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"When Can I Tase Him, Bro?": Bryan v. McPherson and the Propriety of Police Use of Tasers

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CASE SUMMARY

"WHEN CAN I TASE HIM, BRO?": *BRYAN V. MCPHERSON* AND THE PROPRIETY OF POLICE USE OF TASERS

I. INTRODUCTION

In the United States, over 11,500 law enforcement agencies are testing or using Tasers[1] and other similar electric devices.[2] A Taser's "non-lethal" nature finds use when a firearm would not be prudent or reasonable but a simple verbal command would not suffice. Despite a Taser's apparent utility, news headlines continue to depict police officers across the country using Tasers inappropriately and unreasonably. For instance, in March 2009, a sixteen-year-old boy died after Detroit police used a Taser on him when the boy fled and resisted arrest after a routine traffic stop.[3] In June 2009, a police officer in Travis County, Texas, used a Taser on a seventy-two-year-old great-grandmother during a traffic stop.[4] In November 2009, a police officer in Ozark,

[1] A Taser is a handheld electrical device that can deliver an electric shock to an individual for the purpose of immobilizing the person.

[2] AMNESTY INTERNATIONAL, "LESS THAN LETHAL?" THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT 1 (2008), *available at* http://www.amnesty.ca/amnestynews/upload/AMR510102008.pdf; NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, STUDY OF DEATHS FOLLOWING ELECTRO MUSCULAR DISRUPTION: INTERIM REPORT 1 (June 2008), *available at* http://www.ncjrs.gov/pdffiles1/nij/222981.pdf.

[3] Abbie Boudreau & Scott Bronstein, *"No Excuse" for Teen's Taser Death, Mother Says*, CNN, May 28, 2009, http://www.cnn.com/2009/CRIME/05/28/michigan.taser.death.

[4] J.D. Tuccille, *Texas Cop Tasers Great-Grandmother*, CIVIL LIBERTIES EXAMINER, June 2, 2009, http://www.examiner.com/x-536-Civil-Liberties-Examiner~y2009m6d2-Texas-cop-Tasers-greatgrandmother.

Arkansas, used a Taser on a ten-year-old girl after she became unruly, combative, and eventually kicked the officer in the groin.[5]

Perhaps the most well-known Taser incident — and the source of the infamous one-liner, "Don't Tase Me, Bro!" — is the story of Andrew Meyer. On September 17, 2007, University of Florida student Andrew Meyer attended an on-campus speech given by Massachusetts Senator John Kerry.[6] Meyer was given permission to pose a question to Senator Kerry.[7] Meyer's inquiry turned into three questions.[8] After his series of questions, but before Senator Kerry could answer, two police officers approached Meyer from behind and attempted to escort him out the door.[9] Wondering why he was being arrested, Meyer exclaimed, "Excuse me, what are you arresting me for?"[10] When another officer appeared on the scene, the three officers moved Meyer toward the back of the auditorium.[11]

At the back of the auditorium, Meyer simultaneously attempted to move away from one of the officers who had him by the arms and proclaimed, "Get away from me!"[12] At this point, the group of officers pinned Meyer to the ground by the aisle.[13] A few moments later, when Meyer noticed one officer take out a Taser, he screamed, "Don't Tase me, bro! Don't Tase me! I didn't do anything!"[14] One of the officers used the Taser on Meyer, and Meyer was then escorted out of the auditorium and arrested for resisting a police officer and disturbing the peace.[15] Meyer spent

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[5] *10-Year-Old Is Tasered by Officer in Arkansas*, MSNBC, Nov. 18, 2009, http://www.msnbc.msn.com/id/34014497/ns/us_news-life.

[6] Monica Hesse, *Aiming to Agitate, Florida Student Got a Shock*, WASH. POST, Sept. 19, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091802115.html; *UF Student Tasered at Kerry Forum (New, Complete)*, YouTube, http://www.youtube.com/watch?v=r7Qef8oPmag (last visited Jan. 6, 2010).

[7] Hesse, *supra* note 6; *UF Student Tasered at Kerry Forum (New, Complete)*, *supra* note 6.

[8] Meyer asked Senator Kerry 1) why he had conceded the 2004 presidential race, 2) why President Bush had not been impeached, and 3) whether he was a member of Yale secret society Skull & Bones. Hesse, *supra* note 6; *UF Student Tasered at Kerry Forum (New, Complete)*, *supra* note 6.

