Law Enforcement Digest

October 2017

Law enforcement officers: Thank you for your service, protection and sacrifice.

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HONOR ROLL

754 Basic Law Enforcement Academy – June 17, 2017 through October 26, 2017

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Best Academic:	Officer Megan Johnson, Mountlake Terrace PD
Best Practical Skills:	Officer Christopher Whitney, Kennewick PD
Patrol Partner:	Officer Trent Dow, Auburn PD
Tac Officer:	Officer Matthew Ludwig, Tukwila PD
	Officer Paul Evers, Olympia PD

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NINTH CIRCUIT COURT OF APPEALS

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***BRADY*: PROSECUTOR VIOLATED *BRADY* BY FAILING TO DISCLOSE: (1) AN OFFICER OBSERVED BLOODY SHOEPRINTS AT THE CRIME SCENE BEFORE ANY OTHER OFFICERS OR FIRST RESPONDERS ARRIVED ON THE SCENE; (2) WITNESS' UNDERSTANDING THAT PROSECUTOR WAS CONSIDERING SPEAKING WITH THE SENTENCING JUDGE (IN THE WITNESS' SEPARATE CRIMINAL CASE) IN EXCHANGE FOR THE WITNESS' TESTIMONY AGAINST THE DEFENDANT; AND (3) THE VICTIM'S PRECISE DESCRIPTION OF THE ASSAILANT'S HAIR.**
Browning v. Baker, 871 F.3d 942 (September 20, 2017).

FACTS: (portions excerpted from the opinion):

In 1985, Hugo Elsen was stabbed to death during a robbery of his jewelry store. The police arrested Paul Browning for the murder. The prosecution charged Browning with several crimes including murder with a deadly weapon.

At the trial, the prosecutor called Randy Wolfe to testify. Randy lived in the same motel where Browning was staying. Randy testified that on the day of the murder, he found Browning in his apartment. Jewelry had been dumped on the bed. Browning told Randy that he thought he had killed someone, and planned to use the jewelry to get his girlfriend out of jail.

At the time of the trial, Randy had pending criminal charges. Randy pled guilty to a lesser charge and was released on his own recognizance (despite having 30 previous failures to appear for court). At trial, Randy testified that he did not receive anything in return for his testimony.

David Horn, an identification specialist, testified about the crime scene. Horn observed bloody tennis shoe-style shoeprints leading away from the corner where the victim was lying and towards the store's front door. Horn testified that the bloody shoeprints did not match the loafers Browning was wearing when he was arrested. But Horn also testified that paramedics and off-duty officers often wear tennis shows at crime scenes, so he did not think any further investigation into the shoeprints was necessary.

The defense called Officer Gregory Branon, who was one of the first two officers to arrive at the scene. Officer Branon testified that he received a description of the suspect as a black male with shoulder length "Jheri-curl type" hair. This description did not match Browning whose hair was a "four inch Afro with braids on top of it." During his testimony, Officer Branon did not identify who gave that description.

Browning was convicted on all charges and sentenced to death. After the trial, Browning discovered that the prosecution withheld several key pieces of evidence including: (1) Officer Branon was the first officer on the scene (before other officers or paramedics arrived) and had observed the bloody shoeprints; (2) the victim (while critically injured) told Officer Branon that the

assailant had shoulder length hair, which was "loosely curled and wet," and Officer Branon (who is African Amercian) used the term "Jheri curl" to describe the hair; and (3) Randy may have received a lighter sentence because of his testimony in the Browning trial.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

Browning filed a petition for a writ of habeas corpus in the United States District Court. Browning argued that the prosecutor violated *Brady* by failing to disclose exculpatory and impeachment evidence. The District Court denied the petition. Browning appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the District Court.

ANALYSIS: (portions excerpted from the opinion):

Under *Brady v. Maryland*, a prosecutor must disclose favorable and material evidence to the defense. Favorable evidence is exculpatory or impeachment evidence. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." When evaluating *Brady* claims, a court "must imagine that every piece of suppressed evidence had been disclosed, and then ask whether, assuming those disclosures, there is a reasonable probability that the jury would have reached a different result."

