.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Opinion Evidence -- Expert Witnesses

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matters, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Jurors May Take Into Account Ordinary Experience and Observations

You have a right to consider all the evidence in the light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of any particular fact in this case, such knowledge may not be used as evidence.

Credibility of Witnesses

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testified, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind, demeanor, and manner while on the stand. Consider each witness's ability to observe the facts as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such

weight, if any, as you determine it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more reliable than the testimony of a large number of witnesses to the contrary.

Police Witness

You have heard testimony from several police officers. That testimony is to be judged by the same standards you use to evaluate the testimony of any other witness.

Witness Who Has Been Interviewed by an Attorney

It has been brought out that an attorney, or a representative of an attorney, has talked with a witness. There is nothing wrong with an attorney, or a representative of an attorney, talking with a witness for the purpose of learning what the witness knows about the case and what testimony the witness will give.

Consideration of Deposition Evidence

During the trial, certain evidence was presented to you by the [reading and/or viewing] of depositions. A deposition is a record of the sworn testimony of parties or witnesses taken before an authorized person. All parties and their attorneys had the right to be present and to examine and cross-examine the [witness/witnesses].

This evidence is entitled to the same consideration as you would give the same testimony had the [witness/witnesses] testified in open court.

Impeachment -- Inconsistent Statements or Conduct --
Falsus in Uno Falsus in Omnibus

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Prior Inconsistent Statement of Witness

If you decide that a witness said something earlier that is not consistent with what the witness said in court, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case.

However, there are exceptions. You may consider an earlier statement as proof of the facts in this case if:

a. the statement was made by a Plaintiff, a Defendant, or an agent or employee of either party; or

b. the statement was given under oath subject to the penalty of perjury at a trial, hearing, or in a deposition; or

c. the witness testified during the trial that the earlier statement was true.

Weighing Conflicting Evidence - Number of Witnesses

Although you may consider the number of witnesses testifying on one side or the other when you weigh the evidence as to a particular fact, the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing.

All Available Evidence Need Not Be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Definitions Introduced

I shall now give you the definitions of some important legal terms. Please listen carefully to these definitions so that you will understand the terms when they are used later.

Preponderance of the Evidence

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of ~~his~~ her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits in evidence, regardless of who may have produced them.

Deliberately

To act "deliberately" means to act intentionally; that is, knowingly and voluntarily and not because of mistake or accident.

Deliberate Indifference

"Deliberate indifference" to the rights of others is the conscious or reckless disregard of the consequences of one's acts or omissions. Deliberate indifference requires more than negligence or ordinary lack of due care.

Knowingly

The term "knowingly," as used in these instructions, means that a Defendant was conscious and aware of his or her actions, realized what he or she was doing, and did not act because of ignorance, mistake, or accident.

Exculpatory Evidence

Exculpatory evidence is evidence which tends to suggest the innocence of a person suspected of or charged with a crime. It includes evidence which tends to prove that the defendant did not commit the crime, or evidence which suggests that the crime might have been committed by someone else, or evidence which might be used to impeach witnesses who would testify against the person accused.

An officer is not obligated to actively search for exculpatory evidence; however, when an officer is aware of exculpatory facts and circumstances, he or she has a duty to disclose those facts and circumstances to the prosecutor.

Reckless Disregard

The phrase "reckless disregard," as used in these instructions, means that a Defendant deliberately closed his or her eyes to what would otherwise [illegible] obvious to him or her. Stated another way, a Defendant's knowledge [illegible] may be inferred from a deliberate or intentional ignorance or deliberate [illegible]ness to the existence of that fact.

It is, of course, entirely up to you as to whether you find [illegible]rd of or deliberate closing of the eyes and the inferences to be drawn [illegible] such evidence. You may not infer that a defendant had knowledge, however, from proof of a mistake, negligence, carelessness, or a belief in an inaccurate proposition.

Malice and Malicious

The words "malice" and "malicious" mean a wish to vex, annoy, or injure another person. Malice means that attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose.

Malice does not necessarily require that the defendant be angry or vindictive or bear any actual hostility or ill will toward the plaintiff. Malice, like any other fact, may be proved by direct or circumstantial evidence.

Proximate Cause

When I use the words "proximate cause," I mean first, that the conduct must have been a cause of Plaintiffs' injury, and second, that the Plaintiffs' injury must have been a natural and probable result of the conduct.

There may be more than one proximate cause. To be a proximate cause, the claimed conduct need not be the only cause nor the last cause. A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence.

Plaintiffs' Claims

I will now instruct you on Plaintiffs' claims in this case.

Nature of the Action

Plaintiffs claim damages alleged to have been sustained as the result of a deprivation, under color of state law, of a right secured to Plaintiff by the Fourth and Fourteenth Amendments of the United States Constitution and by a federal statute protecting the civil rights of all persons within the United States.

Each Plaintiff alleges that Defendant police officers subjected each Plaintiff to deprivation of rights and privileges secured and protected by the Constitution and laws of the United States. Specifically, Plaintiff **Kimberly Sykes** alleges that she was deprived of the Constitutional right to be free from an unreasonable seizure of her person, the Constitutional right to be free from malicious prosecution, and the Constitutional right not to be denied due process of law.

Plaintiff **Tevya Urquhart** alleges that she was deprived of the Constitutional right to be free from malicious prosecution and the Constitutional right not to be denied due process of law.

Defendant police officers deny that any of their actions during the time in question violated plaintiffs' constitutional rights. Defendant police officers claim that they were acting in good faith and with probable cause and that their actions were reasonable. Defendant police officers further claim that they were not guilty of any fault or wrongdoing in regard to the incident sued upon.

Generally

The federal civil rights act under which Plaintiffs bring this suit was enacted by Congress to enforce the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment to the Constitution provides that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

matter of law, under the Constitution of the United States every citizen has the iberty, that is, the right not to be arrested without probable cause. Additionally, ıth Amendment's Due Process clause gives all citizens the right to a fair trial. ses, this right includes the right to be furnished with material exculpatory hands of the prosecution or police.

Section 1983, the federal civil rights statute under which plaintiffs sue, provides that a person may seek relief in this court by way of damages against any person or persons who, under color of any state law or custom, subjects such person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

Plaintiff Kimberly Sykes' Claims Generally

In order to prove her claims, the burden is upon Plaintiff Kimberly Sykes to establish by a preponderance of the evidence each of the following elements:

First: That Defendant police officers performed acts that operated to deprive plaintiff Kimberly Sykes of one or more of her federal Constitutional rights, as defined and explained in these instructions, by arresting or seizing Plaintiff Kimberly Sykes without probable cause, or causing or continuing a malicious prosecution against her, or depriving her of the Constitutional right not to be denied due process of law;

Second: That Defendant police officers then and there acted under the color of state law; and

Third: That Defendant police officers' acts were a proximate cause of damages sustained by Plaintiff Kimberly Sykes.

Because Defendants were acting as officials of the City of Detroit at the time of the acts in question, Defendants were acting under color of state law. In other words, the second requirement is satisfied.

Plaintiff Tevya Urquhart's Claims Generally

In order to prove her claims, the burden is upon Plaintiff Tevya Urquhart to establish by a preponderance of the evidence each of the following elements:

First: That defendant police officers performed acts that operated to deprive plaintiff Tevya Urquhart of one or more of her federal Constitutional rights, as defined and explained in these instructions, by causing or continuing a malicious prosecution against Plaintiff Tevya Urquhart or depriving her of the Constitutional right not to be denied due process of law;

Second: That Defendant police officers then and there acted under the color of state law; and

Third: That Defendant police officers' acts were a proximate cause of damages sustained by Plaintiff Tevya Urquhart.

Because Defendants were acting as officials of the City of Detroit at the time of the acts in question, Defendants were acting under color of state law. In other words, the second requirement is satisfied.

Civil Rights Act - No Specific Intent Required

Intent is not an element of Plaintiffs' case. Plaintiffs need not show that Defendants intended to deprive them of their rights. The fact that Defendants had no specific intent or purpose to deprive Plaintiffs of their civil rights will not absolve Defendants if they did in fact deprive Plaintiffs of those rights.

need not prove intent

Violation of Internal Policy

The mere fact that a police officer may have violated the police department's internal policies does not by itself establish a constitutional violation sufficient to establish recovery under the federal civil rights act under which Plaintiffs bring this suit.

Unlawful Seizure

I will now instruct you on Kimberly Sykes' unlawful seizure claim, which arises under the Fourth Amendment. Kimberly Sykes alone has presented a claim for unlawful seizure. Tevya Urquhart has not presented a claim for unlawful seizure.

This claim lies only against Defendant Derrick Anderson. This claim does not lie against Defendant ~~Carol~~ Carolyn Nichols or against Defendant Maurice McClure.

Fourth Amendment

The Fourth Amendment to the United States Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." An individual who has suffered an unreasonable search or seizure has suffered a violation of his constitutional rights as guaranteed by the United States Constitution.

Unlawful Seizure

Plaintiff **Kimberly Sykes** claims to have been unlawfully seized. An arrest is a seizure under the Fourth Amendment. The United States Constitution provides that no person may be arrested without due process of law. This means that a person may not be arrested without probable cause for such an arrest. A police officer must have information that would lead a reasonable person possessing the same official expertise as the officer to conclude that the person being arrested committed or is about to commit a crime.

Before you can determine whether Plaintiff **Kimberly Sykes** was deprived by the defendant police officers of a liberty "without due process of law," you must determine from a preponderance of the evidence in the case:

First: Whether defendant police officers committed the acts alleged; and if so,

Second: Whether defendant police officers acted under circumstances within or without the bounds of their lawful authority under state law.

If defendant police officers acted within the limits of their lawful authority under state law, then defendant police officers could not have deprived Plaintiff **Kimberly Sykes** of any right "without due process of law."

Under the law of the State of Michigan, police officers may arrest a person upon issuance of an arrest warrant. Probable cause exists if the facts and circumstances known to the officer at the time and of which the officer had reasonable, trustworthy information are sufficient for a prudent person (meaning a person who is careful and

sensible) to believe that the suspect has committed a crime. An individual's mere presence at a crime scene does not constitute probable cause for an arrest.

In determining whether defendant police officers had reasonable grounds to believe that a person has committed an offense, the facts known to defendant police officers need not meet the standard of conclusiveness upon which a conviction must be based. Rather, the actions of defendant police officers in making a warrant request are to be measured by the test of what a reasonable person would have believed under the same circumstances.

Unlawful Seizure - Warrant Request

In this case, Kimberly Sykes claims that her Fourth Amendment Right to be free from an arrest without probable cause was violated. Defendants claim that the seizure of Ms. Sykes was lawful because it was done pursuant to an arrest warrant. An arrest is lawful if the Defendants did not act in bad faith when they made the arrest pursuant to a warrant naming Kimberly Sykes. This is because it is a complete defense to an action for unlawful seizure under the Fourth Amendment that the prosecutor approving the warrant exercised independent discretion to initiate the case.

However, Defendants are not entitled to this defense if they obtained an invalid warrant by making, in the warrant request, material false statements either knowingly or in reckless disregard for the truth, or by omitting material exculpatory information with the intent to mislead.

Police officers cannot in good faith rely upon a prosecutor's decision to issue the warrant when that determination was premised upon the officer's own material misrepresentations.

To prevail on this claim, Kimberly Sykes has the burden of proving each of the following:

1. That in the warrant request, Defendants made a false statement or omitted exculpatory information;

2. That the false statement was made knowingly and intentionally or with reckless disregard for the truth, or that exculpatory information was omitted with an intention to mislead; and

3. That if the false statement were set to one side and if the omitted exculpatory information were included, the content in the warrant request

would be insufficient to establish probable cause.

Malicious Prosecution

I will now instruct you on Plaintiffs' malicious prosecution claims. Both Plaintiffs have presented a claim for malicious prosecution.