[9] Hesse, *supra* note 6; *UF Student Tasered at Kerry Forum (New, Complete)*, *supra* note 6.

[10] Hesse, *supra* note 6.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Hesse, *supra* note 6; *UF Student Tasered at Kerry Forum (New, Complete)*, *supra* note 6.

the night in city jail and was released the following morning.[16] Meyer later apologized, and the charges against him were dropped.[17]

This incident is illustrative of the type of heavy-handed use of Tasers by police officers that has raised questions about excessive use of force and police immunity from lawsuits in Taser incidents. The U.S. Court of Appeals for the Ninth Circuit directly addressed these issues at the end of 2009 in *Bryan v. McPherson*.[18]

In *Bryan,* the Ninth Circuit set clear parameters as to when police officers can and cannot use Tasers and other similar electronic devices.[19] The court held that the use of the Taser by Officer Brian McPherson upon Carl Bryan was an "intermediate quantum of force,"[20] and this level of force can be justified only by strong governmental interests.[21] The Ninth Circuit held that, in this case, the governmental interest was only minimal.[22] Therefore, accepting Bryan's allegations as true for purposes of Officer McPherson's motion for summary judgment, the Ninth Circuit concluded that the use of the Taser against Bryan was unreasonable and he could proceed with his legal action against the police officer.[23]

This Case Summary begins by detailing the factual and procedural history of *Bryan*. Next, it outlines the "reasonable use of force" analysis of the Ninth Circuit as applied to Tasers. Finally, it concludes by briefly discussing the broad implications of *Bryan*, both for law enforcement and for every individual who may someday find himself or herself facing a police officer armed with a Taser.

II. FACTUAL AND PROCEDURAL HISTORY

In the summer of 2005, twenty-one-year-old Carl Bryan planned to drive his brother across Southern California, from

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[16] Hesse, *supra* note 6.

[17] *"Don't Tase Me, Bro" Student Won't Be Charged*, ASSOCIATED PRESS, Oct. 30, 2007.

[18] Bryan v. McPherson, 590 F.3d 767 (9th Cir. 2009).

[19] *Id.*

[20] The Ninth Circuit defined "quantum of force" as the type and amount of force used. *Bryan*, 590 F.3d at 772.

[21] *Id.* at 774.

[22] *Id.* at 780.

[23] *Id.* at 781.

Camarillo to Coronado.[24] However, his cousin's girlfriend accidentally took Bryan's car keys with her to Los Angeles.[25] So, before Bryan could begin his trip to Coronado, he had to make an early morning trek to Los Angeles to get the keys back.[26] Once Bryan obtained his car keys, he headed toward Coronado.[27] While on Interstate 405, Bryan was stopped by the California Highway Patrol (CHP) for speeding, and he was issued a speeding ticket.[28] This would not be Bryan's only encounter with law enforcement that day.

At approximately 7:30 a.m., Bryan's vehicle crossed the Coronado Bridge.[29] Officer McPherson of the Coronado Police Department was stationed at a nearby intersection to enforce seatbelt usage.[30] Officer McPherson stepped in front of Bryan's vehicle and signaled for the vehicle to stop.[31] According to the record, Bryan forgot to put on his seatbelt after the earlier incident with the CHP.[32] When Bryan realized why he had been stopped by Officer McPherson, he became increasingly angry with himself.[33] Due to his emotional state, Bryan did not answer Officer McPherson's question as to whether Bryan knew why he had been stopped.[34]

Officer McPherson then requested Bryan to turn down his radio and pull his vehicle to the curb.[35] Bryan complied with both of the requests.[36] Bryan's anger continued to increase and he hit his steering wheel and yelled several expletives to himself.[37] Once Bryan pulled his car to the curb and placed it in park, he stepped out of his vehicle.[38] Once outside the vehicle, Bryan was approximately twenty to twenty-five feet away from Officer

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[24] *Id.* at 770.

[25] *Id.* The drive from Camarillo to Los Angeles is approximately fifty-three miles. *See* http://maps.google.com (type in "Camarillo to Los Angeles, California" and click on "Search Maps") (last visited Apr. 14, 2010).

[26] *Bryan*, 590 F.3d at 770.

[27] *Id.*

[28] *Id.* at 771.

[29] *Id.*

[30] *Bryan,* 590 F.3d at 771.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Bryan,* 590 F.3d at 771.

