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18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

20 BETTY LOU HESTON, individually, and  
21 ROBERT H. HESTON, individually and as  
22 the personal representatives of ROBERT C.  
23 HESTON, deceased,

24 Plaintiffs,

25 vs.

26 CITY OF SALINAS and SALINAS POLICE  
27 DEPARTMENT, SALINAS POLICE CHIEF  
28 DANIEL ORTEGA, MICHAEL DOMINICI,  
CRAIG FAIRBANKS, JAMES GODWIN,  
LEK LIVINGSTON, VALENTIN  
PAREDEZ, JUAN RUIZ, TIM SIMPSON  
and TASER INTERNATIONAL, INC., and  
DOES 1 to 10,

Defendants.

Case No.: C 05-03658 JW

[James Ware, United States  
District Judge]

**DECLARATION OF MARK.  
W. KROLL, PhD, FACC, IN  
SUPPORT OF DEFENDANT  
TASER INTERNATIONAL,  
INC.'S NOTICE OF MOTION  
AND MOTION IN LIMINE  
NO. 1 TO EXCLUDE EXPERT  
OPINIONS AND  
TESTIMONY OF DR. MARK  
R. MYERS, OR, IN THE  
ALTERNATIVE, FOR  
DAUBERT HEARING**

PTC Date: 4-29-08  
Time: 1:00 pm.  
Courtroom: 8

Final PTC: 4-29-08  
Trial: 5-13-08

1 I, MARK. W. KROLL, PhD, FACC, FHRS, declare as follows:

2 1. I have personal knowledge of the facts and statements set forth in this  
3 declaration and if called upon to testify I could and would competently testify thereto.

4 2. I have been designated as one of Defendant TASER International, Inc's  
5 ("TASER's") experts. I have invested most of my adult life researching and developing  
6 electrical devices to diagnose and treat disease. My primary scientific specialty is the  
7 effect of shocks on the human body. This investment has resulted in every ICD  
8 (Implantable Cardioverter Defibrillator) made anywhere in the world licensing some of  
9 my patented improvements. I research, lecture, and publish on electric shocks and their  
10 effects on the human body. I have lectured in over 30 countries as well as at the major  
11 universities and medical centers of the United States on this topic. With over 260 issued  
12 United States patents and numerous pending and international patents, I currently hold  
13 the most patents on electrical medical devices of anyone in the world. Over 1 million  
14 people have devices in their chests — made by licensees of my patents — monitoring  
15 every heartbeat and ready to give lifesaving therapy. I also currently hold the most  
16 cardiac device patents. I am an author on about 200 abstracts, papers, book chapters, and  
17 invited presentations. I am the co-editor of the book, "Implantable- Cardioverter  
18 Defibrillator Therapy" published in 1996 by Kluwer of Boston and the book "Cardiac  
19 Bioelectric Therapy" in press by Springer-Kluwer of New York. True and correct copies  
20 of the expert reports I prepared in this case, dated December 1, 2006, December 17,  
21 2006, April 6, 2007, and June 18, 2007, are attached hereto respectively and  
22 incorporated herein by reference as Exhibits F, G, H, and I. My curriculum vitae is  
23 attached to the December 1, 2006 report.

24 3. Plaintiffs have designated Dr. Mark R. Myers ("Myers") as an expert in this  
25 case. Myers is expected to offer opinions on the issue of the cause of death of Mr.  
26 Robert C. Heston and in particular regarding the physiological effects of the TASER®  
27 Electronic Control Device ("ECD" or "device") on the human body and/or whether  
28 application of the ECDs caused the death of Mr. Heston. True and correct copies of the

1 expert reports of Dr. Myers, dated November 28, 2006, January 2, 2007, March 11,  
2 2007, and April 27, 2007, are attached hereto respectively and incorporated herein by  
3 reference as Exhibits A, B, C, and D. True and correct copies of portions of Myers'  
4 deposition, taken on April 28, 2007, are attached hereto respectively and incorporated  
5 herein by reference as Exhibit E. True and correct copies of portions of the deposition  
6 of plaintiffs', now withdrawn, expert, Dr. Werner U. Spitz, taken on May 15, 2007, are  
7 attached hereto respectively and incorporated herein by reference as Exhibit J.

