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# Non-Lethal Weapons & Misuse

## COUNTY LAW UPDATE

by Mike Rainwater on 05/10/05

**When a non-lethal weapon is misused, that misuse becomes the use of *excessive* force (which is unconstitutional).**

**Non-Lethal Force Can Be Excessive Force:** In *Deorle v. Rutherford*, 242 F.3d 1119 (9<sup>th</sup> Cir. 2001), the Court ruled that cloth-cased shot, commonly called a “beanbag” round: i) “constitutes force which carries a significant risk of serious injury,” ii) “is not to be deployed lightly,” and iii) “is to be used only when a strong governmental interest compels the employment of so high a degree of force.” The Court noted that the “beanbag” euphemism “grossly underrates the dangerousness of this projectile. By Rutherford's own admission, the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet.” Also by Rutherford's own admission, “[t]he target area for lethal capabilities would probably be the facial area.... If it impacted at the heart it could stop the heart or possibly tear a vital artery.” Rutherford shot at Deorle's torso from thirty feet: the round hit Deorle in the head and removed his left eye and lodged pieces of lead shot in his skull.

**Misuse of a Non-Lethal Weapon is Excessive Force:** In *Deorle*, the Court noted that it was undisputed that officer Rutherford was properly trained in the use of “cloth-cased shot.” Furthermore, the Court acknowledged that the cloth-cased shot “appears to fall short of deadly force” because “[t]he shot is not like a regular bullet--it does not normally rip through soft tissue and bone on contact with the human body. It is designed to knock down a target, rendering the individual incapable of resistance, without (in the normal course of deployment) resulting in death.” Nonetheless, the Court found that the use of cloth-cased shot constitutes force which carries a significant risk of serious injury and, when misused, becomes the use of *excessive* force (which is unconstitutional).

**Use Only Degree of Defensive Force Needed to Meet Offensive Force:** “The force which is applied must be balanced against the need for that force.” *Liston v. County of Riverside*, 120 F.3d 965, 976 (1997). *See also Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9<sup>th</sup> Cir.1994). The officer's actions are measured by the standard of objective reasonableness, *Graham*, 490 U.S. at 397, 109 S.Ct. 1865. The reasonableness of the force used to effect a particular seizure is determined by “careful[ly] balancing ... ‘the nature and quality of the intrusion on the individual's Fourth Amendment interests’ against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

**Objective Reasonableness Required:** All claims that law enforcement officials have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other “seizure” of a free citizen are analyzed under the Fourth Amendment’s “objective reasonableness” standard. The 4<sup>th</sup> Amendment “reasonableness” inquiry is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The “reasonableness” of a particular use of force must be judged from the perspective of a *reasonable* officer on the scene. *Graham v. Connor*, 490 U.S. 386 (1989).