[37] *Id.*

[38] *Id.*

McPherson, and he continued to yell expletives and gibberish at himself while hitting his thighs.[39] Officer McPherson testified that he told Bryan to remain in his car, but Bryan testified that he did not hear any such command.[40] There was also a dispute as to whether Bryan moved toward the officer. Officer McPherson testified that Bryan took "one step" toward him, while Bryan testified that he did not; the physical evidence supported Bryan's testimony in this point.[41] However, it was undisputed that Bryan did not verbally threaten Officer McPherson and was not attempting to flee.[42]

Then, without any warning, Officer McPherson shot Bryan with his Model X26[43] Taser gun.[44] A Taser probe was embedded in Bryan's upper left arm, and the electrical current immobilized him.[45] Bryan fell face first into the ground and fractured four teeth.[46] The fall also caused several facial contusions.[47]

Bryan was arrested after being taken to the hospital for treatment.[48] Bryan was charged with violating California Penal Code section 148 for resisting and opposing an officer in the performance of his duties.[49] But after a trial resulted in a hung jury, the state dismissed all charges against Bryan.[50]

Bryan sued Officer McPherson, the Coronado Police Department, the police chief, and the City of Coronado for excessive force in violation of 42 U.S.C. § 1983,[51] assault and

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Bryan*, 590 F.3d at 771.

[43] Model X26 is manufactured and sold by Taser International. *See* TASER X26, http://taser.com/products/law/Pages/TASERX26.aspx (last visited Jan. 6th, 2010).

[44] *Bryan,* 590 F.3d at 771.

[45] *Id.*

[46] *Id.*

[47] *Bryan,* 590 F.3d at 771.

[48] *Id.*

[49] *Id.* n.1.

[50] *Id.*

[51] 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

battery, intentional infliction of emotional distress, violation of California Civil Code section 52.1,[52] failure to train, and other related causes of action.[53] The U.S. District Court for the Southern District of California[54] granted summary judgment[55] to the City of Coronado and the Coronado Police Department on the basis of qualified immunity.[56] However, the district court determined that Officer McPherson was not entitled to qualified immunity.[57] The district court further found that a reasonable jury could find for Bryan and that a reasonable officer would have known that using the Taser on Bryan would cause pain from the electrical current and cause the fall onto the asphalt.[58] The district court concluded that it was clear to a reasonable officer that using a Taser on Bryan was unlawful.[59]

Officer McPherson appealed to the Ninth Circuit, arguing that he was entitled to qualified immunity because the "use of one single, properly-administered deployment of a non-deadly [T]aser to subdue a person behaving as violently and irrationally as Bryan was after Bryan repeatedly declined to follow orders is, as a

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equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (Westlaw 2010).

[52] California Civil Code section 52.1(a) provides as follows:

If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

CAL. CIV. CODE § 52.1(a) (Westlaw 2010).

[53] *Bryan,* 590 F.3d at 771.

[54] Bryan v. McPherson, 3:06-CV-01487-LAB (S.D. Cal. 2008).

[55] *See* FED. R. CIV. P. 56.

[56] *Bryan,* 590 F.3d at 771.

[57] *Id.*

[58] *Id.* at 772.

[59] *Id.*

matter of law, reasonable under the Fourth Amendment to the United States Constitution."[60] Accordingly, Officer McPherson requested that the Ninth Circuit reverse the district court's denial of his motion for summary judgment.[61]

"Qualified immunity" is a special immunity that protects governmental officers from a lawsuit, as distinguished from a defense only to liability.[62] But qualified immunity is available only if the governmental officer's conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[63] The Supreme Court has stated that "[q]ualified immunity balances two important interests–the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[64] The Court went on to hold that "[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact."[65]

For an officer to receive qualified immunity, a court must first "decide whether the facts that a plaintiff has alleged make out a violation of a constitutional right."[66] Then, "if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[67] If the official was acting within the scope of his or her discretionary authority, the burden then shifts to the plaintiff to show that the grant of qualified immunity is inappropriate.[68] A court must grant qualified immunity to a law enforcement officer unless the plaintiff can demonstrate that the facts, when viewed in the light most favorable to the plaintiff, establish a constitutional violation, and that the illegality of the officer's actions was "clearly established" at the time of the incident.[69]

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[60] Opening Brief of Appellants at 1, Bryan v. McPherson, 590 F.3d 767 (9th Cir. 2009) (No. 08-55622), 2008 WL 5410908.