Plaintiffs' malicious prosecution claims lie against Defendant Derrick Anderson and against Defendant Carol Nichols. Plaintiffs' malicious prosecution claims do not lie against Defendant Maurice McClure.

Malicious Prosecution

Plaintiffs claim that they were maliciously prosecuted by Defendants for the offenses of Larceny by Conversion and False Report of a Felony. In order to prove this claim, the burden is upon Plaintiffs to establish by a preponderance of the evidence each of the following propositions:

First, that a criminal proceeding was commenced against Plaintiffs;

Second, that Defendants commenced or continued the criminal proceeding against Plaintiffs;

Third, that the criminal proceeding ended in favor of Plaintiffs;

Fourth, that the criminal proceeding was commenced or continued by Defendants without probable cause;

Fifth, that Defendants acted with malice; and

Sixth, that Plaintiffs were damaged by the criminal proceeding.

In this case, the first three elements have been met. Therefore, you only need to determine whether Plaintiffs have established by a preponderance of the evidence the fourth, fifth, and sixth elements.

Fourth Element of Malicious Prosecution Claim

Plaintiffs may establish the fourth element of a malicious prosecution claim, that the criminal proceeding was commenced or continued by Defendants without probable cause, by proving by a preponderance of the evidence:

1. That at the preliminary hearing, Defendants stated a deliberate falsehood or showed a reckless disregard for the truth; and

2. That if the false statement were set to one side, the remaining content presented at the preliminary hearing was insufficient to establish probable cause.

Plaintiffs also may establish the fourth element of a malicious prosecution claim by proving by a preponderance of the evidence:

1. That in the warrant request, Defendants made a false statement or omitted exculpatory information;

2. That the false statement was made knowingly and intentionally or with reckless disregard for the truth, or that exculpatory information was omitted with an intention to mislead; and

3. That if the false ~~statement~~ information were set to one side and if the omitted exculpatory information were included, the content in the warrant request would be insufficient to establish probable cause.

Probable Cause for Prosecution

To constitute probable cause for the prosecution of a criminal action against Plaintiffs in this case, the evidence must establish that the facts and circumstances known to Defendants at the time and of which Defendants had reasonable, trustworthy information are sufficient for a prudent person (meaning a person who is careful and sensible) to believe that Plaintiffs had committed the crimes for which they were charged.

If you find from all the evidence that the foregoing facts are true, you must find that there was probable cause for the prosecution of the criminal action against Plaintiffs.

If you find that such facts are not true, you must find that there was not probable cause for the prosecution of the criminal action against Plaintiffs.

Due Process of Law

I will now instruct you on Plaintiffs' claims that they were denied due process of law. Both Plaintiffs have presented this claim.

Plaintiffs' due process claims lie against Defendant Derrick Anderson and against Defendant Maurice McClure. Plaintiffs' due process claims do not lie against Defendant Carol Nichols.

Due Process of Law - Fourteenth Amendment

Plaintiffs claim that they were denied their constitutional right to due process under the Fourteenth Amendment. To prevail on this claim, Plaintiffs must prove each of the following elements by a preponderance of the evidence:

> First, that Defendants knowingly withheld exculpatory evidence in Plaintiffs' criminal trial;
>
> Second, that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different;
>
> Third, that the injuries claimed by Plaintiffs were proximately caused by Defendants' conduct; and
>
> Fourth, that Defendants were acting under color of state law.

Because Defendants were acting as officials of the City of Detroit at the time of the acts in question, Defendants were acting under color of state law. In other words, the fourth requirement is satisfied.

Absolute Immunity for Perjured Testimony

Witnesses are granted absolute immunity from suit for all testimony provided in judicial proceedings. Thus, even if you find that Defendant Anderson provided false testimony in Plaintiffs' criminal trial, Defendant Anderson may not be held liable on the basis of that testimony.

Rather, the claim against him for a violation of the due process clause relates to Plaintiffs' allegation that he withheld material exculpatory evidence.

Damages

I will now instruct you on damages.

Defendants Take Plaintiffs as They Find Them

Defendants take the Plaintiffs as they find them. If you find that the Plaintiffs were unusually susceptible to injury, that fact will not relieve the Defendants from liability for any and all damages resulting to Plaintiffs as a proximate result of Defendants' conduct.

Measure of Damages

If you decide that Plaintiffs are entitled to damages it is your duty to determine the amount of money which reasonably, fairly and adequately compensates them for each of the elements of damage which you decide has resulted from the conduct of Defendants, taking into account the nature and extent of the injury.

You should include each of the following elements of damage which you decide has been sustained by Plaintiff to the present time:

1. Pain and suffering;

2. Reasonable expenses of necessary medical care, treatment, and services;

3. Mental distress and mental anguish;

4. Fright and shock;

5. Indignation, aggravation, or outrage;

6. Shame;

7. Embarrassment or humiliation;

8. Loss of liberty and actual imprisonment;

9. Reasonable expenses of the legal representation at criminal trial and appeal;

10. Loss of income, lost wages.

You should also include each of the following elements of damage which you decide Plaintiffs are reasonably certain to sustain in the future:

11. Pain and suffering;

12. Reasonable expenses of necessary medical care, treatment, and services;

13. Mental distress and mental anguish;

14. Fright and shock;

15. Indignation, aggravation, or outrage;

16. Shame;

17. Embarrassment or humiliation;

18. Loss of income, lost wages.

If any element of damage is of a continuing nature you shall decide how long it may continue. If an element of damage is permanent in nature, then you shall decide how long Plaintiffs are likely to live.

Which, if any, of these elements of damage has been proved, is for you to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict for these damages must be solely to compensate Plaintiffs for th
and not to punish Defendant.

Life expectancy

Punitive Damages

In addition to the damages mentioned in other instructions, the law permits you under certain circumstances to award Plaintiff punitive damages in order to punish the Defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in similar conduct.

If you find in favor of Plaintiff and against a Defendant, and if you find the conduct of that Defendant was recklessly or callously indifferent to Plaintiff's constitutional rights, then in addition to any other damages which you find Plaintiff is entitled, you may award Plaintiff an additional amount as punitive damages, if you find it appropriate to punish the Defendant or deter the Defendant and others from similar conduct in the future. Whether to award either Plaintiff punitive damages, and the amount of those damages, are within your sound discretion.

You may access punitive damages against any or all Defendant police officers, or you may refuse to impose punitive damages. If punitive damages are accessed against more than one Defendant, the amounts accessed against such Defendants may be the same or they may be different.

Present Worth of Future Loss

If you should find that Plaintiffs are entitled to a verdict, and further find that the evidence in the case establishes either: 1) a reasonable likelihood of future medical expenses, or 2) a reasonable likelihood of loss of future earnings, then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a ~~los~~ loss that will not actually be sustained until some future date.

Under these circumstances, the result is that Plaintiffs will in effect be reimbursed in advance of the loss, and so will have the use of money that Plaintiffs would not have received until some future date but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump-sum payment of anticipated future loss, the law requires you to discount, or reduce to its present worth, the amount of the anticipated future loss, by taking 1) the interest rate or return that Plaintiffs could reasonably be expected to receive on an investment of the lump-sum payment, together with 2) the period of time over which the future loss is reasonably certain to be sustained.

Then reduce, or in effect deduct from, the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time. Include in the verdict an award for only the present-worth -- the reduced amount -- of anticipated future loss.

Bear in mind that your duty to discount to present value applies to loss of future

earnings or future medical expenses only. If you find that Plaintiffs are entitled to damages for future pain and suffering or future mental anguish, then such award is not subject to any reduction for the present use of such money.

Effect of Inflation on Future Damages

If you decide that Plaintiffs will sustain damages in the future, you may consider the effect of inflation in determining the damages to be awarded for future losses.

Mitigation of Damages

If you find each Plaintiff was injured as a result of conduct by Defendant police officers in violation of Section 1983, you must determine whether each Plaintiff could have done something to lessen the harm suffered. Defendant police officers have the burden to prove by a preponderance of the evidence that each Plaintiff could have lessened or reduced the harm done to each plaintiff and each Plaintiff failed to do so.

If Defendant police officers establish by a preponderance of the evidence that each Plaintiff could have reduced the harm done to plaintiff but failed to do so, each Plaintiff is entitled only to damages sufficient to compensate for the injury that each Plaintiff would have suffered had Plaintiff taken appropriate action to reduce the harm.

Avoidance of Double Recovery

If you find Defendant police officers violated more than one of Plaintiffs's rights, each Plaintiff is entitled to be compensated only for the injuries each Plaintiff actually suffered.

Thus, if the Defendant police officers violated more than one of each Plaintiff's rights, but the resulting injury was no greater than it would have been had Defendant police officers violated one of those rights, you should award an amount of compensatory damages no greater than you would award if Defendant police officers had violated only one of each Plaintiff's rights.

However, if Defendant police officers violated more than one each Plaintiff's rights and you can identify separate injuries resulting from the separate violations, you should award an amount of compensatory damages equal to the total of the damages you believe will fairly and justly compensate each Plaintiff for the separate injuries each Plaintiff has suffered.

Deliberations

The following instructions concern the manner of your deliberations.

Election of Foreperson -- General Verdict

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

Forms of verdict have been prepared for your convenience.

[Form of verdict read.]

You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the form which sets forth the verdict upon which you unanimously agree; and then return with your verdict to the courtroom.

Verdict - Unanimous - Duty to Deliberate

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

Communications Between Court and Jury During Jury's Deliberations

If it becomes necessary during your deliberations to communicate with the Court, you may send a note, signed by the foreperson, by way of one of the Court staff members.

When you reach an agreement as to the verdict, you should send a note to the staff, signed by the foreperson, on which you shall state only that a verdict has been reached.

Verdict Forms -- Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Jury Instructions

I will give you a copy of these instructions for your use while deliberating. It is available to each of you. If you have questions about the law or your duties as jurors, you should consult the copy of the instructions as given to you.

I am also sending in all of the exhibits with you for your use while deliberating.

Verdict

A verdict form is attached to these instructions. You will take this form to the jury room and when you have reached agreement as to the answers, in accordance with these instructions, you will have your foreperson fill in the date and sign the form. You will then notify the Court's staff that you have reached a verdict, and bring the verdict form with you upon your return to the Court.

I will now explain the verdict form to you.

CHAPTER 5

Ensuring Rights for All: Realizing Human Rights for Prisoners *

Deborah LaBelle

When photographs depicted American soldiers, in the spring of 2004, degrading and torturing Iraqi citizens in the Abu Ghraib prison in Iraq, the actions garnered worldwide condemnation as human rights abuses. However, attempts by criminal justice advocates in the United States to parley this condemnation into recognition of the existence of human rights violations in prisons in the United States were largely unsuccessful. Despite the commonality of the abuse of prisoners in Iraq by American personnel—a number of whom had employment histories in U.S. prisons—with the abuse taking place in American prisons, the latter abuse has occasioned little censure, leading prisoners' rights advocates to decry the lack of recognition of human rights violations committed against American prisoners held in prisons and jails in the United States.

While reports of abuses in the United States have failed to elicit expressions of official outrage and disgust, Secretary of Defense Donald Rumsfeld responded to photographs revealing naked Iraqi prisoners shackled or hooded, with smiling American staff looking on, by characterizing the treatment as "fundamentally un-American," "blatantly sadistic, cruel and inhumane." Longtime advocate for humane treatment of prisoners and director of the American Civil Liberties Union National Prison Project Elizabeth L. Alexander pointed out to the media, in response to the disclosure of abuse of prisoners in Iraq, that, "Beating prisoners, sexually abusing prisoners all of those things go on in American prisons." In contrast to the official response that abuse of Iraqi prisoners constituted human rights abuses, the official response to allegations of similar abuse in state prisons in Michigan,

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was to focus on the status of prisoners as warranting less humane treatment, asserting that:

> They [prisoners] should have thought before they robbed, raped, and killed people. I mean, that's what these prisoners have done. These aren't people who have human identity. They are prisoners . . . they have committed sins, cardinal sins, original sins, against Michigan's citizens.[1]

How is it that the mistreatment of prisoners who had officially been labeled as "enemy combatants" and "terrorists" was recognized as a human rights violation while the very concept of human rights for incarcerated American citizens has been routinely rejected based on their lesser status as prisoners?