8 4. I have reviewed 12 expert reports in this case written by physicians and  
9 scientists. Of these reports, 10 conclude that the cause of Mr. Heston's death was  
10 excited delirium brought on by his acute and chronic methamphetamine usage. Dr. Spitz  
11 does not offer an opinion as to the cause of death. Dr. Myers, in 3 reports presents a  
12 total of 6 theories for the death of Mr. Heston. Five of his 6 theories (1-4, and 6)  
13 required the involvement of the ADVANCED TASER M26 ("ECD", "device", or  
14 "M26"). (The role of the ECD was not specified in theory # 5.) On April 28, 2007, Dr.  
15 Myers submitted an additional expert report in which he limited his theories of death  
16 causation (of Mr. Heston) from six possible causes down to three: 1) vasovagal; 2)  
17 metabolic acidosis, and 3) respiratory acidosis.

18 5. Based on Myers' reports dated November 28, 2006, January 2, 2007, March  
19 11, 2007, and April 27, 2007, and his deposition testimony taken on April 28, 2007,  
20 Myers will be offering expert testimony regarding three theories of causation:  
21 1) Vasovagal theory of causation: TASER ECD pain allegedly caused a vasovagal  
22 reaction leading to asystole (flat-line); 2) Metabolic acidosis theory of causation: The  
23 TASER ECD caused violent and prolonged muscle contractions in Mr. Heston which  
24 allegedly significantly raised the lactic acid levels in his blood; his body failed to correct  
25 for this, and the acidosis was so severe that it shut down his heart; and 3) Respiratory  
26 acidosis theory of causation: The TASER ECD allegedly suffocated Mr. Heston by  
27 stopping his breathing which made his blood acidic which severely slowed his heart into  
28 a flat-line (asystole) condition.

1           6. Myers dropped the previous theories as to causation which were set out in  
2 his first three reports:

3           1) Rhabdomyolysis. As noted in my 6-18-07 report, in Myers' previous  
4 expert reports, he put forth the theory that the ECDs could have directly caused  
5 rhabdomyolysis in Mr. Heston. In other words, the muscle stimulation was so dramatic  
6 that it caused muscle cells to die and the by-products of this muscle cell death clogged  
7 Mr. Heston's kidneys and killed him. Obviously, Mr. Heston had rhabdomyolysis as  
8 this is a common feature of methamphetamine abuse, dramatic extended exercise,  
9 exertion, struggle with police, and of excited delirium. Myers admitted he is not an  
10 expert on the effects, if any, of ECDs and the risks of rhabdomyolysis. (Myers  
11 depo.:19:7-10.) On the morning of his deposition, Myers brought in a fourth report,  
12 dated April 27, 2007, in which he dropped the theory of rhabdomyolysis.

13           2) Direct stimulation of the heart (ventricular fibrillation [VF]). In Myers'  
14 previous expert reports, he put forth the theory that the TASER device could have  
15 directly induced VF in Mr. Heston. In other words, the ECD allegedly electrocuted Mr.  
16 Heston. In his fourth report dated April 27, 2007, produced on the day of his  
17 deposition, Myers explicitly states: "Consideration of the circumstances of Mr. Heston's  
18 collapse and the known science of TASER [ECDs] leads me to conclude that direct  
19 stimulation of the heart by TASER [ECDs] was unlikely."

20           3) Deductive. In Myers' 1-2-07 report, his theory was: "All people with  
21 methamphetamine intoxication do not die of the methamphetamine or of 'excited  
22 delirium.' In the present case the only significant adverse physical stimulus was from  
23 the TASER [ECD] applications. Are we really expected to believe that the TASER  
24 [ECD] has no physiologic effects when delivered in the manner of this case? If so, then  
25 if the police had simply waited outside for 5 to 10 minutes, this man would have died  
26 spontaneously. I could not explain such a death." In Myers' fourth report, dated April  
27 27, 2007, he does not mention this theory. In his deposition, Myers testified that he was  
28 not suggesting that the police should have waited for 5 or 10 minutes or that the police

1 wait outside.” (Myers depo.:101:14-25.) Myers testified that he was not aware that any  
2 police actions in the resuscitation adversely impacted Mr. Heston. (Myers depo.:103:15-  
3 20.) Myers admitted that he was not asked to give an opinion about the conduct of the  
4 police in this case. (Myers depo.:102:1-6.)

5 7. While Myers appears to have dropped his police action theory, even if he  
6 still intends on offering his deductive theory as a cause of death, this theory has  
7 numerous scientific and logical errors:

8 a) As I noted in my 4-6-07 report, since people do not always die from  
9 methamphetamine, Myers illogically assumes that people could never die from  
10 methamphetamine alone. This is clearly erroneous.