[61] *Id.*

[62] Pearson v. Callahan, 129 S. Ct. 808, 815 (2009); Mattos v. Agarano, 590 F.3d 1082, 1086 (9th Cir. 2009).

[63] *Callahan*, 129 S. Ct. at 815.

[64] *Id.*

[65] *Callahan*, 129 S. Ct. at 815.

[66] *Callahan*, 129 S. Ct. at 815-16.

[67] *Id.* at 816.

[68] Oliver v. Fiorino, 586 F.3d 898, 905 (11th Cir. 2009) (citing *Callahan*, 129 S. Ct. 808, 808).

[69] *Id.* (citing *Callahan*, 129 S. Ct. at 815-16, 818).

III. NINTH CIRCUIT ANALYSIS

The Ninth Circuit's standard of review of a district court's denial of qualified immunity is de novo.[70] In evaluating the denial of qualified immunity by the district court, the court in *Bryan* organized its analysis around two distinct questions.[71] First, the court, taking the facts in the light most favorable to Bryan as the nonmoving party, had to determine whether Officer McPherson employed constitutionally excessive force upon Bryan.[72] If there was a constitutional violation, the second question was whether Officer McPherson violated Bryan's clearly established rights.[73] To affirm the denial of summary judgment, the appellate court had to answer both questions affirmatively.[74]

A. WHETHER OFFICER MCPHERSON EMPLOYED CONSTITUTIONALLY EXCESSIVE FORCE

The first question is governed by the 1989 Supreme Court case *Graham v. Connor*.[75] *Graham* held that a citizen's claim that law enforcement officials used excessive force in the course of making a seizure of the person is to be analyzed under the Fourth Amendment's objective reasonableness standard.[76] The Court

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[70] Bryan v. McPherson, 590 F.3d 767, 772 (9th Cir. 2009).

[71] *Id.*

[72] *Id.*

[73] *Bryan,* 590 F.3d at 772. 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." al-Kidd v. Ashcroft, 580 F.3d 949, 964 (9th Cir. 2009) (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

[74] *Bryan,* 590 F.3d at 772.

[75] Graham v. Connor, 490 U.S. 386 (1989).

[76] The facts of *Graham* are as follows:

> On November 12, 1984, Graham, a diabetic, experienced an insulin reaction. He asked his friend to drive him to a convenience store so he could purchase juice in an attempt to counteract the reaction. When Graham entered the store, he saw a line at the checkout, so he decided to leave the store and ask his friend to drive him to a friend's house instead. Officer Connor of Charlotte, North Carolina, observed Graham enter and leave the store in a hasty manner. Officer Connor became suspicious that something was amiss and followed Graham and his friend's car. At about half a mile from the store, the officer made an investigative stop. Graham tried to explain that he had an insulin reaction, but the officer ordered the two people in the car to wait while he tried to find out what, if anything, happened at the convenience store. While Officer Connor returned to the patrol car to call for backup, Graham got out of the car, ran around the car twice, and finally sat down on

identified a balancing test between the nature and quality of the intrusion on the individual's Fourth Amendment interests and the countervailing governmental interests at stake.[77]

Since the critical determination is whether the amount of force used in a particular seizure was "reasonable" under Fourth Amendment jurisprudence, the analysis requires careful attention to the facts and circumstances of the case.[78] *Graham* noted that, in analyzing the governmental interest involved, a court should consider "the 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."[79] *Graham* further held that the "reasonableness" of the use of force must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[80] Hindsight is not relevant to the analysis because police officers are "often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation."[81] Finally, the objectiveness of the analysis disregards the police officer's underlying intent or motivation.[82]

1. Nature and Quality of the Intrusion

The Ninth Circuit began its analysis of the first question by

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the curb, where he subsequently passed out for a brief moment. When backup arrived, one of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring the friend's plea to get Graham some sugar. The officers did not believe the friend and assumed Graham was drunk. The officers lifted Graham from the ground and placed him on the hood of a patrol vehicle. Graham regained consciousness and asked one of the officers to check his back pocket for a diabetic decal. The officer ignored his request, told Graham to "shut up," and shoved Graham's face onto the hood of the car. Four officers grabbed Graham and threw him head first into the patrol car. A friend tried to bring Graham some orange juice in the vehicle, but the officers refused to allow Graham to drink it. Finally, when Officer Connor received a report that Graham had done nothing wrong at the convenience store, the officers drove Graham home and released him. Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder. He also claimed to have developed a loud ringing in his right ear. Graham subsequently sued the individual officers pursuant to 42 U.S.C § 1983.