In this case, the Ninth Circuit found that the withheld evidence was material, and the prosecutor violated *Brady*. The Court reasoned:

(1) At trial, Horn testified that officers or paramedics could have left the bloody shoeprints (which did not match Browning's shoes). Had the prosecutor disclosed Officer Branon's observation that he was the first officer on the scene, and saw the shoeprints before other first responders arrived, Browning could have used that evidence to bolster his contention that the shoeprints were left by the real killer. This evidence disproves the prosecution's primary rebuttal against Browning's strongest piece of evidence that someone else killed the victim.

(2) Randy knew that the prosecutor might help reduce his sentence if he testified against Browning. Randy's expectation of a potential benefit in exchange for his testimony constituted impeachment evidence and should have been disclosed to the defense. This evidence adds a powerful reason to disbelieve Randy and his wife, the prosecution's most critical witnesses. They were the original accusers, the source of the alleged murder knife, and the source of Browning's alleged confession. It is fair to say that had the jury not credited their testimony, Browning would not have been convicted.

(3) Officer Branon testified that the assailant was described as having a "Jheri curl" hairstyle. Browning had an Afro hairstyle. During closing argument, the prosecutor contended that whoever gave this description to Officer Branon did not know the difference between a Jheri curl and an Afro. However, the victim did not use the word "Jheri curl." Rather, the victim told Officer Branon that the assailant's hair was "shoulder length," "loosely curled," and "wet." Officer Branon, who is African American, then interpreted those words to mean a Jheri Curl, and used that term in his report and testimony. Had the prosecutor disclosed before trial that the victim's description of the assailant's hair was not a "Jheri Curl," but "shoulder length," "loosely curled," and "wet," Browning could have easily refuted the prosecutor's argument that the witness did not know the difference between a Jheri Curl and an Afro.

(4) The prosecution's trial evidence was remarkably weak. Its case relied on flawed identifications and Randy's unreliable testimony. And the physical evidence was just as consistent with Browning having been framed as with him being the killer.

RESULT: The Ninth Circuit found that Browning is entitled to a writ of habeas corpus for the burglary, robbery, and murder with the use of a deadly weapon convictions.

CIVIL RIGHTS LAWSUIT: DEPUTIES ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED THAT: (1) TASING A LARGE, MENTALLY ILL MAN (LIKELY UNDER THE INFLUENCE OF DRUGS) WHO FOUGHT THE DEPUTIES, WAS EXCESSIVE FORCE; AND (2) USING DEADLY FORCE ON THAT MAN WHO BECAME ANGRY FROM THE TASING, ASSAULTED ONE DEPUTY TO THE POINT THAT THE DEPUTY WAS CLOSE TO PASSING OUT, AND THE MAN HAD SAID VOICES TOLD HIM TO KILL HIS WIFE, WAS EXCESSIVE FORCE.
Isayeva v. Sacramento Sheriff's Office, 872 F.3d 938 (October 2, 2017).

FACTS: (portions excerpted from the opinion):

Paul Tereschenko's family called the police and reported that he suffered from mental illness, heard voices in his head, and refused to move out of the house. Deputy A and Deputy B responded to the call. The deputies' dispatch readout described Tereschenko as "rambling" and "talking about random things," but stated that no weapons were involved.

When the deputies arrived at the residence, Tereschenko's family reported that Tereschenko was rambling and speaking nonsense; that he was mentally ill or possibly mentally ill; that they believed he was under the influence of methamphetamine; and that they did not think that he had any weapons. The family asked the deputies to remove Tereschenko from the house. After the deputies entered the house, another family member said that Tereschenko had stated that he wanted to kill his wife.

The deputies encountered Tereschenko with his wife in a bedroom. Tereschenko was considerably larger than the deputies. Tereschenko stood over 6 feet tall and weighed more than 250 pounds. In contrast, Deputy A is 5 foot 7 inches and 185 pounds, and Deputy B is between 5 foot 10 and 5 foot 11 inches and 195 pounds. Tereschenko's skin was pockmarked, he was sweating profusely, he spoke quickly, and he moved his hands rapidly. The deputies recognized these symptoms as indicating drug use, particularly methamphetamine use.