By focusing on the status of the victim, and not on an objective standard of humane treatment, prison officials in the United States are all too often able to avoid adherence to a standard of care that is not mutable based on circumstances or the object of the abuse. In contrast, international human rights documents provide standards based on the nondefeasible humanness of the object of the challenged treatment. Despite the alleged "sins" of the prisoner, human rights treaties maintain the recognition of the individual as a human being entitled to basic dignity and rights accorded to all individuals based solely on their humanity.

Treatment of prisoners in the United States, in contrast, has always been diminished by the construct that in addition to losing civil and political rights occasioned by violating laws, those detained in jails and prisons, are reduced to a lesser human status. Having violated the social contract, they are regarded as diminished beings, not entitled to the rights that are accorded good citizens. The common official terms used are "inmate," "offender," "prisoner," or "criminal," never the designation of "incarcerated citizen" routinely used by the Canadian courts, for example, when analyzing claims of rights violations in Canadian prisons

Over 2 million people are held in prisons, jails, and detention facilities in the United States, and the last decade saw the prison population more than double. Many states' budgets for operating prisons, jails, and parole supervision systems now outstrip all but the general fund, and well exceed budgets for education and health services. The rising costs are a reflection of rising numbers of people detained for longer periods of time, not an increase in expenditures for humane treatment. Without a human rights framework creating a baseline for humane treatment, the increasing numbers of people who are incarcerated are at the mercy of the changing social doctrines on the origins of crimes and resultant manner of punishment, protected only by equally varying judicial interpretations of what constitutes the baseline for prohibited unusual cruelty.

The absence of applicable human rights doctrines also endangers the humanity of those who operate the prisons and jails, a growing workforce in the United States. Human rights doctrines contain the inherent recognition that a failure to recognize the humanness of the object ultimately degrades the humanity of those in control. As the military personnel captured on film in the Abu Ghraib prison in Iraq were ultimately viewed as having degraded

themselves and brought shame on the United States, abuses in United States' prisons demean the officers perpetrating the abuse. The impact of the abuse extends beyond the object to alter the lives of staff, prisoners' families, the system, and our own humanity. The oft quoted reminder by Dostoyevsky that, "the degree of civilization in a society can be judged by entering its prisons" encompasses both a recognition of the duality of human rights and a warning of the cost of ignoring its application to those regarded as least entitled to its shield.

The example of Abu Ghraib evidences that, while abuses in the United States are not commonly viewed through the lens of human rights obligations, nor has the language of human rights settled into our domestic justice lexicon, advocates have begun to recognize this duality and the value of demanding transparency and adherence to international norms. This chapter explores both the import of realizing human rights as the framework for ensuring humane treatment of prisoners in the United States and analyzes the impact this strategy has had when used to address the mistreatment of women prisoners and juveniles incarcerated in this country's prisons and jails.

PRISONERS' RIGHTS ADVOCACY IN THE UNITED STATES

Penitentiaries came into broad use in this country in the 1820s, with a goal of rehabilitation. Criminal activity was generally believed to be a result of a failure of upbringing or social influences. As crime increased through the nineteenth century, empathy waned and punishment replaced rehabilitation. Both the length of confinement and the harshness of conditions increased unabated as statutes enacted during the nineteenth century divested prisoners of civil and political rights on the theory that they ceased to exist as legal persons after their conviction. These "civil death" statutes prohibited persons convicted of a felony from bringing any civil action and prevented challenges to the conditions of their confinement or treatment while incarcerated.[2] Civil death statutes had a long reign, lapsing into desuetude a hundred years later with the concurrent rise of the prisoners' rights movement. Described by then as "archaic remnant(s) of an era which viewed inmates as being stripped of their constitutional rights at the prison gate,"[3] the elimination of the civil death statute and the rise of the prisoner's rights movement in the 1960s paved the way for prisoners acting as "jailhouse lawyers" and civil rights lawyers to address mistreatment in U.S. prisons through litigation alleging violations of the Constitution.

The Rise of the Prisoners' Rights Movement: 1960s–1980s

While most grassroots movements face organizational difficulties, building a prisoners' rights movement involved the additional difficulties of a community both disenfranchised and incarcerated. Prisoners' inability to communicate freely with each other and restrictions on their communications with the outside world made organization and movement building extremely difficult.

Challenges to these restrictions were consistently rejected by the courts, which upheld prison rules prohibiting prisoner unions, limiting meetings and petitions by prisoners, and restricting visitation with the outside world.[4] Throughout the early years of the movement, lawyers, who alone (with the exception of clergy) had ready access to prisoners, became major contributors to the movement and the call for humane treatment of prisoners.

Prisoners and their families worked with organizations such as the American Friends Service Committee (which included prisoners in its Quaker mission since its founding in 1917) and established CURE (Citizens United for Rehabilitation of Errants) in 1972. However, the revolution in prisoners' rights in the United States beginning in the 1960s through 1980s has traditionally been linked to a rising assertiveness of prisoners, particularly the black Muslims, and the development of the civil rights lawyer.[5] Prisoners and lawyers alike were influenced by the civil rights movement occurring in the free world, and the federal courts were becoming responsive to lawyer-assisted prisoner petitions, raising issues as diverse as freedom to practice religion in prison to freedom from corporal punishment. Prisoners, most notably with the riots at the Attica State Prison in New York in 1971, called attention to their abysmal treatment, which included long-term isolation in dungeon-like holes, beatings, inadequate food, racial discrimination, and rampant violence. Government legal services funding and private foundation money made it possible for lawyers to make expensive and time consuming legal challenges to violation of the rights of economically and socially marginalized persons. Armed with such funding, lawyers were able to go to court to argue the constitutional rights of prisoners.

Early legal victories by lawyers challenging conditions of confinement of prisoners were brought under the Federal Civil Rights Act, which enabled prisoners to sue for violations of their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. These victories paved the way for judicial intervention in the isolated and secretive prisons and jails of the United States, which had been operating with little oversight and less restraint. One of the early victories, brought initially by jailhouse lawyers on behalf of prisoners in Arkansas and fought by court-appointed counsel, concerned the constitutionality of the whip. While formal, authorized corporal punishment, as a response to minor prison infractions, had been on the wane in the 1960s, whippings still remained the primary ad hoc disciplinary tool in prisons where few privileges existed to take away and solitary confinement space was limited. In the 1968 case *Jackson v. Bishop*, a panel of three federal court judges held that use of routine whippings as a method of controlling prisoners violated the Eighth Amendment ban on cruel and unusual punishment.[6] The panel found the imposition of uncontrolled whippings to the bare skin of prisoners with a five-foot strap was inhumane and barbarous. The court rejected the claim that the punishment was necessary for discipline, noting that, "Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike."

The next ten years saw a series of legal challenges to the mode of punishment, mistreatment, and restrictions on the rights of prisoners reach the

United States Supreme Court. In 1978, the Supreme Court returned to the conditions of prisoners in Arkansas in *Hutto v. Finney.*[7] Prisoners who had been successful, ten years earlier, in ending the official use of electric shocks and physical beatings as methods of discipline and punishment now challenged their incarceration in eight-by-ten-foot windowless cells for indeterminate periods of time as violative of the Eighth Amendment's proscription against cruel and unusual punishment. Prisoners were successful in arguing that the Eighth Amendment prevents more than physically barbarous punishment. The Supreme Court found that the Eighth Amendment prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress broad and idealistic concepts of dignity, civilized standards, humanity, and decency. Depending on the infraction, the length of time prisoners were kept in a hole and the conditions under which they were maintained, nonphysical punishment could contravene the Eighth Amendment's proscription against cruel and unusual punishment.

The *Hutto* case followed a series of decisions which recognized that while imprisonment necessarily made unavailable many rights and privileges of the ordinary citizen, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime and edged toward an understanding that prisoners were entitled to be treated in a nondegrading manner. In a talisman phrase, the Supreme Court in the 1974 case *Wolff v. McDonnell* opined that, "though his rights may be diminished by the needs and exigencies of the institutional environment, there is no iron curtain drawn between the Constitution and the prisons of this country."[8] In a series of cases from the late 1960s through the mid-1970s, the Supreme Court expanded prisoners' rights, recognizing prisoners' religious freedom, the right to access to the courts, and protection from invidious race discrimination. Prisoners were also advised they could claim the protections of the due process clause in circumstances depriving them of life, liberty, or property and could not be denied basic medical care.[9]

The general principle that prisoners do not forfeit all of their rights under the Constitution upon incarceration was now firmly established. But what rights remained and how to balance the rights of prisoners with their status and the needs of security remained to be carved out in a series of fact-dependant cases. The Supreme Court held that a prisoner retains the right to marry and some freedom of expression in the case of *Turner v. Safely.*[10] The same year the Court upheld a prisoner's' right to freedom of religion in *O'Lone v. Estate of Shabazz.*[11] However, both of these significant rulings were five-to-four decisions, presaging the retrenchment of prisoners' rights that was on the horizon. Many states continued to operate systems that were blatantly racist, with routine reports of beatings, rapes, and intolerable conditions of confinement. Before Supreme Court rulings issued in the 1970s and 1980s could take force or become institutionalized policy, the judicial pendulum began to swing the other way.

More Prisoners, Fewer Rights: 1990s Onward

Over the next ten years, just as the U.S. prison population began to soar, the Supreme Court retreated from protecting prisoners' rights. The Court

introduced new legal concepts that undermined Eighth Amendment protections. It also expressed concern about overinvolvement of the federal judiciary in the operation of states' prisons and showed increasing deference to prison officials. At the same time, previously effective mechanisms for challenging mistreatment were severely restricted by federal legislation and conservative courts.

In the 1990s, Supreme Court prisoners' rights cases largely deferred to arguments that punishments were necessary to maintain a correctional facility. Institutions' "penalogical objectives" of "security" and "order" became relevant concerns for determining whether the punishment being challenged was cruel or unusual. Taking their cue from the Supreme Court, many appellate courts overturned trial court remedial orders based on their lack of deference to prison authorities.[12] The decisions raised the specter of inmate violence and concerns for public safety should prison officials be constrained in the manner they operated prisons, including their ability to restrict prisoners' rights and the manner in which noncorporal punishment was meted out. Gone were the acknowledgments of the reality that cruel treatment begot violence and forgotten was the cause of the violence at Attica prison. Instead, it was opined that harsh treatment was necessary to prevent future violence.

The Supreme Court also failed to adhere to the Eighth Amendment as an objective standard for humane treatment in a civilized society. Instead, a new element crept into the analysis of whether punishment was cruel or unusual—whether prison officials, in meting out the challenged punishment, had a culpable state of mind. In the 1991 Supreme Court case *Wilson v. Seiter*,[13] Justice Scalia held that treatment which could objectively be characterized as abusive, inhumane, or degrading treatment would not violate the Constitution unless the punishment was implemented with a kind of knowingness—a deliberate and wanton infliction of unnecessary pain.[14] This opened the door to justifying punishment that would otherwise rise to the level of torture or other degrading treatment based on the motivations of the party inflicting the punishment or necessities of correctional management. With an increasingly narrow interpretation of what constituted cruel and unusual punishment, prisoners had little left with which to tether their challenges of inhumane treatment.