Graham, 490 U.S. at 388-90.

[77] *Graham*, 490 U.S. at 396.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Graham*, 490 U.S. at 397.

[82] *Id.*

looking at the quantum of force Officer McPherson used on Bryan.[83] Officer McPherson used the Coronado Police Department-issued Taser X26.[84] This model uses compressed nitrogen to propel a pair of electrical dart-like probes toward the person.[85] The probes are made of aluminum, and the tips of the probes are stainless-steel barbs.[86] The probes are connected to the firing unit by insulated wires.[87] The probes travel at a rate of about 160 feet per second.[88]

Tasers and stun-guns are considered "non-lethal."[89] As the quantum of force of "non-lethal" devices varies depending on the type of instrument used, the court compared and contrasted Tasers to other non-lethal uses of force.[90] For example, pepper spray affects only the target's eyes or respiratory system.[91] The pain caused by pepper spray is "intense . . . [and causes] an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx."[92] In contrast, the court in *Bryan* noted that the Taser X26 delivers a far more intense, body-wide, and immediate pain.[93] Further, a Taser will likely cause secondary pain when the target suddenly cannot control his or her muscles, resulting in a "sudden and uncontrolled fall."[94]

When Taser probes hit a person, the firing unit delivers a 1200-volt, low-ampere electrical charge through the wires to the probes and into the person's muscles.[95] The electrical current paralyzes the person's central nervous system and muscles throughout the body.[96] The target becomes "limp and helpless."[97] In addition, the target person experiences an "excruciating pain that radiates throughout the body."[98]

Bryan testified to the paralysis and the intense pain he

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[83] *Id.*
[84] *Id.*
[85] Bryan v. McPherson, 590 F.3d 767, 772 (9th Cir. 2009).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 773.
[90] *Id.* at 774.
[91] *Bryan,* 590 F.3d at 774.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 773.
[96] *Id.*
[97] *Bryan,* 590 F.3d at 773.
[98] *Id.*

experienced.[99] Further, when the Taser struck Bryan, he lost muscular control and fell face first onto the pavement.[100] He shattered his front four teeth and had several facial abrasions.[101] Also, one of the barbed probes remained in his body and required removal by a scalpel.[102] Based on these facts, the Ninth Circuit concluded that the Taser X26 and similar electric devices constitute an "intermediate or medium, though not insignificant, quantum of force."[103]

2. Governmental Interest in the Use of Force

After holding that a Taser constituted an intermediate quantum of force, the next step in the Ninth Circuit's analysis was to determine the government's interest in the use of that level of force. As previously stated, a court should use the *Graham* factors when determining whether the government's interest justifies the use of force. The *Graham* factors are: a) the severity of the crime at issue, b) whether the suspect poses an immediate threat to the safety of the officers or others, and c) whether he or she is actively resisting arrest or attempting to evade arrest by flight.[104] The Ninth Circuit cautioned, however, that the three *Graham* factors are not exclusive.[105] Instead, this analysis must encompass the totality of the circumstances of each case and take into account factors that might not have been listed in *Graham*.[106]

a. The Severity of the Crime at Issue

Officer McPherson originally stopped Bryan for a seatbelt violation, a traffic infraction punishable by a fine.[107] The court stated the general rule that "traffic violations generally will not support the use of a significant level of force."[108] But during the

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Bryan,* 590 F.3d at 774.
[104] *Bryan,* 590 F.3d at 775.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 777.
[108] *Bryan,* 590 F.3d at 777; Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009). Although the Ninth Circuit did not define what is a "significant level of force," one can posit that in this context, the Ninth Circuit is saying that normally, a routine traffic stop will not

traffic stop, Officer McPherson also believed that Bryan had potentially committed three misdemeanors: resisting a police officer,[109] failure to comply with a lawful order,[110] and being under the influence of a controlled substance.[111] However, the court concluded that, since none of these three misdemeanors was inherently dangerous, there was no substantial governmental interest in effectuating Bryan's arrest through the use of intermediate force.[112]

b. Whether the Suspect Poses an Immediate Threat to the Safety of the Officers or Others

The most important *Graham* factor is whether the suspect poses an immediate threat to the safety of the officers or others.[113] The Ninth Circuit agreed with the district court that Bryan's behavior was unusual, that Bryan appeared, and in fact was, unarmed, and that Bryan was shouting expletives and gibberish to himself.[114] However, Bryan never directed a physical or verbal threat to Officer McPherson.[115] At the time of the Taser incident, Bryan was approximately twenty feet away from the officer, and Bryan contended he did not advance toward Officer

present a situation where the police officer would need to use a level of force to have the person comply with the officer's commands.