11 b) Myers incorrectly states that the ECDs were the only contributing stress on  
12 Mr. Heston in this incident which is clearly false. An experienced police officer stated  
13 that he had never seen someone fight so hard in his whole career.

14 c) This theory does not offer any scientific or medical links from the ECDs  
15 to Mr. Heston’s death. Myers merely states that he could not otherwise explain such a  
16 death. This would be more convincing if Myers were able to refute the conclusion of  
17 excited delirium from the other experts.

18 d) A strong criticism to this level of illogic was written a decade ago and is  
19 repeated here verbatim: “Legal reasoning favours single proximate causes rather than  
20 medical conditions, but the intervention most proximate to the time of death is not  
21 necessarily the cause of death. Similarly, popular journalism favours controversy and  
22 blame rather than balance and exploration.” This is noted in my 4-6-07 Report, pg. 15,  
23 in which I cite Farnham FR, Kennedy HG. Acute excited states and sudden death. *Bmj*  
24 1997;315:1107-8.

25 8. Myers is not qualified to render an expert opinion regarding the effects of  
26 the ECDs on the human body and/or whether application of the ECDs contributed to the  
27 death of Mr. Heston.

28 9. Based on Myers’ own admissions, he is not qualified to render an expert

1 opinion regarding the effect of the ECDs on the human body. In his deposition, Myers  
2 admitted he is not a forensic pathologist, nor an electrical engineer, nor an expert in  
3 excited delirium, nor an expert in agitated delirium, nor an expert in neuroleptic related  
4 syndrome, nor an expert in drug-induced excited delirium, nor an expert in drug-induced  
5 agitated delirium, nor an expert on metabolic acidosis, nor an expert on in-custody  
6 deaths involving law enforcement. (Myers depo: 14:24-15:24.) Myers also admitted he  
7 is not a toxicologist, nor a pharmacologist, nor an expert in neuropharmacology, nor an  
8 expert on electrical effects throughout the entire human body, nor an expert on ECDs.  
9 (Myers depo:15:24-16:17.) Myers also admitted he is not an expert on TASER brand  
10 ECDs, nor an expert on advanced TASER M26 ECDs, nor an expert on the TASER  
11 X26. (Myers depo:16:18-25.)

12 10. Myers is not an expert on the effects on a human of a TASER ECD, nor an  
13 expert on the effects, if any, of a TASER ECD on a human's arterial blood gases.  
14 (Myers depo:17:1-7.) Myers is not an expert on the effects, if any, of a TASER ECD  
15 on a human's pulmonary function. (Myers depo:17:8-11.) Myers testified that he  
16 considers himself knowledgeable in the area of the effects of the TASER ECD on the  
17 human's cardiac system based upon the research he has done, but admitted that whether  
18 or not that rises to the level of an expert, he does not know. (Myers depo:17:12-18:5.)

19 11. Myers has not published any papers on the effects of a TASER ECD on a  
20 human's cardiac system. He has never done any presentations of the effects, if any, of  
21 a TASER ECD on a human's cardiac system. He has never been recognized in a court  
22 of law as an expert on the effects, if any, of the TASER ECD on a human's cardiac  
23 system. (Myers depo: 18:6-17.) Myers read some research but has never communicated  
24 with any of the authors of that research regarding the effects, if any, of a TASER ECD  
25 on a human cardiac system. Myers is not an experts on the effects, if any, of a TASER  
26 ECD on the human skeletal muscles. Myers is not an expert on the effects, if any, of a  
27 TASER ECD and the breakdown of skeletal muscles. (Myers depo: 18:18-19:6.)

28 12. Myers is not an expert on the effects, if any, of a TASER ECD and the risks

1 of rhabdomyolysis. (Myers depo:19:7-10.)

2 13. Myers' three remaining theories of causation (vasovagal, metabolic  
3 acidosis, and respiratory acidosis) are wholly unsupported by reliable scientific  
4 evidence.