With one notable exception in the 2002 case of a prisoner in Alabama who challenged being handcuffed above his head to a hitching post in the sun without water or breaks for seven hours at a time as punishment for a rule infraction, following *Wilson v. Seiter,* the Supreme Court has found little to chastize as punishment that violates the Eighth Amendment in U.S. prisons. The hitching-post case also garnered a strong dissent, led by Justice Thomas who opined that the legitimate penalogical purpose of encouraging compliance with prison rules took the punishment out of the constraints of the Eighth Amendment. Justice Thomas's extreme position also advocates for restricting the Eighth Amendment's proscription against cruel and unusual punishment to the sentencing stage of the criminal justice process. He argues that the Eighth Amendment's protection is not applicable to claims of mistreatment or even torture during a prisoner's incarceration. Instead, he argues that cruelty within the context of confinement is best addressed by a

sort of capitalist system of human rights in which the states would naturally be concerned about real torture in prisons that lacked any legitimate penalogical purpose and regulate themselves.

Just as the Supreme Court became increasingly tolerant of ill treatment of prisoners, government funding for legal services declined overall, and prohibitions were placed on the remaining legal service organizations receiving federal funding that specifically forbade representation of prisoners or challenges to the conditions of their confinement. Foundation funding for direct legal challenges, never large, became increasingly hard to obtain. New federal statutes created barriers to both prisoners' and lawyers' ability to complain about conditions in America's prisons.

Edging back to the days of civil death, the conservative majority of the Supreme Court, in decisions like *Lewis v. Casey*,[15] limited the access of jailhouse lawyers to basic books and tools for litigation. In addition, the federal Prison Litigation Reform Act (PLRA) was past in 1996 to restrict prisoners' access to the courts to challenge their treatment. Contrary to its moniker, the PLRA was more akin to the civil death statutes of 100 years prior than the provision of reform. Its goal was to strictly limit prisoners' ability to file federal litigation challenging the conditions of their confinement, their sentencing, and their treatment by setting up onerous preconditions for filing lawsuits, dramatically limiting available remedies and judicial oversight, and creating disincentives to lawyers representing prisoners. Many states followed the federal legislation to enact their own state laws restricting not just challenges to conditions, but also challenges to sentences and denials of release, all the while increasing the length and severity of punishments.

With the loss of the courts as fair arbitrators of mistreatment of prisoners, many advocates began focusing on education, media, and legislative strategies, while understanding that the usual corporate concerns of cost-value analysis are often inapplicable where the issue involves both fears surrounding public safety and the rise of the prison industrial complex, which provided its own impetus for continued prison buildups and resistance to outside oversight.

Simultaneously, the rehabilitation corrections mode of the 1980s, which touted the use of vocational training and educational programs to rehabilitate prisoners, faded with the increasing numbers and costs of incarceration. It was replaced with the increased use of cold storage, super maximum facilities, and increased isolation from the outside world. Prisons in the United States had become a multibillion dollar industry. In 2006, the budget for state corrections facilities exceeded $50 billion per annum. It was this confluence of factors that created fertile ground for developing a human rights analysis to challenging inhumane treatment in U.S. prisons and jails.

Human Rights Response

International human rights documents and treaties establish basic principles for the treatment of individuals and encompass those incarcerated in prisons, jails, and detention centers around the world. The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man (1948); the UN Standard Minimum Rules for the Treatment

of Prisoners (1957); the International Covenant on Civil and Political Rights (ICCPR) (1976); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) (1987) are the most frequently cited documents in human rights reports concerning the treatment of individuals in detention.

However, prior to the 1990s, those documentation reports, created by international human rights organizations, rarely included the United States in their worldwide investigations of prison conditions. Either as a consequence or perhaps as the rationale for their exclusion, international treaties and documents played little part in the advocacy in the United States for prisoners' rights, which was waged, largely, by attorneys and jailhouse lawyers.

In 1987, however, Human Rights Watch (HRW) began a project which enlisted several of its divisions in the investigation and documentation of the treatment of prisoners with the goal of issuing a global report. In 1991, HRW issued a breakout report titled *Prison Conditions in the United States* with the worldwide report, *Human Rights Watch Global Report on Prisons*, issued two years later. Similarly, Amnesty International began turning its attention to conditions in U.S. prisons in its investigation of compliance with international documents in the prison context.

In 1993 when the United States underwent its first UN compliance review following U.S. ratification of the ICCPR, another opportunity emerged to use human rights standards to examine U.S. prison conditions. HRW, and the traditionally American civil rights organization, the American Civil Liberties Union (ACLU), worked together to issue a report on U.S. compliance with the ICCPR, urging enforcement of the ICCPR's provisions with regard to prison conditions in United States courts. The report relied heavily upon federal judicial rulings, which had found many of the abuses also violated U.S. constitutional norms, undermining the report's assertion of the need for enforcement of the ICCPR. However, the report's concern with the federal court's tendency to diminish protections of prisoners based on their crimes and its call for recognition of a guarantee of humane treatment irrespective of the prisoner's crime, presaged the events of the next decade which heightened the need for a human rights framework to address abuse in United States' prisons.

The report contributed to a broader ongoing dialogue on the need to scrutinize the United States's compliance with international norms and address "U.S. exceptionalism" with particular emphasis on an area with diminishing protections under domestic constitutional instruments. The focus on criminal justice issues—with its emphasis on torture, and racial and gender discrimination of those in detention—provided a strong argument for the relevancy of human rights documents, which specifically set minimum standards for many of these issues. The report ushered in a series of reports in the late 1990s by Amnesty International and HRW on a number of prisoners' rights issues, including custodial sexual abuse of women prisoners in American prisons: *All Too Familiar* (1996), *No Where to Hide* (1998), and *Not Part of My Sentence* (1999);[16] the human rights violations against prisoners held in SHU's or super-maximum holding units examined in *Cold Storage: Super Maximum* (1997); and the violence endemic in men's prisons, *No Escape: Male*

Rape in U.S. Prisons (1998). Amnesty International addressed many of these issues in its 1998 report, *Rights for All.*

These reports created new opportunities for human rights organizations and activists to collaborate with U.S. litigators and criminal justice advocates on specific cases in a way that had not occurred previously in the United States, although consistent with collaborations in other countries. The documentation reports were a crucial vehicle for introducing advocates for prison reform, prisoners and their attorneys to human rights organizations and individuals working on the international stage and introducing a human rights language and framework to the issue. For prisoners and their counsel, who had rarely strayed from attempts to enforce "prisoners' rights" using U.S. laws that specifically limited the concept of rights to the diminished status of a prisoner, the introduction of international rights documents and the glimpse into other countries' systems provided a number of insights that were to be instrumental in integrating human rights documents into prison reform work.

By limiting themselves to the concept of "prisoners' rights," advocates in the United States had in some manner accepted a diminished status and standard of rights. This construct had also infected the actions of corrections officials who, viewing prisoners as lesser beings deserving a different standard of humane treatment, accorded prisoners a degraded treatment in direct proportion to prison administration's conception of prisoners as lesser beings.

With larger numbers of prisoners serving longer time and with less opportunity to challenge either their treatment or their sentence, prisoners' rights advocates from the critical resistance movement to lawyers and grassroots advocates began to recognize that a different approach was necessary. The issues being impacted by incarceration could not be encompassed within any one legal theory or expertise. Incarceration affected youths and educators, who challenged the school-to-prison pipeline, the disparate impact on children of color, and the loss of education funding which was being usurped by building and operating prisons; mental health professionals, prisoners, and family members, who recognized that prisons were increasingly incarcerating people who were mentally ill as opposed to providing treatment; and activists working on women's rights and violence against women, who viewed the cycle of abuse and self-medication as leading to incarceration and more abuse. Incarceration posed obvious issues of race discrimination in the administration of the criminal justice system and the perpetuation of discriminatory treatment inside and social and economic justice issues, including the impact that incarceration was having on poor people and immigrants in the system. It also raised concerns with violence targeting gays, lesbians, and transgender persons incarcerated in jails and prisons.

The common language and the umbrella available in which to have a dialogue for remedial relief existed not in domestic legal theories or case law, but in human rights treaties. With the recognition that large swaths of American citizens would spend some part of their life in a prison or jail cell, relying solely on diminishing "prisoners' rights law" to challenge inhumane treatment was neither appropriate nor tenable. The laws and treaties establishing baseline standards applicable to all persons took on a heightened relevance. Both the difficulties and value of utilizing a human rights framework for domestic

challenges to the mistreatment of prisoners in the United States is explored in the following two case studies involving the custodial abuse of women prisoners in a state prison in Michigan and the sentencing of juveniles serving life without possibility of parole sentences in American prisons.

HUMAN RIGHTS FOR WOMEN PRISONERS IN THE UNITED STATES

In 1995, the Fourth World Conference on Women was held in Beijing, and in April of that year, Felice Gaer of the U.S. delegation spoke the following words at the United Nations Conference on Human Rights: "Our task as nations is clear; we must make our global human rights machinery expand and adapt; we must shift from neglecting women's issues, to mainstreaming them; we must mobilize the will to stop the abuses facing women throughout the world, establish instruments of accountability and effective domestic remedies."

As the international community began focusing on the human rights of women, domestic remedies for issues facing the rising population of women prisoners in the United States were becoming progressively more difficult to come by, and the number of women prisoners was skyrocketing. In 1980 there were 12,300 women in prisons in the United States. This number had increased ten-fold, to 120,000, by the mid-1990s. By the year 2000, there would be over 1 million women either behind bars or under the control of the criminal justice system in the United States.

Groups with widely diverse interests began recognizing the toll on society resulting from the increase in the incarceration of women, the vast majority of whom were mothers and family caretakers. Incarceration of these women, largely for nonviolent property and drug offenses, increased not only the corrections budget but impacted foster care and social services as their children were placed in foster homes or agencies and chronically ill, disabled, or aged family members sought replacement services for their caretakers. There was also a growing awareness of the additional punishments inflicted on women prisoners in the form of sexual and physical violence and the ripple effect the resultant trauma had on their communities upon their release. Yet, there had been neither widespread exposure of the abuse nor significant legal challenges to mistreatment of women prisoners.

Traditional Equal Protection Litigation

Previously, major prisoners' rights litigation had focused on conditions for men, who formed the majority of prisoners. Litigation on behalf of women prisoners was limited to equal protection challenges to their denial of comparable educational and vocational training in prison and denial of gender-based health care. Throughout the late 1970s and 1980s, rehabilitation and correctional opportunities for prisoners largely benefited male prisoners with the provision of education, vocational training, and apprenticeships. Education and skills training were provided based on the belief that rehabilitation of

prisoners depended on their obtaining bona fide occupational skills and that such skills would best serve them to reintegrate into society thus decreasing recidivism.

This approach was not, however, applied equally to women prisoners based, in part, on a different rationale accepted for women prisoners' status as convicted felons. Historical explanations for female lawbreakers as gender aberrants lingered through the 1980s in the United States, and the belief that criminal behavior by women could be traced to a failed femininity guided the rehabilitation programs for women. While male prisoners were receiving skills dedicated to economic redemption, women prisoners were being schooled in home economics, parenting classes, and models of obedience to reclaim their femininity.

The disparity in opportunity led a group of women prisoners in Michigan to file the first class-action case on behalf of women prisoners. They argued that their right to equal protection under the United States Constitution was violated by the absence of similar rehabilitation opportunities as those being provided to male prisoners. Their 1979 lawsuit, *Glover v. Johnson*,[17] was successful, resulting in improved educational, vocational, and apprenticeship training for women prisoners. However, it tied women prisoners' future to the treatment of male prisoners.

The problem with reliance on an equal protection model became evident a few years later as programs for male prisoners were eliminated with the decline of a rehabilitative corrections model in the United States. Because their legal claim for rehabilitative programs was based on being treated the same as men, after a few brief years of parity, women prisoners were once again deprived of participation in any programming that would provide opportunity for rehabilitation. The legal strategy of using equal protection law and addressing the problems with treatment of women prisoners through a gender discrimination lens did not advance an independent model for the treatment of prisoners based upon respect for their dignity and value as human beings, concepts imbedded in human rights documents.