[109] California Penal Code section 148(a)(1) provides as follows:

> Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

CAL. PENAL CODE § 148(a)(1) (Westlaw 2010).

[110] California Vehicle Code section 2800(a) provides as follows:

> It is unlawful to willfully fail or refuse to comply with a lawful order, signal, or direction of a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, when that peace officer is in uniform and is performing duties pursuant to any of the provisions of this code, or to refuse to submit to a lawful inspection pursuant to this code.

CAL. VEH. CODE § 2800(a) (Westlaw 2010).

[111] California Health & Safety Code section 11550(a) provides as follows: "No person shall use, or be under the influence of any controlled substance . . . ." CAL. HEALTH & SAFETY CODE § 11550(a) (Westlaw 2010).

[112] *Bryan,* 590 F.3d at 777.

[113] *Id.* at 775.

[114] *Id.*

[115] *Id.*

McPherson.[116] The Ninth Circuit concluded that, even if Bryan had taken a step toward Officer McPherson, an intermediate level of force would not have been justified, because Bryan would still have been about nineteen feet away from the officer.[117]

Further, when Officer McPherson confronted Bryan, he had un-holstered and charged his Taser X26, thereby readying himself for an immediate response to any changes in the circumstances.[118] Additionally, there was evidence that Bryan was actually facing away from Officer McPherson when the officer shot Bryan with the Taser.[119] The court noted that one of the electrical probes was lodged in the side of Bryan's arms rather than in his chest, indicating that Bryan was not directly facing Officer McPherson.[120] Furthermore, the blood on the pavement indicated that Bryan fell face-first away from Officer McPherson.[121] Accordingly, the Ninth Circuit concluded that, not only did Bryan appear to be no threat to Officer McPherson, but Bryan's behavior did not pose a threat to anyone else because there were no nearby pedestrians.[122]

The Ninth Circuit distinguished the circumstances in *Bryan* from those facing the officer in the Eleventh Circuit in *Draper v. Reynolds*.[123] In *Draper*, an officer pulled over the defendant's vehicle for an alleged tag light violation.[124] The officer requested four times that the defendant provide specific documents pursuant to a traffic stop.[125] However, the defendant ignored all four requests and became increasingly belligerent.[126] It was only after the fifth request was ignored by the "threatening" defendant that the officer concluded he had to discharge his Taser to protect himself and bring the defendant under control.[127]

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[116] *Bryan,* 590 F.3d at 775.
[117] *Id.* at 776.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Bryan,* 590 F.3d at 776 n.10.
[123] *Bryan,* 590 F.3d at 776; Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).
[124] *Reynolds*, 369 F.3d at 1273.
[125] *Id.*
[126] *Id.*
[127] *Id.*

c. Whether the Suspect is Actively Resisting Arrest or Attempting To Evade Arrest by Flight

The Ninth Circuit began the analysis of the third factor by cautioning that resistance is usually not purely passive or purely active.[128] The court stated that an example of "passive resistance" was when protestors remained seated and ignored police orders to move.[129] In comparison, an example of "active resistance" was when an arrestee swung a belt at an officer and "strenuously resist[ed]" as the police attempted to handcuff the individual.[130] But the court noted that, even in a situation in which an individual is purely passive in resistance, the use of some force upon that individual might be justified if the factual circumstances depict bellicosity toward the officer rising to the level of a threat.[131]

Here, the court found Bryan's behavior was not purely passive.[132] Bryan shouted expletives at himself and hit his thighs in apparent frustration with how his day had started.[133] However, Bryan complied with all of Officer McPherson's commands, except the one to remain in the vehicle, which Bryan claimed he did not hear.[134] The Ninth Circuit concluded that, although Bryan's behavior was "bizarre," his actions were not "bellicose" and were far from indicative of an intention to engage in an active struggle with the officer.[135] Since the reviewing court must view the facts in the light most favorable to the nonmoving party, the Ninth Circuit concluded that Bryan's conduct was not enough to constitute resistance.[136]

d. Two Additional Considerations Beyond the *Graham* Factors

Aside from the three *Graham* factors, the Ninth Circuit analyzed two additional factors that supported its conclusion that the officer's use of force was unreasonable.[137] The first was Officer McPherson's failure to warn Bryan that he would use a

