



Broward County Chiefs of Police Association, Inc.

## ***Legal Update***

**Legal Advisor Committee**

Joel Cantor  
Capt. Mike Martinez  
954-967-4490

November 3, 2010

### The 9<sup>th</sup> and 11<sup>th</sup> CIRCUITS DENY QUALIFIED IMMUNITY FOR OFFICERS DEPLOYING TASERS

The 9<sup>th</sup> Circuit issued two (2) recent opinions regarding qualified immunity for officers accused violating the Taser Policy established by their respective employers. These two (2) recent opinions have somewhat conflicting rulings which may eventually reconcile before the United States Supreme Court. In Bryan v. Officer Brian McPherson and the City of Coronado Police Department, the 9<sup>th</sup> Circuit determined that Officer McPherson was not entitled to qualified immunity and could therefore face an individual judgment if a jury determined that the type and amount of force used against the Defendant was unreasonable. Officer McPherson deployed his X26 Taser upon Bryan following a traffic stop for a seatbelt violation and when the Taser was deployed, Bryan lost muscular control and fell, uncontrolled, face first into the pavement, shattering four of his front teeth and causing facial abrasions and swelling. Additionally, a barbed probe lodged in his flesh required hospitalization so that a doctor could remove the probe with a scalpel. The 9<sup>th</sup> Circuit determined that Bryan did not pose an immediate threat to Officer McPherson, was unarmed, and further scrutinized the underlying basis for the detention (seatbelt violation) in reaching its ruling.

In Malaika Brooks v. City of Seattle and Officer Steven Daman, the 9<sup>th</sup> Circuit determined that Officer Daman was entitled to qualified immunity when he deployed his Taser on Brooks who refused to sign a Notice of Infraction for a speeding violation and refused to leave her car, remaining inside the vehicle with the ignition running and the door shut. Although Brooks advised Officer Daman, among other individually named Officers, she was pregnant, the Officers employed a compliance technique to remove her from her vehicle. When Brooks braced and frustrated all of the attempts to remove her from her vehicle, Officers discharged their Tasers and were careful to deploy the Taser probes in areas away from Brooks abdomen. The 9<sup>th</sup> Circuit ruled that the Officers' deployment of their Tasers did not show excessive force and was consistent with their policy in light of the corresponding escalation of Brooks' resistance and the fact that it was the third tasing that extracted her so that Officers could gain control over her. Although the underlying traffic offense was not a factor in favor of finding the Officers' actions unreasonable, the fact that Brooks provided some level of resistance and was not ultimately injured as a result of being tased, worked in favor of the Officers maintaining their qualified immunity and avoiding the burden of individual liability.

Our own 11<sup>th</sup> Circuit Court of Appeals determined recently that Police Officers Fiorino and Burk of the Orlando Police Department were not entitled to qualified immunity in a claim of excessive force when they deployed their Taser at least eight and as many as eleven or twelve times upon Oliver who was not suspected of a crime at the time he was tased. Oliver continued to be tased several times while lying on the cement pavement in the middle of July, immobilized and clenched up. The 11<sup>th</sup> Circuit, in affirming that the Officers were not entitled to qualified immunity stated ".....though the initial use of force (a single Taser shock) may have been justified, the repeated tasing of Oliver into and beyond his complete physical capitulation was grossly disproportionate to any threat posed and unreasonable under the circumstance".