Moreover, some courts had taken aim at *Glover v. Johnson*, eroding its finding that women prisoners' equal protection rights were violated when women prisoners were provided inferior programming as compared to male prisoners. In *Klinger v. Dept. of Corrections,* upon review of an equal protection case in which women prisoners in Nebraska challenged their denial of equal rehabilitation opportunities, the Eighth Circuit Court of Appeals approved the existence of separate but unequal facilities for male and female prisoners, reasoning that women prisoners were not similar situated to male prisoners due to the different profile of women prisoners (being nonviolent) and their lesser numbers.[18] The court noted that women prisoners were generally single mothers with substance abuse histories, as compared to male prisoners who were most often incarcerated for violent crimes and not the custodians of children. The court used these gender differences as a basis to deny women prisoners equal educational and program opportunities, rather than creating a model of rehabilitative opportunity that addressed differences by enhancing rehabilitative program choices. The court, after finding the male and female prisoners to be different, rejected the women prisoners' equal protection

claims stating, "dissimilar treatment of dissimilarly situated persons does not violate equal protection." Basically, the court asserted that only if two people were identical and did not receive equal treatment could you challenge the lesser treatment of one individual. The ruling moved the analysis of constitutional based rights even further away from an inclusive model of human rights and dignity for all. As a final deterrent to relying solely on the Constitution as a basis for challenging inhumane treatment of women prisoners, the PLRA wound its way through the U.S. Congress to be signed into law in April 1996, further limiting prisoners' access to the courts.

Just as the limitations of the equal protection model and prisoners' rights litigation were becoming evident, human rights standards appeared to provide some models for the minimum standards for treatment of prisoners and also a new perspective on increasing concern with endemic custodial sexual abuse in women's prisons in the United States. In addition to protections in the ICCPR, the Convention Against Torture, and the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Declaration on the Elimination of Violence Against Women prohibited any "degrading treatment or punishment . . . and any gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life," providing a framework based on universal values, which codified core values of human dignity and equality available to all individuals including prisoners. Human rights documents, based solely on one's status of as a human, provided a core set of entitlements that could not be truncated based upon incarceration, gender, or the changing perception of how to handle convicted felons in America.

Sexual Abuse of Women Prisoners

It was in this milieu that women prisoners in Michigan decided to file a class-action lawsuit seeking relief from years of sexual assaults, rapes, sexual harassment, and retaliation by male guards and staff employed by the Michigan Department of Corrections. In light of the impending implementation of the federal PLRA, cases were filed both in federal court and in state court under Michigan's Civil Rights Act in March 1996, arguing that sexual harassment, degrading treatment, and rapes of women and girl prisoners by male custodial staff in Michigan had become endemic. The complaints alleged hundreds of incidents ranging from prurient viewing of women while naked, routine groping of women's breasts and genitalia under the guise of security pat-down searches, the common and constant use of sexually degrading and demeaning language, and penetrative rapes. The lawsuits challenged the treatment under standard constitutional and civil rights frameworks and sought traditional remedies of injunctive relief and damages. Capitalizing on the recent domestic restrictions on the rights of those in detention, the state argued that both lawsuits should be dismissed because the federal suit was impermissible under the newly passed PLRA and the state civil rights act, which protected "all persons," should not be read to include prisoners. The lawsuits seemed destined to make the same arguments and follow a similar

trajectory as other women prisoners' rights cases until human rights standards and organizations began influencing advocacy around and within the lawsuit itself.

When the Michigan lawsuits were filed, Human Rights Watch was in the midst of conducting interviews in eleven state prisons for a report on the prevalence of sexual misconduct by male officers in authority over female prisoners. A year after the women prisoners filed suit, the United States Department of Justice joined the fray under its mandate to ensure the constitutional treatment of institutionalized persons. Thus, three different groups—the women prisoners themselves, the United States Department of Justice, and Human Rights Watch—were all on the field at the same time, all utilizing different frameworks from state to federal to international, to examine the abusive treatment of women held in detention in Michigan prisons. All three were to play central roles in the synthesis of the analysis and the resulting remedies for women prisoners, which, in the end, relied heavily on international standards.

While both uninformed and dubious of the ultimate value of HRW's focus on violations of international standards and treaties that appeared unenforceable, the women prisoners and their lawyers cooperated with both HRW and the DOJ by participating in interviews and responding to fact finding requests. The DOJ attorneys were wary of HRW's efforts because they did not want to appear to concede the legal applicability of the international standards because the international treaties HRW relied upon either had not been ratified by the United States or were ratified in a manner that limited their enforceability in U.S. courts. They also viewed domestic laws and statutes as adequate to ensure the humane treatment of the women prisoners.

Attorneys for the women prisoners, who were struggling to obtain positive results under familiar state and federal civil rights statutes and constitutional law, were also skeptical of the value of international human rights law in domestic courts. Historically, international human rights claims in U.S. courts had been brought primarily by foreign nationals for harms suffered on foreign soil, and there had been little development of international human rights law based upon incidents that occurred in the United States against domestic actors. In a climate where federal courts were increasingly unsympathetic to prisoners' claims challenging conditions of confinement under U.S. law, it seemed unlikely, at best, that the courts would be receptive to challenges based on international laws, treaties, and standards that had heretofore not been enforced in the domestic context.[19]

Impact of HRW Report on the Litigation

Human Rights Watch concluded its interviews and research after two and half years resulting in a documentation report released in December 2006 titled *All Too Familiar: Sexual Abuse of Women Prisoners in United States Prisons.* The report focused on five states including the state of Michigan. The report found extensive sexual abuse being perpetrated against women prisoners in U.S. state prisons. With regard to female prisoners in the Michigan system,

the report found widespread abuse including rape, sexual harassment, forced abortions, privacy violations, and retaliation, noting that:

> In the course of committing such gross misconduct, male officers have not only used actual or threatened physical force, but have also used their near total authority to provide or deny goods and privileges to female prisoners, to compel them to have sex or, in other cases, to reward them for having done so. . . . In addition to engaging in sex with prisoners, male officers have used mandatory pat frisks or room searches to grope women's breasts, buttocks and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas. Male correctional officers and staff have also engaged in regular verbal degradation and harassment of female prisoners, thus contributing to a custodial environment in the state prisons for women which is often highly sexualized and excessively hostile.

The HRW report addressed the sexual abuse in Michigan as violations of the ICCPR (ratified by the United States in 1993), the Convention Against Torture (ratified in 1994), and the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Rights Convention) and made recommendations based on international standards, including that searches of women prisoners be conducted only by female staff and male officers announce their presence before entering women's housing units, toilet, or shower areas. These recommendations were echoed in Amnesty International's 1998 report *Rights for All* on human rights violations in the United States.

The HRW report garnered significant national publicity but little local attention. However, its value to the litigation became readily apparent to the women's attorneys. Although, the report was not conceptualized with domestic litigation in mind (indeed Michigan was the only state under review in which there was pending litigation), litigation with its judicial enforcement mechanisms was the most effective way to implement the report's remedial recommendations.

At the beginning stages of the litigation, the report, compiled by an independent international organization after extensive interviews with women prisoners and prison staff and documentation review, played an important role in developing factual support for both the state and federal litigation. The women's attorneys used the detailed factual findings to inform the court of the extent and range of abuses for purposes of demonstrating that there were enough women harmed to justify class-action certification in the state case. The validation of the complaint's factual allegations by an independent organization diminished the state's power to deny any problem and contributed to the federal courts' denial of the states' motions to dismiss. The detailed report and the media attention surrounding its release also made any dismissal of the suit by the court, based upon the state's mere denial, extremely unlikely.

In addition to providing factual support, the international standards referenced in the report also had a profound effect on the courts' view and treatment of the case, both in terms of the applicable standards in the case and the overall perception of the claim. While the complaints, at that time, contained only allegations of violation of the state and federal constitutions and civil

rights statutes, the HRW report raised the specter of violations of international treaties and standards. The federal judge was cognizant of the question of whether the United States domestic laws would prove to provide equal and sufficient protection of the rights of the women prisoners as those provided in international treaties and guaranteed by the majority of "peer" nation states such that the rights had reached the status of customary international law. Counsel also pointed out that if necessary, plaintiffs would seek to amend the complaint to add claims based on international law and that a number of the women prisoners were foreign nationals who might have a greater entitlement to the protections of the international documents signed and ratified by their nation states.

Federal and state judges are also, understandably, fiercely protective of the state and federal constitutions they have sworn to uphold. They often believe that the constitutions provide (or should provide) sufficient protections for the rights of all individuals, including prisoners. Judges are also not immune from the general American perception that we provide leadership and, until recently, are the standard bearer of civil and human rights around the world. To have an international human rights organization assert that the treatment of women prisoners violates international norms and standards and hold these violations up to the world, placed the domestic courts in a situation of either disregarding the findings of the report, or interpreting the United States Constitution to provide an adequate mechanism for remedying these violations.

The attorneys, by attaching the HRW report to court pleadings, also introduced an entirely new perspective on the treatment of women prisoners in Michigan. The report provided a glimpse of possible remedial measures both through the recommendations and through the opportunity to view best practices in other states and countries. Educating the court early on that there were jurisdictions that did not have the level of abuse that existed in Michigan's women's prisons significantly diminished corrections officials' standard second line of defense to challenges to conditions of confinement. After denying the problem, corrections officials often defend a challenged condition as an unavoidable consequence of housing dangerous felons and resisted remedial measures as incompatible with penalogical objectives and security concerns. Information that other countries and states have managed to house their women prisoners without pervasive sexual abuse by male guards allowed the court to disregard this defense without impermissibly failing to give deference to the expertise of corrections management. As discussed below, the information about international standards and practices also would have a profound influence on the shaping of remedies in the case.

The HRW report, as introduced by the plaintiffs in the federal and state litigation, also provided a more intangible but no less important benefit to the domestic litigation. The perception by the courts that this was not just another prisoner case seeking damages but, rather, a case of international human rights importance, had a lasting impact on both of the judges. The judges, who had sentenced some of the very clients that were now before them seeking protection, relief, and damages, were provided a different lens through which to view the women in the litigation, as well as the goals and potential impact of their rulings beyond this case.

The use of human rights as opposed to prisoners' rights became more than a semantic distinction in the case and began to inform the way participants viewed the issues. It is easier to disregard the statements of, as the defendant corrections department often refer to them (with a bit of redundancy), the "convicted female felon," the "prisoner inmate," or the "felony offender" than it is to disregard the human rights of an incarcerated woman. The language of humane treatment, degrading treatment of women, and human rights began to be repeated by the media as the case progressed, adopted by the women's attorneys and ultimately echoed by the court.[20]

Outside of the courtroom, but no less important for the success of the litigation, the HRW report was distributed to the women prisoners and proved to be an important organizing and solidifying tool for the class. The women saw a concrete result from their willingness to disclose the details of their abuse with an international agency that recognized them as humans entitled to be treated with dignity and respect. The report lifted the veil of isolation and despair that had descended upon a group of women who believed not only that no one was listening but that, even if they were heard, no one would care. It also introduced women to the existence of counterparts in other states, lessening the self-blaming guilt that was a constant companion for many of the women who had been raped by guards, and provided a new non-legalistic language in which to assert their entitlement to nondegrading treatment and basic human rights.

Continuing Human Rights Interventions

In 1998, two years after the litigation began and the HRW report, the United Nations Commission on Human Rights appointed a special rapporteur, Radhika Coomaraswamy, to investigate the treatment of women prisoners in the United States as part of her mandate to investigate the causes and consequences of violence against women. The reports of the international human rights organizations and the supporting documentation from the litigation were largely responsible for this mission. The State Department approved the visit and the special rapporteur prepared to visit Michigan's prisons along with six other states. However, on the eve of her visit, the then-governor of Michigan, John Engler, revoked his agreement to allow her to visit women prisoners and canceled her meetings with state representatives. The refusal was grounded in part on the governor's assertion that the United Nations both lacked authority and was being used as a tool of the litigation.

