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AMERICAN CIVIL LIBERTIES UNION of VERMONT

Testimony by Allen Gilbert, executive director, ACLU-VT, on H. 225, Taser regulation bill, April 9, 2014

H. 225 as passed by the House is deficient and needs work. Most importantly, the standard for when Tasers can be deployed must be changed. If the standard isn't changed, the lawsuits and the "Lawful But Awful" cases documented in the ACLU's Taser research will continue. H. 225 is simply not an acceptable bill in its present form.

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H. 225 is a bill whose roots go back to an incident that happened in June 2012, the fatal Taser shooting by a Vermont state trooper of Macadam Mason in Thetford. The shooting was immediately defended by Department of Public Safety officials and the governor. In January 2013, the shooting was formally deemed "justified" by the attorney general; no charges would be brought against the officer. The New Hampshire medical examiner who did the autopsy after the shooting said the death was attributable to cardiac arrest caused by the Taser shock. Such determinations are rare.

A carefully constructed Taser regulation bill was introduced Feb. 8, 2013, in the House and sent to the Government Operations Committee. The bill had 32 sponsors, from across the political spectrum – all three parties, plus independents. The goal of the bill was to make sure Taser misuse stopped and that another death like Mason's wouldn't occur. The bill's provisions were straightforward and fair.

The bill sat in committee for 13 months. The ostensible reason was to wait to see what a Taser review panel convened by the attorney general would recommend. The panel was created by the attorney general after he had issued his report clearing the trooper who had Tased Mason. The panel's purpose was to receive information from a variety of sources and to make recommendations to the attorney general regarding the use of Tasers, best practices for training and policies, and any other related issues.

The panel came up with several recommendations. The attorney general decided to hand those recommendations to the state's Law Enforcement Advisory Board, a body created in 2004 to try to coordinate police activities. The board is made up almost entirely of law enforcement officials.

The LEAB worked in the fall of 2013 to draft a model Taser use policy. When the policy was unveiled in December of 2013 it was met with sharp criticism from the advocates who had criticized police handling of the Mason case and some of whom had served on the attorney general's review panel.

The chief complaint was that the LEAB policy merely codified existing Taser use policies. LEAB members acknowledged that was indeed how they had written the policy – they had collected current Taser use policies from the state's police departments and melded them together. No effort was made to answer the question, How can we make sure another death like Macadam Mason's doesn't occur?

Advocates' hopes that a meaningful reform policy would be developed were based on the Taser regulation bill that had been introduced, as well as comments the attorney general had made going back to 2007, when he and then-Gov. Jim Douglas expressed concern about Taser use in two incidents in Brattleboro.

The Taser regulation bill said that Tasers shouldn't be used except when deadly force was justified or when the Taser would reduce an imminent risk of a person's death through self-harm.

The attorney general had also said as much as early as 2007. Mr. Sorrell said in an Aug. 14, 2007 Vermont Public Radio interview that appropriate situations for Taser use were when "the police or innocent bystanders or perhaps even the person who's Tased is in immediate danger of death or serious bodily injury." After a review of the Brattleboro incidents, the attorney general determined that the police had used their Tasers inappropriately; in the case of the protestors, they had used Tasers like "cattle prods to inflict pain" on them.

Hopes for H. 225 diminished when the bill, with input only from law enforcement, was redrafted this year to fit law enforcement desires to retain current standards around Taser deployment. The revised bill was quickly reviewed by the House Government Operations Committee March 12 and voted out the same day, in time to meet crossover. A few minor changes were made when the bill came to the House floor. But the bill passed by the House is largely the bill as redrafted by law enforcement. It doesn't reflect the goal of the original H. 225.

And the redrafted bill also ignored ideas heard during public hearings before the LEAB – ideas such as requiring the measurement and calibration of Tasers' electrical charge, and establishing citizen review panels to review a department's use of Tasers. The committee also rejected a suggestion that officers using Tasers should also be using cameras. That was a suggestion endorsed by the CEO of Taser International himself, Rick Smith, when he flew from Scottsdale, Arizona, on Feb. 20 to visit with the committee. Smith said that recording officers' actions can reduce Taser abuse.

If the deployment standard in H. 225 is not changed, Taser misuse will continue and the lawsuits will continue to pile up. Here's why.

Tasers are powerful weapons that should only be deployed in unusual circumstances. The manufacturer originally termed them "non-lethal," but had to revise the designation to "less-

lethal" following numerous fatal incidents. Given the weapon's power, the most important aspect of Taser use is establishing the threshold before they can be deployed.

As I've noted, the standard in the bill as passed by the House codifies the deployment standard that police currently use. The LEAB's adoption of this standard was one of the most hotly contested issues during public hearings before the LEAB this fall and winter. The reason is because the language sets a very low threshold for deployment. The language reads, at § 2367 (a)(2)(A)(i-ii) on Page 1 of the bill:

> *(2)(A) Officers may deploy an electronic control device:*
> *(i) in response to an actively resistant 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;*
> *(ii) in response to an assaultive subject when lethal force does not appear to be objectively reasonable.*

This is a very low threshold because of the way "actively resistant" is described in other parts of the LEAB policy (the "Use of Force in General" section). Examples in this section of actions by an "actively resistant subject" include "pulling away, escaping or fleeing, struggling and not complying on physical contact, or other energy enhanced physical or mechanical defiance." "Pulling away," for example, can be putting your arms across your chest.

And belief "that using another compliance technique will result in a greater risk of injury to the officer, the subject, or a third party" means that if an officer feels he or a bystander is at a higher risk of injury if the officer pulls out a baton or pepper spray instead of a Taser, then the officer is justified in pulling out the Taser. Any possible injuries caused to the subject by the Taser are immaterial to the determination of use.

Putting these two things together, justification for using a Taser could be as little as "Mr. Mason pulled back from me when he saw me reaching for my handcuffs; I thought, because of the strong wind blowing at the time, that if I used pepper spray the spray could blow back on me, or his girlfriend, and we'd get injured. The Taser seemed like the best choice. Mr. Mason would get shocked, lose control of his muscle system long enough for me to cuff him, and the incident would be over."

The incident would be over, but -- as happened in June 2012 -- Mason would be dead.

To avoid another death like Mason's, there has to be a different standard that makes clear there must be a serious threat to the subject, officer, or others before a Taser is used. We believe the appropriate standard is this:

> *(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.*

This language is more direct, it's shorter, and it uses the "immediate threat" threshold from the U.S. Supreme Court's decision of *Graham v. Conner* when judging whether an officer's use of force is justified. (*Graham v. Conner* is the 1989 U.S. Supreme Court case often cited by police, including in the LEAB draft policy.)

The deployment standard in H. 225 has resulted in lawsuits that have cost Vermont police $269,500 in settlements after being accused of misusing the weapons. Lawsuits such as these will continue unless the loose, permissive standard in the bill is changed. It's simply not acceptable to adopt as state law a standard so deficient.

We urge you to change the standard to what we're suggesting. We also believe adding requirements around measurement and calibration, use of cameras, and civilian review of Taser incidents would help to cut down on Taser abuse and make sure another death like Macadam Mason's doesn't occur.

Thank you.