[128] Bryan v. McPherson, 590 F.3d 778 (9th Cir. 2009).
[129] *Id.* (citing Forrester v. City of San Diego, 25 F.3d 804, 805 (9th Cir. 1994)).
[130] *Id.* (citing Abdullahi v. City of Madison, 423 F.3d 763, 776 (7th Cir. 2005)).
[131] *Id.* at 779.
[132] *Id.* at 778.
[133] *Id.*
[134] *Bryan,* 590 F.3d at 779.
[135] *Bryan,* 590 F.3d at 779.
[136] *Id.*
[137] *Id.*

Taser if Bryan did not remain in the car.[138] The court stated that there appeared to have been ample time for the officer to give such a warning if the officer had intended to do so.[139]

Second, the Ninth Circuit noted that police officers are required to consider alternative tactics to effectuate an arrest.[140] The alternative tactic the Ninth Circuit concluded Officer McPherson should have considered was the deployment of additional officers to control Bryan.[141] The court found that Officer McPherson knew other officers would arrive on the scene and that the presence of these additional officers would likely have transformed the situation into one that would not require the use of a Taser.[142] These two additional considerations significantly factored into the court's *Graham* analysis.[143] All five factors led the Ninth Circuit to hold that the government had, at best, a minimal interest in the use of force against Bryan.[144]

3. Balancing the Competing Interests

Once the court determined the level of force in the use of the Taser and the government's interest in that use of force, the final step was to balance these two competing interests. The court noted that, although Bryan's behaviors were unusual, he never attempted to flee.[145] He was unarmed.[146] He stood by his vehicle about twenty feet away from the officer.[147] He never advanced toward the officer, and evidence indicated that Bryan faced away from the officer.[148] Bryan was simply not an immediate threat to anyone.[149]

In addition, the court noted that Officer McPherson had his Taser charged and ready but he gave no warning to Bryan that he was going to fire his Taser for failure to comply with orders.[150]

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[138] *Id.*

[139] *Id.* at 780.

[140] Although this is a factor, it is not a challenge to the well-settled principle that police officers need not employ the least-intrusive degree of force possible. *Id.* at 780 n.15.

[141] *Bryan,* 590 F.3d at 780.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Bryan,* 590 F.3d at 780.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Bryan,* 590 F.3d at 780.

Further, Officer McPherson failed to consider the alternative tactic of waiting for backup before engaging Bryan.[151] The Ninth Circuit concluded that the intermediate force use by Officer McPherson upon Bryan was excessive compared to the governmental interests at stake.[152]

Even though the court in *Bryan* recognized the realities police officers face when confronting real situations, and acknowledged that those situations can often be tense, unpredictable, and require near-split-second decisions, it noted that this alone does not give officers unchecked authority to use force.[153] The court underscored that the relevant circumstances must be considered objectively, rather than from the officer's subjective point of view, in performing such an analysis.[154]

B. DID OFFICER MCPHERSON VIOLATE BRYAN'S CLEARLY ESTABLISHED RIGHTS?

After *Bryan* concluded that Officer McPherson used constitutionally excessive force, the court next addressed the second question of whether "at the time of the current incident . . . Officer McPherson could have reasonably believed his use of the [T]aser against Bryan was constitutional."[155]

Here, the Ninth Circuit reiterated the facts of the case to illustrate that Officer McPherson should have known that the use of intermediate force was unjustified.[156] The offense was a minor one.[157] There was no reason to believe Bryan was armed or dangerous.[158] Bryan was twenty feet away, and he did not confront or taunt Officer McPherson.[159] Further, there was evidence that Bryan was not even facing Officer McPherson when Bryan was shot with the Taser.[160] Therefore, the court concluded that Officer McPherson's use of an intermediate amount of force against Bryan did not constitute a reasonable mistake of either

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[151] *Id.* at 781.
[152] *Id.*
[153] *Id.* at 780.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Bryan,* 590 F.3d at 781.
[159] *Id.*
[160] *Id.*

fact or law that would have entitled him to qualified immunity.[161] Consequently, based on the intermediate level of force from the Taser and the minimal governmental interest in using the Taser, the Ninth Circuit affirmed the district court's denial of summary judgment and remanded the case for further proceedings.[162]