The deputies spoke with Tereschenko for about seven to ten minutes. Tereschenko said he was schizophrenic and had been in a mental institution. He asked the deputies to help him. After his wife left the room, Tereschenko got down on his knees and said "you're gonna have to shoot or kill me."

The deputies decided to take Tereschenko to a hospital for a 72-hour mental health evaluation. The deputies told Tereschenko that he was not under arrest, but they were going to take him to a hospital. Tereschenko said, "no, no."

At this point, there are some factual disputes on what happened next. The Ninth Circuit Court of Appeals summarized the following facts in the light most favorable to Tereschenko:

Deputy A thought Tereschenko was reaching for something, and grabbed one of his arms. Deputy B grabbed Tereschenko's other arm. Tereschenko stiffened his arms and tried to get his hands

free by pushing the officers and resisting Deputy B's attempt at a control hold. Both deputies told Tereschenko to stop resisting. The deputies struggled with the resisting Tereschenko who was tossing them around. Then, Deputy A tased Tereschenko in drive-stun mode for a five-second cycle.

The shock from the tasing caused Tereschenko to buck Deputy A into a wall. Tereschenko then turned to Deputy B, and pushed him backwards. Tereschenko was screaming like a wounded animal. He repeatedly hit Deputy A on the head, neck, and back. Deputy A was losing consciousness when he jumped backward onto the bed. Tereschenko continued to move towards him with balled fists in the air. Deputy B jumped on Tereschenko's back and tried to put him in a chokehold, but Tereschenko pushed him off. Deputy A yelled "Shoot him." With Tereschenko still moving towards him, Deputy A fired three shots, killing Tereschenko. Deputy A sustained cuts and bruises around his eyes, ears, and the base of his neck, as well as a minor head injury.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

Tereschenko's wife sued the deputies under 42 U.S.C. § 1983 (Section 1983). The lawsuit claimed that the deputies used excessive force in tasing and shooting Tereschenko, and violated his Fourth Amendment rights. The deputies moved for summary judgment based on qualified immunity. The District Court denied the motion by reasoning that material facts were in dispute. The deputies appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the District Court.

ANALYSIS: (portions excerpted from the opinion):

In a Section 1983 lawsuit, an officer is entitled to qualified immunity if: (1) the officer did not violate the plaintiff's constitutional rights; or (2) the plaintiff's constitutional right was not clearly established at the time of the incident. An unreasonable use of force violates a person's Fourth Amendment rights.

To determine whether an officer used unreasonable force, courts weigh the *Graham* factors: (1) the severity of the alleged crime; (2) whether the suspect posed an immediate threat to the officers' safety; and (3) whether the suspect was actively resisting arrest or attempting to escape. Courts may consider other factors such as whether the officer had available any less intrusive alternatives to the force used, whether the officer gave proper warnings before using the force, and whether it should have been apparent that the suspect was emotionally disturbed. The most important factor is whether the suspect posed an immediate threat to the safety of the officers or others.

In this case, the Ninth Circuit found that deputies' use of force did not violate clearly established constitutional rights.

First, the Ninth Circuit found that Tereschenko did not have a clearly established right violated by Deputy A's use of the taser. The Court reasoned:

(1) Tereschenko posed a greater and more immediate threat than suspects in other cases where the Ninth Circuit found an officer used unreasonable force. Tereschenko was engaged in a struggle with deputies, physically resisting them, and indeed was tossing them around. Deputy A also had reason to believe that Tereschenko was under the influence of drugs, which indicated that he might be less willing or able to control himself.

(2) Tereschenko's resistance posed a much greater threat to the deputies than suspects in other cases. Tereschenko was more than six-foot-tall and more than 250-pounds. The deputies who tried to detain Tereschenko were much smaller. This size disparity posed obvious risks of physical harm to the officers. Tereschenko was strong enough to toss the deputies around and frustrate their physical efforts to constrain him. Additionally, Tereschenko was likely under the influence of drugs.

Second, the Ninth Circuit found that Tereschenko held no clearly established right not to be shot by Deputy A. The Court reasoned:

(1) Deputy A shot Tereschenko while enmeshed in, and on the losing end of, a serious fight with an opponent who was bigger than Deputy A and possibly high on drugs.