Nevertheless, the special rapporteur journeyed to Michigan to meet with lawyers, academics, former guards, and former prisoners. Despite the lack of cooperation, the conditions in Michigan women prisons were included in the 1999 United Nations Human Rights Commission report on Violence Against Women. The report detailed the credible allegations of both sexual abuse and retaliation and, recognizing the UN Standard Minimum Rules for the Treatment of Prisoners, as augmented by the Basic Principles for the Treatment of Prisoners,[21] stressed the need for gender-specific supervision of women prisoners.

In an act of reciprocity, plaintiffs' counsel for the women prisoners, made presentations both at the United Nations Crime Prevention and Criminal Justice Congress in Vienna and an ancillary meeting panel at a session of the United Nations Human Rights Commission in Geneva on the ongoing human rights violations occurring in Michigan's women prisoners.

The local media then picked up on the reports in the Geneva press, reinforcing the relevance of the human rights framework and the scrutiny the state was being subjected to, in part because of the governor's refusal to acknowledge the authority of the United Nations on this issue. The state's refusal to allow inspections subjected it to scathing comparisons with rogue countries with extensive human rights violations and a history of rejecting international oversight and investigations into their conduct.

In 1998, Human Rights Watch returned to Michigan to follow up on reports that the women prisoners' cooperation with the international organizations and participation in the litigation had resulted in severe retaliatory actions by staff against them, including physical assaults and abuse, incarceration in isolation cells for long periods of time, intensified threats of sexual abuse, threats to their family, denial of visits, and loss of paroles. The resulting report, titled *Nowhere to Hide*, highlighted the near-absolute power staff had over the women prisoners—controlling their access to the world and their freedom, the risks the women incurred in speaking out, and the difficulty of addressing the abuse in this punitive and secretive environment. The report also reflected the interactive synergy between the litigation and human rights documentation. The acknowledgment both of the impact of stepping forward and the price that women prisoners were paying heightened both the credibility of HRW among the women as well as confirming the need for the litigation to seek additional remedial measures with regard to the retaliation.

The Path to Settlement

Meanwhile, the litigation was continuing at both the state and federal levels. Hundreds of depositions were taken, and weekly motions were occurring in federal court to address discovery issues, retaliation, and ongoing abuse. While no formal claims for violation of human rights had been filed, the language of the litigation both in the court room and in media coverage began incorporating the language of the recommendations of the reports and the observations of the United Nations calling for ensuring the human rights of women prisoners in Michigan. Phrases such as degrading treatment and inhumane conditions had replaced domestic legalese terms, and the call for taking male correctional staff out of the housing units of the female facilities was taken up by the Michigan state legislature as well as editorials in the local newspapers.

The accumulated negative press and pressure of the international scrutiny and local and national media coverage, and the rejection of the state's attempt to characterize the litigation as frivolous or the result of isolated acts of a few rogue guards by both the courts and the press resulted in the parties beginning settlement discussions.[22]

During the litigation, the Department of Corrections had made changes in its operations, as part of a settlement with the DOJ, including changes in

some of its process for hiring, training, and investigation of staff and structural changes in the facilities. The women prisoners, however, insisted that any settlement of their claims must include adherence to the international norms prohibiting cross-gender supervision and searches. While this relief was never specifically requested in the original pleadings, plaintiffs had prepared an amended complaint to allege violations of customary international law and specifically request injunctive relief consistent with the applicable standards set forth in the Convention Against Torture, the Women's Rights Convention, and the UN Standard Minimum Rules for the Treatment of Prisoners should the settlement negotiations fail and trial on this issue be required.[23]

Ultimately, the federal litigation was settled for significant damages and remedial relief, including the commitment to remove male staff from the housing units, intake, and transportation areas of women's prisons in Michigan and to eliminate cross-gender patdowns. The HRW report played a key role in persuading the court and the Department of Corrections to agree to remove male staff. While traditional prisoners' rights cases typically include experts who provide reports and testimony on the best practices in other states and correctional standards, it is unlikely that global standards regarding the treatment of incarcerated women prisoners would have been provided to the court absent HRW's report and Amnesty International's subsequent report in 1998. The reports revealed that while cross-gender supervision was standard practice in the United States, it was contrary to international standards that the majority of the world had accepted as a minimum standard.

In Michigan, women prisoners were largely supervised by male staff who performed the vast majority of body searches and routinely viewed women nude and performing basic bodily functions. In many instances, the midnight shift at the women prisons would be comprised entirely of male guards with full access to the women. The unfettered access, prurient viewing, and constant touching all worked to create a culture of sexual abuse and degradation in the women's facilities. The state had steadfastly refused to consider gender-specific supervision, asserting it to be near impossible, inconsistent with standard correction practices, and unlawful. The DOJ also declined to consider the remedy of elimination of cross-gender supervision and body searches, both because the federal prisons utilized male staff in their female prisons and a concern for the constitutionality of gender-based staffing raised by DOJ attorneys in the employment division.

Yet, HRW and Amnesty International maintained that internationally accepted UN standards[24] for the treatment of prisoners as well as the Convention Against Torture, the Women's Rights Convention, and the ICCPR should be considered in determining the treatment of prisoners, including women in detention. In particular, the UN Standard Minimum Rules for the Treatment of Prisoners represented a global consensus for the standards applicable to women prisoners and included the requirement that male staff shall not enter the part of the institution set aside for women unless accompanied by a female officer; and that women prisoners shall be under the authority of and attended and supervised only by woman officers. Although the United States had, in 1975, indicated its full compliance with implementation of these standards, the United States had lapsed into noncompliance beginning in the 1980s.[25]

Although no domestic standards required female supervision, plaintiffs' counsel, who heretofore had had no basis upon which to assert the provisions as a remedy, now based on the HRW and Amnesty International reports, had the entire world.

Post-Settlement

The intertwining of human rights advocacy with the domestic litigation continued when a contingent of guards challenged the Department of Corrections's implementation of the terms of the settlement, claiming that the removal of staff, based on their gender, violated their constitutional rights to equal protection under the law.[26] The women prisoners sought and obtained the right to intervene to protect their settlement and ensure compliance with both their constitutional rights and international standards of treatment. The history, as well as the current practices, in the United States and in 'peer' countries was a prominent concern of the trial judge in the case, who contacted Canadian government officials to inquire about the standards in provincial facilities housing women prisoners, and admitted into evidence the HRW and Amnesty International reports, the report of the UN Commission on Human Rights, and *The Report of the Canadian Government, Cross-Gender Monitoring Project Third And Final Report,* dated September 30, 2000, which recommended enforcement of the requirements of female-only corrections officers in female prisons in Canada. Although the court considered pleadings that directly raised the argument that failure to implement the settlement agreement would violate women prisoners' rights under both the Constitution and customary international law, it failed to directly rule on the women prisoners' claims and rejected the gender-specific assignments relying only on an analysis of the equal protection rights of the guards.

The federal trial court was, however, reversed on appeal by the Sixth Circuit Court of Appeals, which upheld the women prisoners' settlement requirement of gender-specific supervision based on women prisoners' rights under the Constitution to privacy and safe and humane treatment.[27]

While much of the interaction between human rights and the constitutional challenge to protect women prisoners from abuse arose from unplanned circumstances, the lessons and values learned were intentionally applied in the following challenge to the State of Michigan's treatment of its incarcerated citizens in this case the imposition of a sentence of life in prison, without the possibility of parole, for children under the age of eighteen, which constituted a clear violation of their human rights.

CHILDREN TO THE WORLD, ADULTS AT HOME

If there is a group of people caught up in the criminal justice system in America that has less legal protection than women prisoners, it has to be the children. In 1997, it was estimated that less than 1 percent of the people in state prisons were under the age of eighteen. Two years later, youth under eighteen accounted for 2 percent of all new commitments to state prisons. In 2004, there were estimated to be over 200,000 children under the age of

eighteen incarcerated in adult jails and prisons in the United States. The number is estimated because no one knows for sure how many children are being held in captivity. The Department of Justice, Bureau of Statistics published a report in 2001 which attempted to identify the number children under eighteen held in adult jails and prisons in this country as well as the number held in both private and public juvenile detention facilities. However, many states do not maintain separate records of the number of children in their adult facilities, reasoning that once a child had been tried or sentenced as if they were an adult, their child or juvenile status does not follow them into the adult prisons, despite the realities of their age. Figures of youth held in county jails are not compiled by, or reported to, a central source, and separate entities altogether monitor children held in most states' juvenile facilities.

There is no federal statute or constitutional provision that provides a child special protection, or even protects a child's right to be treated consistent with their status as a child, and throughout the country state laws allow prosecutors to turn a blind eye to the chronological age and corresponding maturity of children, designating them as adults and subjecting them to adult prosecution, punishment, and incarceration.

In stark contrast, the Convention on the Rights of the Child (CRC) recognizes that the special status of children entitles them to special protection. It provides that children are to be incarcerated as a last resort, for the least amount of time possible with mandated rehabilitative efforts. Further, the CRC flatly prohibits sentencing children to life in prison without parole, stating in Article 37(a) that "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

This provision of the CRC has near universal acceptance. 192 of the 194 countries have signed, ratified, and not registered a reservation to the CRC's prohibition on life imprisonment without release for youth offenders. The United States and Somalia are the only two countries in the world that have not ratified the CRC, although both have signed it.[28]

Life imprisonment for juveniles also violates the clear language of the ICCPR, which was both signed and ratified by the United States. Article 10(3) requires that children (under the age of eighteen) be treated appropriate to their age and legal status as children. Article 14(4), which was cosponsored by the United States, mandates that criminal procedures for youth charged with crimes "take account of the age and the desirability of promoting their rehabilitation."[29]

The harshest punishment available for a crime, in states that do not have the death penalty, is the sentence of life imprisonment. In forty-two states, in the United States, it is also a permissible punishment for crimes committed by children.

Developing an Integrated Human Rights Strategy

Despite the clear problem of juvenile life without parole sentences, little was known of the number of youth serving this sentence in the United States. Given the positive, if somewhat serendipitous, impact of interweaving

documentation of the abuse of women prisoners by international human rights organizations with domestic litigation challenging their treatment, a joint documentation project was planned as the first step in an integrated advocacy strategy incorporating human rights to address juvenile life without parole sentences in the United States.

The coalition which would become known as the *Second Chances* coalition was spearheaded by the Juvenile Life Without Parole Initiative and began in the state of Michigan in 2003 with the sponsorship of the Michigan affiliate of the American Civil Liberties Union, the research assistance of the Institute for Social Research at the University of Michigan, and Columbia Law School's Human Rights Institute. The national ACLU, a domestic civil rights organization, had recently created a Human Rights Working Group to incorporate a human rights framework in certain litigation and advocacy work, and the work around juvenile life without parole, which combined that working group's concerns with human rights, racial justice, and criminal justice, quickly became part of the national initiative.

Documentation was conceptualized as a first step for several reasons. As in the prior work around sexual abuse of women prisoners, documentation by human rights organizations would identify, humanize, and give voice to the victims of the human rights violations. In addition, documentation was necessary because there was a dearth of knowledge on the extent of the use of this punishment in the United States. Fact-finding could also function to identify potential areas of litigation.

Documentation as a first step also made sense because direct legal challenges under domestic law appeared limited. The traditional challenge used to attack the juvenile death penalty was the Eighth Amendment's prohibition on cruel and unusual punishment. The U.S. Supreme Court stuck down the death penalty for juveniles under the age of sixteen in 1988.[30] Although the U.S. Supreme Court, at the time the documentation project was initiated in 2003, had not yet rejected the death penalty for sixteen- and seventeen-year olds, the challenge was well underway to argue that this punishment had also become sufficiently unusual to warrant a ruling on its unconstitutionality.