5 14. Myers' opinion re causation based on vasovagal syncope is wholly  
6 unsupported by the scientific evidence. Myers' unsupported vasovagal theory is that the  
7 TASER ECD pain allegedly caused a vasovagal reaction leading to asystole. The  
8 vasovagal theory was first introduced in Myers' second expert report dated January 2,  
9 2007 and supported by no one, even his own fellow, now withdrawn, expert Dr. Werner  
10 U. Spitz, who called the vasovagal death theory "voodoo." (Spitz 5-15-07 depo.:100:12-  
11 22.) Myers testified in his deposition that a vasovagal reaction would occur with one  
12 second of Mr. Heston experiencing the pain of a TASER [ECD] discharge. (Myers  
13 depo.:90:5-6.) Under this theory, the TASER ECD hurt and this made Mr. Heston's  
14 heart go so slow that it stopped (flat-lined). As set out in my expert reports, this  
15 vasovagal theory has many fundamental scientific problems and is wholly lacking in  
16 reliable scientific support:

17 1) As I noted in my 6-18-07 report, vasovagal syncope is not possible with  
18 extreme agitation. A vasovagal condition requires the loss of sympathetic drive while  
19 agitated people have maximum sympathetic drive. To use the automobile analogy, the  
20 car is going so fast that the brakes cannot make it instantly stop.

21 2) Methamphetamine kills pain equally as well as morphine and thus Mr.  
22 Heston was likely not feeling pain. There is no indication in the record that Mr. Heston  
23 experienced pain from any ECD current.

24 3) Outside of a head injury after falling, I could only find one possible fatality  
25 in recorded medical literature from a vasovagal response.

26 4) Myers admits that he has never seen a case of a fatal vasovagal reaction in  
27 his 20 year career.

28 Q You had mentioned you're immersed in vasovagal reactions

1 every day; correct?

2 A Yes.

3 Q But yet you have never seen a death in your 20 years. Does that imply that  
4 vasovagal reaction is not lethal?

5 A It implies I am a good doctor.

6 Q Can vasovagal response occur in your patients when you're not present?

7 A Yes.

8 Q Has anyone died in one of those situations?

9 A No. (Myers depo.:97:2 -13.)

10 5) The idea of a fatal vasovagal reaction is completely and unequivocally  
11 rejected by plaintiffs' other causation expert, Dr. Spitz.

12 In his deposition, Dr. Spitz testified:

13 Q Do you— did you form any opinion in your review of the materials provided  
14 to you as to whether or not a vasovagal response played any role in Mr  
15 Heston's death?

16 A You know, vasovagal response is like voodoo. (Spitz 5-15-07  
17 depo:100:12-16.)

18 Q And just to be clear, you also stated in your fifty thousand death autopsies  
19 that you performed in your career, how many times have you found the  
20 cause of death to be a vasovagal response or vasovagal syncope? I believe  
21 you said none. Just want to verify.

22 A Yes. I agree. I was going to try and tell it to you, to tell you that I do not  
23 recall a single such instance. (Spitz depo:107:1-9.)

24 15. The purported end effect — asystole — is, however, highly associated with  
25 excited delirium which theory Myers rejects.

26 16. The unsupported vasovagal theory requires the unreachable assumption that  
27 Mr. Heston was able to fight even after he had fainted. Otherwise the struggle from Mr.  
28 Heston would have ceased immediately.



1 17. Myers refused to admit this fundamental problem in his deposition:

2 Q Have you ever had a vasovagal patient that maintained full strength and  
3 full consciousness?

4 A Yes.

5 Q How many times approximately, if you know?

6 A Many times. Commonplace. (Myers depo.:95:23-96:2.)

7 18. I know of no such ability to maintain full strength and consciousness and  
8 I have asked many of Myers' colleagues if they had ever had a patient maintain full  
9 consciousness and strength during a vasovagal reaction. None of them have. If Myers  
10 truly had had such an unusual patient, he would have had no problem getting a case  
11 study published. A vasovagal reaction is basically fainting and people do not maintain  
12 consciousness after fainting.

13 19. Based on the foregoing, Myers' opinion that TASER ECD pain caused a  
14 vasovagal reaction leading to asystole is wholly unsupported by reliable scientific  
15 evidence and should be excluded.

16 20. Myers' opinion re causation of death based on metabolic and respiratory  
17 acidosis is not supported by the scientific evidence. Myers breaks his acidosis theory of  
18 causation into two separate theories: 1) respiratory acidosis; and 2) metabolic acidosis.  
19 The respiratory theory in lay terms is that the ECDs allegedly suffocated Mr. Heston by  
20 stopping his breathing which made his blood acidic which severely slowed his heart into  
21 a flat-line (asystole) condition. Myers' theory of respiratory acidosis has numerous  
22 fundamental scientific problems:

23 1) As I noted in my 6-18-07 report, ECDs do not stop breathing in humans.  
24 The speculation that ECDs stop breathing in humans is based on a misapplication of the  
25 Jauchem porcine model paper<sup>110</sup> which reported that pigs stopped breathing during  
26 extended TASER X26 exposures. If a single (1) TASER device halts breathing, then  
27 what is left for the second one to do? The answer is clearly, nothing.