(2) Deputy A took repeated blows to the head and was losing consciousness, giving him reason to believe that serious injury to himself or to Deputy B – or possibly to other family members in the house, including Tereschenko's wife standing just outside the door – could result if Tereschenko was not stopped.

(3) There are strong reasons to believe that Tereschenko posed a risk of death or serious injury to the officers or to the family members in the home. Tereschenko clearly had the upper hand in the fight. After being tased – which failed to immobilize Tereschenko – Tereschenko had succeeded in freeing both of his arms, in pushing Deputy B, and in pummeling Deputy A to the point that he began to pass out. Deputy B had tried without success to use a chokehold to subdue Tereschenko, but Tereschenko just threw him off. Tereschenko's repeated hits to Deputy A's head and face left the deputy with facial bruises and a minor head injury.

(4) Deputy A began to pass out when he was being beaten turned this dangerous fight into a potentially deadly one. If a police officer is knocked out during a struggle, it increases the risk to the officer and others because it gives the attacker an opportunity to hit the officer no longer able to defend himself, or grab the officer's gun. Had Tereschenko landed a few more blows before Deputy A fired at him, Tereschenko could have either beat him while defenseless, potentially causing serious injury, or gotten hold of his firearm.

(5) Tereschenko was likely under the influence of methamphetamine or some other drugs, and was possibly less able to control himself. Once Deputy A began to pass out, the possibility that Tereschenko might lack self-control to stop himself from seriously injuring or killing the deputies made the situation more dangerous. Tereschenko's earlier mention of voices in his head talking about family members killing his wife also raised the threat level. While the government interest in using deadly force is usually less strong when an individual is mentally ill, here Tereschenko's apparent mental condition led him to recount homicidal voices, and the knowledge of that fact would increase the perceived threat to any reasonable officer.

(6) Deputy A yelled "Shoot him" before firing, and there is no reason to think that Tereschenko did not hear the deputy. These words gave notice to Tereschenko that more struggle could result in gunshots, making Deputy A's use of force more reasonable.

(7) Deputy A had no reasonably effective alternative to deadly force. Using physical force against Tereschenko plainly did not work; the officers were quickly losing in hand-to-hand combat. Deputy A had already tried tasing Tereschenko, and it seemed to only make Tereschenko more angry and aggressive. Escaping and calling for backup was not a practical option. Being close to unconsciousness, Deputy A likely could not escape himself, and if Deputy B tried to leave the room. Deputy A would have been left alone in serious danger.

RESULT: The Ninth Circuit found that the deputies were entitled to qualified immunity and reversed the District Court's denial of the deputies' motion for summary judgment.

CIVIL RIGHTS LAWSUIT: PRISONER HAS A CLEARLY ESTABLISHED FIRST AMENDMENT RIGHT TO THREATEN TO FILE A CIVIL LAWSUIT; AND A PRISONER HAS A FIRST AMENDMENT RIGHT TO THREATEN TO FILE (OR ACTUALLY FILE) A CRIMINAL COMPLAINT AGAINST PRISON OFFICIALS PROVIDED THAT THE COMPLAINT IS NOT BASELESS.
Entler v. Gregoire, 872 F.3d 1031 (October 6, 2017).

FACTS: (portions excerpted from the opinion):

John Thomas Entler is a prisoner. During the summer of 2012, he took issue with certain incidents at the prison and submitted written complaints to the prison officials involved. In all but one, he threatened to file a civil lawsuit if the prison did not address his concerns. In the other complaint, he threatened to file a criminal complaint against a number of state officials and have them arrested. The prison disciplined Entler for these threats under a prison regulation that prohibits prisoners from intimidating or coercing prison staff.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

Entler filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the prison officials alleging that the discipline violated his First Amendment rights. The prison moved the District Court to dismiss the action. The District Court granted the motion based on qualified immunity. Entler appealed to the Ninth Circuit Court of Appeals.

ANALYSIS: (portions excerpted from the opinion):

Prisoners have a First Amendment right to file prison grievances, and to pursue civil rights litigation in the courts. The form of the grievance or complaint (oral or written) has no constitutional significance. A prisoner's threat to sue officials (like the right to file prison grievances) is protected by the First Amendment.