However, the U.S. Supreme Court had also held in general that life without parole sentences were constitutional, and the laws of forty-two states allowed life without parole sentences for juveniles, making a constitutional challenge that the punishment met the conjunctive requirements of cruel *and* unusual difficult on its face.

Federal appellate courts had also held that mandatory sentences of life without parole imposed on juveniles for murder convictions do not violate the Eighth Amendment, and where review has been sought by the United States Supreme Court, it has been declined. These courts also rejected arguments that the lack of consideration of the defendants' youth posed constitutional problems.[31]

In 2004, the Supreme Court finally forced the United States into compliance with the world's standards on criminal punishment of juveniles in the context of the death penalty in *Roper v. Simmons,* which struck down the death penalty for juveniles who committed their crimes under the age of eighteen as a violation of the Eighth Amendment. Much of the Court's reasoning

about the differences between juveniles and adults, the vulnerability of juveniles to negative influences and pressures, and other developmental realities apply equally to life without parole sentences. It was clear that the human rights communities' work on this issue contributed to the Court's interpretation of the Eighth Amendment,[32] and the same international authorities that condemned the juvenile death penalty instruct that the sentence of life without parole for juveniles also violates international law and is a rare punishment around the world.[33] However, while *Roper* struck down the juvenile death penalty, it left intact laws in forty-two states which sentence children to grow old and die in a prison cell for crimes committed when they were under the age of eighteen. With the practice remaining widespread in the United States, a challenge under the Eighth Amendment, which required a demonstration of both cruelty and unusualness, was still premature.

Similarly, state constitutional challenges were not promising, although many states, including Michigan where the documentation project started, had a disjunctive constitution requiring the proof of cruel *or* unusual punishment. The Supreme Court of Michigan had held that juveniles do not have a fundamental or constitutional right to special protection, and the state appellate courts had rejected a challenge to the life without parole sentences as cruel or unusual and held that children or juveniles had no constitutional right to be treated as juveniles. The lack of a right to special protection means that there is no fundamental right to certain procedures and standards for determining when children can be treated as adults.

An additional perspective contributed to a decision not to attempt domestic litigation as the first challenge to juvenile life without parole sentences. While litigation had been a significant tool in challenging human rights violations, its focus on the authority of the judiciary could, without care, disengage advocates, families, and the victims of the human rights violations themselves while the litigation wound itself through courts and appellate processes. Without an advocacy movement in place, a pure litigation strategy was insufficient for building a successful human rights framework.

The strategy then was to begin a challenge using a human rights framework, both substantively and procedurally using traditional human rights devices to begin the advocacy. The strategy would first create a documentation project, then join together domestic advocacy groups involved with children's rights and criminal justice issues together with international human rights organizations to develop both an advocacy campaign and a coordinated legal challenge incorporating human rights law.

Human Rights Documentation

In Michigan, the documentation project involved extensive interviews with juveniles serving the life without parole sentence; collateral interviews with families of the juveniles and victims' families; extensive review of trial transcripts and records of the juveniles, pre- and postconviction; interviews with judges and prosecutors; and data collection, in order to compile a broad understanding of the impact of the laws allowing life without parole sentencing of juveniles.

The data collections and the interviews proved the most challenging and enlightening. In order to obtain a nuanced view of the data, it was planned to collect data and obtain interviews from a minimum of fifteen states from different geographic areas that allowed life without parole sentences to be imposed on juveniles. While the data collected provided a wealth of information and the beginning of an understanding of the extent of the use of life without parole sentences for children, the diverse recordkeeping of various Departments of Corrections together with divergent rules on what constituted public documents, and a patchwork of laws left some gaps in the data.

The interviews, once permission was obtained, ranged from emotional discussions with youths who had not received a single visitor since they had been arrested and lacked knowledge of the terms of their sentence, to in-depth thoughtful discussions with mature men and women who spoke of their youthful selves almost as children from another era and identity, to youths who were deeply damaged and brought to visits from observation facilities after suicidal or self-mutilation incidents. Initial interviews led to follow-ups, letter writing, and phone calls and the emergence of a family advocacy network and a network of incarcerated youth who began their own documentation project to detail their lives.

When it became apparent that there was an impetus for seeking remedial action in Michigan, a breakout report was issued titled, *Second Chances*: *Juveniles Serving Life Without Possibility of Parole in Michigan's Prisons*, reporting that over 300 children in Michigan alone were serving the sentence of natural life without any possibility of parole.

After the publication and attendant publicity of *Second Chances*, Amnesty International and Human Rights Watch partnered together, for the first time, to complete and issue a national documentation report on juveniles serving life without possibility of parole in the United States. The report was able to utilize the data collected by the ACLU's juvenile life without parole initiative and take advantage of the findings compiled from focus groups and statewide polling conducted in Michigan on the issues. The report, titled *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, was issued in late fall 2005, and its unveiling at the ACLU offices of Michigan recognized the combined efforts of these three organizations to adopt a human rights framework approach to the challenge to juvenile life without parole in this country.

Infusing Human Rights Advocacy in Local Campaigns

The report garnered worldwide media attention, raising the consciousness of media and the public in the United States to the human rights violation involved in sentencing juveniles to life without parole, while concurrently raising the issue of the United States' violation of human rights with the worldwide body.[34]

Meanwhile, the documentation reports sparked an informal national coalition that included domestic advocacy groups, children's groups, legal academics, funders, additional domestic criminal justice advocacy groups, doctors and psychologists, and traditional human rights advocates to coordinate

national challenges to juvenile life without parole sentencing. The overarching issue and approach was to keep the human rights component alive in whatever strategies were most effective on a state-by-state and national basis. In Colorado, advocacy groups, in collaboration with Human Rights Watch, issued their own state documentation report titled *Thrown Away: Child Offender Serving Life Without Parole in Colorado*. California and Illinois began working with a private law firm to begin their own statewide documentation project in preparation for legislative and/or litigation challenges, drawing on the expertise of both Human Rights Watch and the ACLU. Mississippi, Louisiana, and Florida all began their own initiatives, again relying upon the assistance of the ACLU, Amnesty International, and Human Rights Watch in developing their state challenges.

In Michigan the documentation project continued and became more nuanced, able to address the racial injustice components of the life without parole sentence and engage advocacy groups to focus on this aspect of racial discrimination in the administration of the criminal justice system in the United States. The project also continued to weave human rights concerns with the domestic agenda, by working domestically to introduce legislation to eliminate the sentence, while filing a petition with the Inter-American Commission, with the assistance of the Human Rights Institute and clinic at Columbia Law School, directly challenging the illegality of their sentence under the American Declaration of the Rights and Duties of Man.

The media reports on all of these events often included specific reference to the fact that this practice violated international norms, treaties, and covenants, a perception not usually included in media reports of domestic sentencing issues involving the criminal justice system in America and impacting the language of the debate. The discussion was more about children's rights, human rights, and second chances for youth and less about violent predators/felons and hardened criminals (language used by the opposition).

Like the situation with women prisoners, the juveniles serving the life sentence together with their families and friends also embraced the human rights language and framework. The Second Chances coalition, which grew out of the grassroots organization of family, friends, and juveniles, created a Web site with links to the domestic legislation, the Inter-American petition, the documentation reports, and the international instruments which supported the assertions of human rights violations.

International Advocacy

In addition to local efforts, activists engaged in international forums to increase international pressure on the United States. Counsel for the juveniles in Michigan attended the UN Congress on Crime Prevention and Criminal Justice in Bangkok in 2005, on behalf of Human Rights Advocates to raise the issue of juvenile life without parole sentences in this international body as a prelude to addressing the issue with the UN Human Rights Committee.

In September 2006, the United Nations Human Rights Committee addressed the issue as part of its concluding observations on the United States's compliance with the ICCPR. After recognizing the documentation reports,

the committee observed that sentencing children to life sentence without parole is of itself not in compliance with Article 24 (1) of the Covenant (Articles 7 and 24) and recommended that:

> The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.[35]

Similarly, the UN Committee Against Torture included the issue in its recommendation on the United States's compliance with the Convention Against Torture, stating: "The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment."[36]

The United Nations General Assembly also adopted a resolution calling for the elimination of this practice as violating the Convention on the Rights of the Child. This international attention, in turn, brought domestic media attention back to the human rights issues and violations, requiring state legislators to address the issues of the state's laws violating human rights norms, treaties, and conventions. Not everyone was impressed with the framework however. Alan Cropsey, the Republican chair of Michigan's Senate judiciary committee, who blocked hearings on the reform legislation, responded to the United Nations observations by asserting that "The UN is a laughing stock. They have no moral credibility." One journalist, however, noting the poor company the United States was keeping on this issue, mourned the United States's ebbing moral authority, coming full circle by connecting the abuses committed by military in Abu Ghraib with the culture of ignoring human rights obligations at home.

NOTES

1. Matt Davis, Michigan Department of Corrections spokesperson (press statement).

2. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

3. *Thompson v. Bond*, 421 F.Supp. 878, 882 (W.D. Mo. 1976).

4. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

5. Many chapters could be written on the confluence of events that resulted in what is known as the modern prisoners' rights movement. *The Autobiography of Malcolm X* was first published in the United States in 1965 and Eldridge Cleaver's *Soul on Ice* in 1968. These followed Caryl Chessman's 1950s exposure of death row (in)justice and were all widely read both inside prison and out, creating a symmetry of shared knowledge and consciousness raising on prison conditions in the United States.

6. *Jackson v. Bishop*, 404 F.2d. 571 (8th Cir. 1968).

7. *Hutto v. Finney*, 437 U.S. 678 (1978).

8. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

9. *Estelle v. Gamble*, 429 U.S. 97 (1976).

10. *Turner v. Safely*, 482 U.S. 78 (1987).

11. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

12. Because prison officials often prove to be recalcitrant even after courts have found the condition and treatment of prisoners unconstitutional, federal trial court

judges have the power to issue injunctive and remedial orders specifically ordering officials to take certain steps or adopt certain measures.

13. *Wilson v. Seiter*, 501 U.S. 294 (1991).

14. Significantly, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment provides that coercion based on discrimination which causes severe harm, whether physical or mental, constitutes torture. For an action to constitute cruel, inhuman, or degrading treatment or punishment it need not be shown to be committed for a particular purpose or with any specific intent.

15. *Lewis v. Casey*, 518 U.S. 343 (1996).

16. Amnesty International, *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody in the United States* (Amnesty International, March 1999); Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (Human Rights Watch: December 1996); Human Rights Watch, *Nowhere to Hide: Retaliation against Women in Michigan State Prisons* (Human Rights Watch, July 1998).

17. *Glover v. Johnson*, 478 F.Supp 1075 (E.D. Mich 1979).

18. *Klinger v. Dept. of Corrections*, 31 F.3d 727 (8th Cir. 1994).

19. In the criminal justice context, attempts by prisoners to challenge their criminal convictions arguing international law in the context of habeas corpus petitions had consistently been rejected, as had challenges to capital punishment against juveniles, something that was clearly violative of a number of international treaties and customary international law.

20. Counsel for the women also attempted to reframe the language and status of their clients by including claims, in the federal litigation, of violations of the federal Violence Against Women's Act, and in the state case raising their central claims under the state's civil rights act which prohibits discrimination, including sexual-based harassment against women in all public services and facilities. Unfortunately, after the cases were filed, the federal courts struck down the Violence Against Women's Act as unconstitutional. When the Act was reauthorized, it excluded protections for women prisoners. Similarly, the state of Michigan amended the state's civil rights act to specifically deprive prisoners of the Act's protection against discrimination. This amendment was, however, later struck down as unconstitutional when challenged by women prisoners as violative of their constitutional and human rights. *Mason v. Granholm,* 2007 WL 201008, ED Mich, January 23, 2007.