IV. IMPLICATIONS OF THE DECISION

The *Bryan* court synthesized several district-court rulings that Tasers constituted "significant force"[163] and labeled that force as an intermediate quantum of force.[164] The court proceeded to weave that level of force into an application of the general principle of excessive-force analysis: "[t]he force which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the *Graham* factors."[165]

Although courts will now have to engage in a case-by-case determination of whether particular instances of Taser usage are improper and whether officers using Tasers are entitled to qualified immunity, *Bryan* makes clear that there are several situations where police use of a Taser is likely to be unconstitutional. First, although *Bryan* dealt with a specific Taser Model, the X26, the Ninth Circuit stated its holding in broad terms applicable to "all controlled electric devices that cause similar physiological effects."[166] However, the officer used the "dart mode" of the Taser and fired the electrical darts at Bryan rather than using the less intense "stun mode."[167] *Bryan* left open the question whether the stun mode of a Taser or other similar electric device would be considered an intermediate quantum of force.[168]

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[161] *Id.* at 782.

[162] *Id.*

[163] *See* Sanders v. City of Fresno, 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008); Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137, 1144 (W.D. Wash. 2007).

[164] *Bryan*, 590 F.3d at 775.

[165] Headwaters Forest Def. v. County of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002) (quoting Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997)).

[166] *Bryan*, 590 F.3d at 772 n.2.

[167] *Id.* at 772-73.

[168] The Ninth Circuit recently decided another Taser case, *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010). The Ninth Circuit distinguished the stun-mode use of the Taser in *Brooks* with the dart-mode use of the Taser in *Bryan*, stating that there are "markedly different physiological effects." *Id.* at 1027. The majority concluded that the stun-mode use of the Taser is less than an intermediate quantum of force. *Id.* at 1028. But Circuit Judge Marsha Berzon filed a strong dissent, noting that in the Eighth Circuit, a single application of the drive-stun mode constituted excessive force. *Id.* at 1037. Judge Berzon also noted that although the Eighth Circuit "explained the difference between the

Second, *Bryan* indicates that minor offenses such as infractions or even nonviolent misdemeanors will not likely serve as proper basis for Taser usage.[169] Third, bizarre but non-threatening outbursts, such as Bryan's profanity and the hitting of his thighs, likely will not by themselves justify the use of a Taser.[170] Finally, police will not likely be able to use Tasers on non-resisting individuals.[171]

In light of the recent media attention to police officers' use of excessive Taser force, this decision should effectively set up strict guidelines for when police may use Tasers. Now that Tasers are clearly considered an intermediate quantum of force within the Ninth Circuit, their use can be justified only by a strong governmental interest. For cities within the Ninth Circuit's jurisdiction with Taser policies already in place, *Bryan* and its progeny will likely compel a wholesale review of those policies. For a city such as San Francisco, which does not currently have a Taser usage policy,[172] it will need to shape its policy within the parameters established by *Bryan*. In addition, law-enforcement agencies will likely provide more training to officers on the proper use of Tasers to help reduce the number of Taser-related injuries and fatalities and to minimize government and individual officer liabilities.

V. CONCLUSION

In *Bryan*, the Ninth Circuit made clear that the use of a Taser presents an intermediate use of force that is not justified unless there is a strong governmental interest at stake. The circumstances of this case indicated that, although Bryan was acting in a bizarre manner, he was not a threat to Officer McPherson or anyone else, and the intermediate use of force of the Taser was unconstitutionally excessive. Recent negative media attention related to law enforcement's improper use of Tasers has brought to light the tragic effect on victims, the costs to

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dart and drive-stun modes, the distinction played no role in the court's excessive force analysis." *Id.* (Berzon, J., dissenting) (citing to Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009)). This "split" within the Ninth Circuit could lead to an en banc review of the Ninth Circuit's excessive-force analysis as applied to the various uses of a Taser.

[169] *See Bryan,* 590 F.3d at 777.

[170] *See Id.* at 776.

[171] *See Id.* at 779.

[172] Jaxon Van Derbeken, *Gascón Presses Case for Tasers*, S.F. CHRON., Feb. 25, 2010, at C-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/02/24/BAVO1C6J7D.DTL.

the justice system, and other detrimental externalities. *Bryan* should provide the legal framework and the necessary incentive to diminish, if not completely eliminate, improper police use of Tasers.

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