

# The Local Government LIABILITY BEAT



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## UNITED STATES COURT OF APPEALS DISTINGUISHES USE OF FORCE (TASER™) ON PERSONS OF DIMINISHED CAPACITY

*By Jack Ryan, Attorney, PATC LLRMI*

The United States Court of Appeals reviewed a lawsuit against Albuquerque officers who used a TASER™, largely in the pure “drive-stun” mode in their attempt to subdue a subject on a well-being check. The court found against the officers and noted in their decision the distinction between use of force during a well-being check versus use of force during an arrest.<sup>1</sup>

The court outlined the facts as follows:

On March 21, 2011, Merlinda Perea called 911 and told the operator that her son, Perea, was on “very bad drugs” and that she was afraid of what he might do. Around the same time, a neighbor also called 911, reporting that Perea was pacing in his yard, clutching a Bible, and asking forgiveness of a higher power. [Officers] Baca and Jaramillo were sent to perform a welfare check. The officers were informed that they were responding to a verbal fight and that no weapons were involved. They were also informed that Perea suffered from mental illness and may have been on drugs.

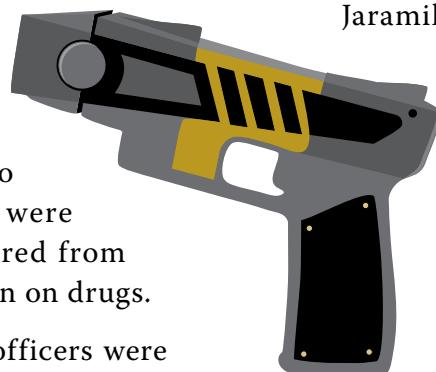
Upon arrival at the home, the officers were told that Perea recently left on his bicycle,

that he was “acting up,” and that Merlinda Perea was afraid for Perea’s welfare. In separate patrol cars, Baca and Jaramillo began to search for Perea in case he was a danger to himself. The officers located Perea pedaling his bicycle. Perea saw the patrol car and began to pedal faster, at which point Jaramillo turned on his emergency lights. According to Baca, Perea did not stop, and instead pedaled through a stop sign without slowing down.

The officers used their patrol cars to force Perea to pedal into a parking lot. Jaramillo left his vehicle to pursue Perea on foot. After a brief chase, Jaramillo pushed Perea off his bicycle. The officers did not tell Perea why they were following him or why he was being seized, and they never asked Perea to halt or stop. After pushing Perea off his bicycle,

Jaramillo reached for Perea’s hands in an attempt to detain him. Perea struggled and thrashed while holding a crucifix.

After Perea began to struggle, Baca told Jaramillo to use his taser against Perea. Jaramillo complied and first shot Perea in the chest with his taser on “probe” mode. Probe mode



is used to subdue an intended target through electric shocks designed to cause immobility. When the initial shot proved ineffective, Jaramillo put the taser in “stun” or “contact” mode, which is used to gain the target’s compliance through the administration of pain. Jaramillo tasered Perea nine additional times, for a total of ten taserings in less than two minutes. At some point before the taserings stopped, Baca and Jaramillo were able to get Perea on the ground on his stomach, with both officers on top of him, effectively subduing him. After the taserings had concluded, Baca called an ambulance and a field supervisor to the scene as required by the Albuquerque Police Department taser policy.

While waiting for the ambulance, the officers noticed that Perea had stopped breathing and was turning gray. The officers successfully performed CPR, and Perea began to breathe normally. However, when Perea heard the sirens from the approaching ambulance, he began to struggle and started to scream and ask God for forgiveness. Upon arrival, the paramedics attempted to treat and calm Perea, but he stopped breathing again and his pulse stopped. Perea was transported to the hospital and pronounced dead a short time later.

In its review of the case, the United States Court of Appeals first noted that the repeated TASER™ deployments against Perea after he was subdued was a violation of the Fourth Amendment as excessive force. The court indicated that a repeated TASER™ deployment against a subdued misdemeanor was a disproportional use of force.

As many other courts have done recently, the court noted that there is a distinction between use of force during an arrest which is different where, as here, officers are performing a welfare check.