28 Myers' sole reliance on the Jauchem porcine model study is not sufficient to

1 prove scientific reliability and/or validity. In addition, Jauchem later published a letter  
2 in Forensic Science International indicating that none of the pigs had died in his studies.  
3 Jauchem also noted that his study could not be solely relied upon regarding human  
4 experiences. Attached hereto as Exhibit V is a true and correct copy of Reply to Letter  
5 to Editor by Jauchem, James R., Forensic Science International; letter dated August 28,  
6 2006, Re: Acidosis, lactate, electrolytes, muscle enzymes, and other factors in the blood  
7 of *Sus scrofa* following repeated TASER [ECD] exposures. Forensic Science  
8 International, Volume 168, Issue 1, Pages e19-e19 J. Jauchem. The last paragraph of  
9 Jauchem's August 28, 2006 letter states: "It is important to note that our exposure  
10 conditions were somewhat extreme compared with those commonly experienced during  
11 civilian law-enforcement use of TASER International's Advanced TASER X26.  
12 Therefore, it would not be prudent to draw conclusions about such use on the basis of  
13 our study alone." *Ibid.*

14 2) Mr. Heston never stopped breathing. It is hard to fight, resist, and/or  
15 struggle while holding your breath.

16 3) Even if the ECDs stopped Mr. Heston's breathing, a five second holding  
17 of the breath is not life threatening.

18 4) ECD applications do not cause any significant increase in acidity  
19 in humans.

20 5) Acidosis and asystole are, however, highly associated with excited  
21 delirium.

22 21. This acidosis theory also contradicts Myers' opinion that Mr. Heston  
23 suffered a vasovagal episode with the first one second of TASER ECD application.  
24 Myers made it very clear in his deposition that a vasovagal reaction was not an  
25 "either-or" causation competing with acidosis as a causation. He opined that the  
26 vasovagal reaction occurred regardless of any acidosis:

27 Q. You just stated that the vasovagal is possible with as little as a second. Are  
28 you stating to a reasonable degree of medical and scientific certainty based

1 upon scientifically reliable data that Mr. Heston experienced a vasovagal  
2 response in this case?

3 A. I believe that vasovagal response would be expected in this circumstance.

4 Q. You used the term expected. Going back, can you say to a reasonable  
5 degree of medical and scientific —

6 A. I believe there are multiple causes in this case. (Myers depo.:90:5 -24.)

7 22. In other words, Mr. Heston definitely had a vasovagal episode. If that was  
8 true, then he would have stopped his resisting, his arms would have released and the  
9 struggle and possible ECD current would have ceased. The acidosis theory cannot  
10 survive with the vasovagal theory. If Mr. Heston had died from the vasovagal collapse  
11 within 1 second then any speculated death from acidosis — from speculated prolonged  
12 TASER ECD applications - would be irrelevant. People can only die once.

13 23. Myers' acidosis theory was soundly rejected by plaintiffs' other, now  
14 withdrawn, expert, Dr. Spitz. In discussing all of the sources of acidosis for Mr. Heston,  
15 including his methamphetamine levels, extreme struggle, and the time from the collapse  
16 until the first hospital blood test, Dr. Spitz stated that the contribution of the TASER  
17 ECD applications was "probably very little." (Spitz depo.:105:17-25.)

18 24. Myers' metabolic theory in lay terms is that the ECDs caused violent and  
19 prolonged muscle contractions in Mr. Heston which significantly raised the lactic acid  
20 levels in his blood; his body failed to correct for this, and the acidosis was so severe that  
21 it shut down his heart. Myers' theory of metabolic acidosis also is wrong for several  
22 reasons.

23 1) As I noted in my 6-18-07 report, Myers is accurately describing the end  
24 stage of an excited delirium death. Excited delirium brings on metabolic derangements  
25 — specifically acidosis — which often leads to a cardiac arrest from asystole.

26 2) The total of 5-9 seconds of ECD application caused only a tiny muscle  
27 contraction.

28 3) TASER ECD applications do not cause any significant increase in acidity

1 in humans.

