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TO: MEMBERS OF SENATE GOVERNMENT OPERATIONS COMMITTEE

FROM: ROBERT APPEL, ATTORNEY 

RE: H. 225—RELATING TO A STATEWIDE POLICY ON THE USE OF AND TRAINING REQUIREMENTS FOR ELECTRONIC CONTROL DEVICES (ECD)

DATE: APRIL 9, 2014

The Bill as Passed by the House, if Enacted, Would Eviscerate the Principle Embedded in the Title of the Bill; that is, There Would Be No Guarantee of a Meaningful and Consistent STATEWIDE Policy on the Use of, and Training Requirements, for the Use of Electronic Control Devices.

I have followed this issue very closely since Vermont law enforcement agencies began to purchase ECDs for their officers. The reason for my interest is that these so-called “less lethal” weapons are deployed disproportionately at persons with disabilities, primarily those with psychiatric issues. I presently represent Rhonda Taylor in her efforts to seek justice. Ms. Taylor is the mother of Macadam Mason, the Thetford resident who died almost immediately after being Tased in the chest by a state police officer. The officers on the scene had been informed that Mr. Mason had a history of both seizure disorder (including having seizures the evening before his death) and facing mental health challenges. Despite the reality that Mr. Mason was unarmed and at a considerable distance from the officer who perceived him to be a threat, Trooper Schaffer fired his weapon at Mr. Mason’s chest. Eyewitnesses report that Mr. Mason’s eyes immediately rolled back in his head. He apparently expired on the scene although he was subsequently pronounced dead at Dartmouth Hitchcock. The New Hampshire Medical Examiner classified his death as a homicide, “a medical rather than a legal term.”

The death of Mr. Mason prompted both a criminal investigation which resulted in no charges being filed against the officer involved, as well as protracted debate about the advisability of arming Vermont police officers with Tasers. As you likely know, the Law Enforcement Advisory Board (LEAB) developed a proposed policy on Taser use which was then withdrawn in the late fall due to the stated concerns of many stakeholders that the proposed policy did nothing more than essentially codify current practice. Such an approach does not protect either the public or the police in that clear guidance remains sorely lacking.

The bill as passed by the House merely defers policy development to the LEAB which has already demonstrated difficulty in producing a viable policy. In addition, H. 225 does not require that this ECD policy go through the Administrative Procedures Act complete with its requirement of public input and legislative review. (By contrast, in §2367(b) of the bill on page 3, the Criminal Justice Training Council is direct to engage in rulemaking.) Without a meaning mandate complete with auditing of performance and imposition of sanctions for non-performance for ALL police agencies to adopt state-wide uniform policies, not only on the use of ECDs but also on the use of force generally, I fear that we

will continue to read headlines about tragic consequences of unarmed citizens being “tased” and/or shot without adequate provocation. A prototype to support my concern is the Bias-Free Policing (BFP) Model Policy that was promulgated by the AG’s Office. However, now two years later, we have no data on how many of the 74 police entities in the state have adopted a policy that is at least as stringent as the model policy as was required by statute. This challenging issue of tracking compliance of the BFP Policy is presently being considered by the House Judiciary Committee.

That said; let me address my comments to the specific components of H. 225:

Sec 1.—20 V.S.A. §2367(2)(A)(i) proposes to authorize the use of an ECD:

in response to an actively resisting subject, if there is reason to believe that using another compliance technique will result in a greater risk of injury to the officer, the subject or a third party.

This language would likely legitimize the fatal use of the Taser in Mr. Mason’s death as he was arguably “actively resisting” by his failure to remain prone on the ground pursuant to the officers shouted commands. There is no consideration or discussion in the bill of the difference between active and passive resistance, which frequently may arise in civil disobedience actions where suspects may decide not to go limp and allow arrest (passive), but rather go rigid (active). Under the provisions of H. 225, the police would be fully authorized to deploy whatever force they believe necessary (including the use of so-called “less lethal” ECDs) to effectuate an arrest given the potential risk of injury (however minor or insignificant) to officers, the subject or members of the public.

I support the alternative language that has been proposed culled from the US Supreme Court decision in *Graham v. Conner* that states that:

(2)(A) Officers may deploy an electronic control device if necessary to reduce an immediate threat of serious injury or expected death to the subject, officer, or others;

Other issues regarding the use of ECDs that are not addressed in H.225 include:

- Regular measurement of the Taser electrical discharge to ensure the weapon is functioning within manufacturer’s specifications.
- Use of cameras by police when they are using Tasers (Taser International CEO Rick Smith supported their use in his testimony to the House Government Operations Committee).
- Some meaningful citizen review of the use of ECDs or other uses of force to ensure that the promise contained in Chapter I, Article 6 of the Vermont Constitution (below) is fully realized.

That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.

I do not support this bill in its present form as if passed, the issue will not likely be revisited by the Legislature for years and Vermont will be saddled with the unfortunate *status quo*. I request an opportunity to testify before your committee takes action on this very important bill. Thank you for your consideration of the information and suggestions contained in this memorandum and of my request to address your committee personally.