In applying the three factor Graham test, the court noted that pedaling through a stop sign,

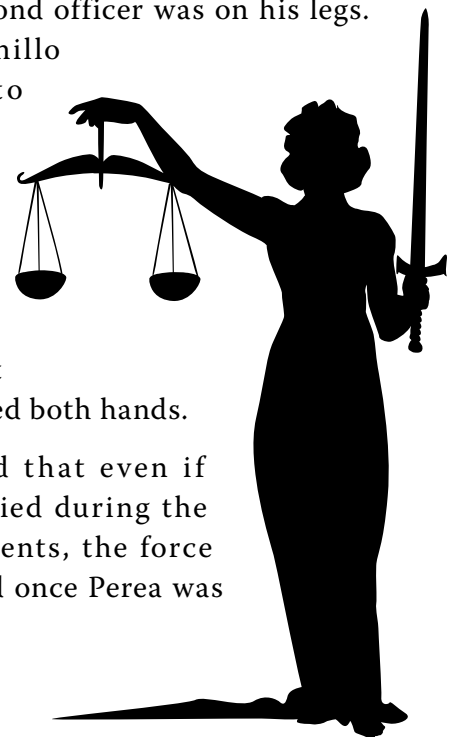
Perea’s only offense at the outset, was minor. Secondly, the officers did not indicate that Perea posed a threat to anyone but himself prior to the interaction. The court indicated that the third factor was an issue because of Perea’s resistance to the officers; however the court noted that the officers’ response to that resistance had to be “reasonable and proportionate given Perea’s resistance.”

The court held that “Perea’s resistance (thrashing and swinging a crucifix) did not justify the officers’ severe response.” While the court acknowledged that some force was justified during Perea’s initial resistance, a jury could find that the continued use of the TASER™ once Perea was subdued was unreasonable.

The court noted:

[T]he situation was not static over the course of the ten taserings. When Officer Jaramillo first engaged the Taser, he shot Mr. Perea in the chest. At the time, Mr. Perea was trying to ward off the officers with his crucifix . . . At some point, however, Mr. Perea fell and the officers pushed him to the ground with his arms under his body. One officer was on “the upper part of his body” while the second officer was on his legs. Officer Jaramillo continued to taser Mr. Perea in the back again and again until he pulled his arms out and handcuffed both hands.

The court held that even if force was justified during the initial deployments, the force was not justified once Perea was subdued.



Having found a violation of the Fourth Amendment, the court went on to find that the law was clearly established at the time and thus the officers were also denied qualified immunity.

*Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*

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## Citations

- i. Perea v. Baca, slip opinion No. 14-2214 (10th Cir. April 4, 2016).

## COMING TRAINING: CONTRACTS FOR LOCAL GOVERNMENTS

ACCG and GMA, through LGRMS, will be holding a six-hour contracts class for local governments that is focused on local government contracting, practice pointers, risk transfer, risk mitigation, indemnity, and technical compliance. Formulating, preparing, reviewing and ultimately approving local government-related contracts can involve an often-complex mix of practical considerations, objective-driven criteria, and legal requirements.

This course will cover all of that ground, starting with clear and easy to understand practical advice to aid in preparing meaningful agreements, combined with a significant legal element to assist in ensuring all statutory and case law-driven elements are included within your agreements. Layered on top will be meaningful, day-to-day guidance to ensure contracts will perform in the manner intended while otherwise protecting and shielding your local government from risk and unintended consequences. A notebook of pertinent material will be made available that can be used as a day-to-day resource in reviewing contracts for statutory compliance, risk abatement, indemnity, and state and

federal rules regarding the legal status of those with whom your agency is transacting business. This course is geared toward city or county managers, administrators, elected officials, constitutional officers, city/county attorneys and anyone who either develops contracts or oversees contract compliance or contractor activities.

Our presenter will be Ken Jarrard, attorney with the law firm Jarrard and Davis. Mr. Jarrard is a member of the State Bars of Georgia and Tennessee and is admitted to practice in all state and federal courts in Georgia, including all federal districts, the Eleventh Circuit Court of Appeals, the Georgia Court of Appeals, and the Georgia Supreme Court. Mr. Jarrard is a cum laude graduate of the University of Tennessee College of Law.

To register, go to [LGRMS.com](http://LGRMS.com) and click the training calendar tab at top, which will take you to the online registration form, or contact Shamilla Jordan ([sjordan@gmanet.com](mailto:sjordan@gmanet.com)).

## Course Dates and Locations

July 19	Cornelia, Habersham County
July 20	Cartersville, Bartow County
August 2	Tifton, Tift County
August 3	Statesboro, Bulloch County



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*This Month:*

**USE OF FORCE AND DIMINISHED CAPACITY**



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