In a Section 1983 lawsuit, a public official is entitled to qualified immunity if: (1) the official did not violate the plaintiff's constitutional right; or (2) the constitutional right was not clearly established at the time of the incident.

In this case, the Ninth Circuit found that Entler's First Amendment right to threaten to sue prison officials was clearly established in 2012. As such, the prison officials were not entitled to qualified immunity for Entler's threats to initiate civil litigation.

The Ninth Circuit found also found (as a matter of first impression) that both the filing of a criminal complaint by a prisoner, as well as the threat to do so, are protected by the First Amendment, provided they are not baseless. However, that right was not clearly established in 2012, and the prison officials were entitled to qualified immunity.

RESULT: The Ninth Circuit reversed the District Court's dismissal of Entler's First Amendment claims based on his right to threaten to sue prison officials, and affirmed the District Court's dismissal of Entler's First Amendment claims based on his right to threaten to file criminal complaints against prison officials (because that right was not clearly established in 2012).

CIVIL RIGHTS LAWSUIT: OFFICER NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW IS CLEARLY ESTABLISHED THAT PEPPERSPRAYING A WOMAN IN RETALIATION FOR HER RUDENESS IS EXCESSIVE FORCE.
Morales v. Fry, __ F.3d __, 2017 WL 4582732 (October 16, 2017).

FACTS: (portions excepted from the opinion):

Maria Morales attended the May Day protests in Seattle. Police officers formed a "bike perimeter" on Pike Street to create a zone where a person who was arrested earlier could be safely moved to a transport van.

Officer A asked Morales to move away from the street so that he could place his bicycle on the sidewalk as part of the perimeter. When Morales did not appear to hear him, he placed his right hand on her left shoulder to gain her attention. Officer A testified that Morales pulled her arm away from his and abruptly said, "Get your fucking hand off of me" before stepping back. Officer A then lost sight of Morales.

Morales followed other people who were moving single file between the wall and bike perimeter. The way was narrow and Morales testified that she needed to turn Officer B's protruding bicycle handlebar to the side to create room to pass. Officer B testified that she simultaneously perceived what felt like a punch to her chest. Seeing Morales closest to her, Officer B believed that Morales had punched her. Officer B yanked Morales headlong over the bike, causing Morales to fall on her back on top of other bikes within the bike perimeter zone.

Several officer held Morales, and she briefly lurched off the ground to her feet. At this point, Officer B, who had not been involved in subduing Morales, discharged pepper spray into her eyes for approximately one quarter of a second.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

Morales filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the officers. A jury found for Morales on her excessive force claim against Officer A, but not on her unlawful arrest and excessive force claims against Officer B. Officer A moved for judgment as a matter of law based on qualified immunity. The District Court denied that motion. Officer A appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed with the District Court.

ANALYSIS: (portions excerpted from the opinion):

In a Section 1983 lawsuit, an officer is entitled to qualified immunity if: (1) the officer did not violate the plaintiff's constitutional rights; or (2) the plaintiff's constitutional rights were not clearly established at the time of the incident.

In this case, the Ninth Circuit found that Officer A was not entitled to qualified immunity because he violated Morales' clearly established rights not to have pepper spray used to intimidate or retaliate against her. The Court reasoned:

(1) The jury could have reasonably decided that Officer A's use of the pepper spray against Morales was retaliatory.

(2) Officer A testified that several minutes before the incident between Officer B and Morales, he had placed a hand on her shoulder while informing her that she needed to move in a certain direction. Morales responded with something to the effect of "Get your fucking hand off of me."

(3) Officer A testified that he lost track of Morales but recognized her when she got back onto her feet after being pulled over the bike by Officer B. The jury could have believed that, having recognized Morales from the earlier encounter, Officer A intentionally pepper-sprayed her in retaliation for her earlier rudeness, and then claimed that he discharged the pepper spray accidentally.

(4) Intentionally pepper-spraying Morales for no legitimate law enforcement reason is an "obvious case" of excessive force.

RESULT: The Ninth Circuit affirmed the District Court's decision that Officer A was not entitled to qualified immunity.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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