21. UN General Assembly, *Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, UN Doc. A/45/11 (December 14, 1990).

22. A one-hour special was aired on national television which focused in large part on the conditions in Michigan and joined comments from Human Rights Watch, the counsel for the women prisoners, the Department of Justice, and state officials in evaluating the conditions of women prisons in the program titled *Women in Prison: Nowhere to Hide.* The special garnered an American Bar Association Silver Gavel Award and a Robert Kennedy award for broadcast journalism that year.

23. See Martin A. Geer, "Human Rights and Wrongs in our Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law: A Case Study of Women in the United States Prisons," *Harvard Human Rights Journal* 13 (Spring 2000): 71.

24. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, UN Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 UN ESCOR Supp. (No. 1) at 35, UN Doc. E/5988 (1977); UN General Assembly, Basic Principles for the Treatment of Prisoner.

25. Nick Pappas, *The Jail: Its Operation and Management* (Washington, DC: United States Bureau of Prisons, 1973), pp. 19, 71–72; UN Standard Minimum Rules. For a full history of the United States lapse into noncompliance, see Martin A. Geer, "Protection of Female Prisoners :Dissolving Standards of Decency," *Margins* 2 (2002): 209.

26. *Everson v. MDOC*, 222 F.Supp 2d 864 (E.D. Mich 2002). The male guards used Title VII of the Civil Rights Act Section 703(a)(1) and (2), which states:

(a) It shall be unlawful employment practice for an employer
   1. To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment because of such individual's race, color, religion, sex or national origin; or
   2. To limit, segregate or classify his employees or applicants from employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

27. *Everson v. MDOC*, 391 F3d 739 (2004), cert. den. 126 S.Ct 364 (2005). For a good discussion of the case and the legal and social issues surrounding women prisoner abuse and privacy rights, see the work of Brenda Smith, "Sexual Abuse of Women in Prison, a Modern Corollary of Slavery," *Fordham Urb. L.J.* 33 (2006): 571; and Brenda Smith, "Watching You Watching Me," *Yale J.L. and Fem.* 15 (2004): 223.

28. The United States signed the Convention on the Rights of the Child on February 16, 1995 and Somalia signed on May 2, 2002, and while neither have since ratified it, Somalia lacks a formal government to effectuate ratification.

29. When the United States ratified the ICCPR, it attached a limiting reservation, providing that "the United States reserves the right, *in exceptional circumstances*, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14."

30. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (the court in holding that such a punishment has become unusual in the United States as part of our evolving standards of decency also noted the global rejection of the death penalty for youth offenders age sixteen or younger).

31. Although two state supreme courts have held that juvenile life without parole sentences were improper, the cases involved particularly troubling circumstances concerning a thirteen-year-old convicted of murder and a fourteen-year-old convicted of rape.

32. The Court specifically referred "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments," and cited two documentation reports on the limited use of capital punishment of minors in the rest of the world. *Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005).

33. According to Human Rights Watch, Amnesty, and Human Rights Advocates, there were only a handful of youth in the rest of the world combined serving a life without parole sentence.

34. There was extensive coverage in both local newspapers in Michigan as well as worldwide coverage. For example BBC radio aired an interview with a juvenile serving LWOP in Michigan and the *New York Times* included the issue in a three-part series. The national report also helped fuel ongoing coverage and attention on Michigan with segments of National Public Radio and state journals focusing on Michigan's efforts to illuminate and eradicate this human rights violation.

35. See UN Human Rights Committee, 87th Session, *Consideration of Reports Submitted By Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006).

36. UN Committee Against Torture, 36th Session, *Consideration of Reports Submitted By Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee Against Torture: United States of America*, UN Doc. CAT/C/USA/CO/2, para. 34.

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WHY I CALL DEFENDANTS FIRST

Having tried many police misconduct cases, I have made some assessments that I use to tailor my trial tactics in such cases. Some of my comments may seem harsh and anti-police, I assure you that is not the case. I served as a police officer for 17 years and in my opinion there is no higher calling – when the job is done right. Furthermore, no one wants to see abusive officers punished more than the officers who do the job properly.

Criminals are criminals because they violate the law, usually those laws are statutes or city ordinances. Police officers are bound by laws as well and in most of my cases, those LAWS are the highest law of the land, the United States Constitution's Bill of Rights. I ask you, which is the more serious danger to our society, violation of a statute or violation of the constitution? I look at being a civil rights trial lawyer as a mission to defend the constitution and to go after those who violate it. So, here are a few of my thoughts based upon 20 plus years of trying police cases.

Suing police officers is always a tricky business. That is because the police hold a special place in the minds of most citizens. No matter how many times the taped beating of Rodney King was shown, no matter the extensive press coverage of the beating and death of Malice Green[1], and no matter the outrage regarding the killing of the unarmed Amadou Diallo,[2] the subconscious favorable image of the police in the minds of most citizens (and it appears, in the minds of too many judges), seems to be

unaffected.

Police misconduct trials are frequently complicated by the fact that the incidents giving rise to the lawsuits, are not one-on-one encounters and the plaintiff is often the sole eye witness in support of his or her claim while there are several officers to testify against the plaintiff. Even where there are other "citizens" who witness the events, they often do not want to be involved. But, regardless of the number of witnesses in support of the plaintiff's claims, it seems that the "preponderance of the evidence" standard of proof in civil cases is much higher when police officers are the defendants because as "officers of the law", juries seem to give them more credibility than the citizen plaintiff or the citizen witnesses supporting the plaintiff.

In every case where I have been successful in obtaining a verdict there is one common factor, I was able to show that the defendant officer LIED. Not that he made a mistake and not that he used bad judgment but that he or she deliberately, purposefully attempted to deceive the jury which was there to look into the propriety of his conduct.

It may be helpful to recognize and remember that police officers are trained to know the law so that they will not violate civil rights during their enforcement activities, at least that is the hope of most police chiefs. That also means that officers recognize when they cross the line and when an officer realizes that he has violated a civil right, there may be a tendency to make it right by fabricating the evidence that would justify his actions. This has been especially true in many cases of excessive force and illegal search and seizure where the touchstone issues are necessary force, probable cause and/or exigent circumstances.

The BADGE is a double edged sword for the police in civil litigation. It does elevate them as a witness in the eyes of the jury, even if subconsciously, as previously noted but it also holds them to a higher standard in the eyes of the jury. It seems a jury will give officers the benefit of the doubt, if the jury believes that their "*dedicated protectors and guardians, who are out there with their lives on-the-line fighting the forces of evil to serve and protect the public*" are candid, truthful and performing their duties in good faith. If you can show that the officer purposefully lied to evade responsibility for violating his oath and public trust, the defendant officer will be removed from his pedestal in the jury's mind. Once he is shown to be a liar, the badge is tarnished and no longer affords him an elevated status but rather hangs around the defendant's neck like an albatross. Once his credibility is destroyed he is viewed very harshly by the jury; the fall from grace seems to be a much longer fall than from any other place.

From day one in preparing a police case, my personal objective is to gather the evidence necessary to show that the defendant knowingly violated the plaintiff's rights and pursued a studied course of deception to make it appear that his actions were justified. The legal nuts and bolts of establishing liability, surviving summary judgment, and providing proof of damages must, of course, not be neglected but the strategic element of obtaining a verdict at trial lies in depriving the defendant officer of credibility.

IT TAKES ONE TO CATCH ONE

I have found that the best witness against a defendant police officer is another police officer. My practice is to call the defendant officer first during my case in chief. I use the officers as witnesses against each other because at that early stage of the trial

the defendant officer has no advantage in status over the other officers in the jury's eyes.

I have often commented that some police officers lie frequently, but they do not do it well. If you are successful in using the "good" officers (or not so good officers) to show that the defendant or co-defendant officers are lying then the non-police witnesses have a lot more weight when you call them later in the case. This is especially true if the plaintiff's witnesses are "corroborating" the testimony of the "good" police officer witnesses who preceded them.

There is frequently a lot of information to use to show a defendant officer's deception. By the time a case goes to trial, the defendant officer has typically made several statements regarding the incident. If there was an arrest and criminal trial of the plaintiff prior to the civil case, the defendant officer has typically (1) written a report, (2) testified at a preliminary exam, (3) testified at the criminal trial and (4) been deposed in the civil case BEFORE taking the stand in the civil trial.

I typically start the trial by calling the defendant officer and then gear my direct examination to highlight differences in his reports, their depositions, their preliminary exam, their criminal trial testimony and the testimony they just gave in the present case. If successful, even a good cross exam by the defense attorney cannot rehabilitate them because the answers appear to be alibi's or excuses.

Once you have "nailed down" the defendant officer to a position, you can then use the rest of the witness to destroy and discredit his account of the incident. This tactic has worked extremely well for me.

Many years ago a client who attended the deposition of a defendant officer expressed his outrage to during a break. The client commented that he could not believe that a police officer would so blatantly lie under oath and he wanted to know why I did not challenge the officer on the lie at the deposition since I already had evidence that proved he was lying. I told him "If officers stop lying I will be out of business." I further explained that I was not distressed by the lies because they would be our biggest asset at trial. After trial, the client, nearly 3 million dollars richer, was still incensed and appalled that a police officer lied under oath.

That attitude is common among jurors and that is why I call the defendant officer first, to foster that attitude among the jurors, to intensify it and to focus the trial on the defendant's deception.

A TIP:
ANTICIPATE DEFENSES AND ATTACK THEM
PREEMPTIVELY IN THE PLAINTIFF'S CASE

I have noticed that defense attorneys typically try to set up four defenses for offending officers and they are, generally speaking, along these lines:

1. I didn't do it.

2. If I did it, the plaintiff forced me to do it.

3. Even if the plaintiff did not force me to do it, I was authorized by law to do it. And

4. If I did it, and if the plaintiff did not force me to do it, and if I was not authorized by law to do it, you should not give the plaintiff any money because I am your protector and the plaintiff is a really bad person who only wants money.

You can count on seeing these "defenses" so plan to show the jury that none of them are valid. Frequently, I tell the jury to look for these defenses when I do opening statement.

ENDNOTES

1. Malice Green was a citizen of the U.S. City of Detroit, Michigan who died while in police custody after being arrested by Detroit police officers Walter Budzyn and Larry Nevers on November 5, 1992, during a traffic stop. Both officers were later convicted for Green's death. While Green's autopsy showed he had crack cocaine and alcohol in his system, the official cause of death was ruled due to blunt force trauma to his head. Green allegedly failed to relinquish a vial of crack cocaine, attempted to assault the officers, attempted to grab Nevers' gun and resisted arrest. Nevers struck Green in the head with his flashlight approximately a dozen times during the struggle which, according to the official autopsy, resulted in his death.

The Michigan Supreme Court granted a new trial for Walter Budzyn, mostly on the grounds of the showing of Malcolm X. Budzyn was immediately released from prison. He was retried, and on March 19, 1998, he was again found guilty of involuntary manslaughter, and in January 1999 the Michigan Court of Appeals reinstated his 4 to 15 year prison sentence. He had already served the minimum under the first conviction, and was released. Larry Nevers' 1997 appeal to the Michigan Supreme Court was denied. However, he was successful on his appeal to a Federal court, which overturned the verdict in 1999.

2.Amadou Bailo Diallo (September 2, 1975 – February 4, 1999) was a 23-year-old immigrant to the United States from Guinea, who was shot and killed on February 4, 1999, by four New York City Police Department plain-clothed officers: Sean Carroll, Richard Murphy, Edward McMellon and Kenneth Boss. The four men fired a total of 41 rounds. Diallo was unarmed at the time of the shooting, and a firestorm of controversy erupted subsequent to the event as the circumstances of the shooting prompted outrage both within and outside New York City. Issues such as police brutality, racial profiling, and contagious shooting were central to the ensuing controversy.
The shooting took place at 1157 Wheeler Avenue in the Soundview section of The Bronx. The four officers involved were part of the now-defunct Street Crimes Unit. All of the officers were exonerated by jury trial of any wrongdoing. Source: Wikipedia.