2 4) Significant metabolic acidosis from mere exercise - in the absence of  
3 stimulant drugs - is rare enough that instances rate a published case study.

4 5) An experienced police officer, Godwin, described Mr. Heston as having  
5 "super human strength" and had never seen anyone so resistant in his whole career.  
6 That ferocious fighting, combined with the damage from years of dangerous illegal drug  
7 abuse, and a prolonged period of hyperactivity — including beating his own father —  
8 is what caused Mr. Heston's acidosis.

9 6) Myers' fellow, now withdrawn, expert, Dr. Spitz, has testified that the  
10 contribution of the ECDs to Mr. Heston's acidosis was "Probably very little."

11 25. Based on the foregoing, Myers' opinion that respiratory and/or metabolic  
12 acidosis from application of the ECDs caused the death of Mr. Heston is wholly  
13 unsupported by reliable scientific evidence.

14 26. Myers' rejection of excited delirium does not comport with the  
15 overwhelming evidence that excited delirium induced acidosis causing Mr. Heston's  
16 death. As explained in my first report dated December 1, 2006, Mr. Heston had 12 of  
17 12 signs from a typical short checklist for excited delirium. Myers' rejection of the  
18 theory of excited delirium does not withstand scrutiny.

19 27. In his first report dated November 28, 2006, Myers opined that the evidence  
20 did not appear to support a diagnosis of excited delirium. At his deposition, Myers  
21 attempted to deny the existence of excited delirium. (Myers depo:21:24-35:9.) On the  
22 day of his deposition, Myers presented a fourth report, dated April 27, 2007, which  
23 called into question the very existence of the excited delirium diagnosis. As noted in  
24 my 6-18-07 report, this was unforeseen to most involved but the arguments themselves  
25 are not supportable. The National Association of Medical Examiners has recognized  
26 excited delirium for more than a decade.

27 28. Myers' attempt to deny the existence of excited delirium does not comport  
28 with his deposition testimony:

1 Q What is your understanding of the difference between excited delirium and  
2 agitated delirium?

3 A According to Di Maio and Di Maio's textbook on this subject, there's a  
4 definition of delirium that states on page 1 of their book that delirium is an  
5 acute tangent condition of altered cognition and consciousness. And when  
6 the person becomes violent and it becomes then --excuse me --an excited  
7 delirium. That is their definition of excited delirium. The book proposes  
8 that there's a syndrome where patients with excited delirium actually then  
9 go on to die related to this scenario. Agitated delirium, in my  
10 understanding, is an older term that describes much the same type of  
11 behavior, both being delirious and agitated or combative. So it's my  
12 understanding that the excited delirium term though is the specific  
13 circumstances wherein -- under those circumstances the individual dies  
14 without an alternative explanation. So an agitated delirium person I guess  
15 would be combative, but survive, and an excited delirium individual would  
16 apparently succumb to his disorder. (Myers depo.: 23:10-24:8..)

17 29. Myers' testimony discussing the finer points of possible distinction  
18 between excited and agitated delirium contradicts his earlier position that excited  
19 delirium does not exist.

20 30. As noted in my 4-6-07 report, the evidence for excited delirium induced  
21 acidosis causing Mr. Heston's death is overwhelming. Ten defense experts — prominent  
22 in the areas of excited delirium, fibrillation, methamphetamine, and electrical effects on  
23 the body — have all concluded that Mr. Heston died of excited delirium. Dr. Deborah  
24 Mash was the expert chosen by the deputy medical examiner to test Mr. Heston's brain  
25 and Dr. Mash herself concluded that the brain test results were also consistent with a  
26 death from excited delirium. Dr. Vincent DiMaio who wrote the book and Dr. Charles  
27 Wetli who, with Dr. Fishbain, first coined the modern term, have also concluded that  
28 Mr. Heston died from excited delirium.

1           31. As noted in my 6-18-07 report, Myers argues that a single excited delirium  
2 diagnostic item (hyperthermia) was not present in Mr. Heston. (Myers depo.99:6-  
3 100:2.) Most of the experts in this case disagree with Myers on the hyperthermia  
4 question but even eliminating hyperthermia from the checklist, there still remains 11/11  
5 diagnostic criteria fulfilled. This statistically still yields a probability ratio of 2,553 to  
6 1 in favor of excited delirium.

7           32. In my 6-18-07 report, I set out a more detailed excited delirium diagnostic  
8 checklist — including hospital and pathology tests — for Mr. Heston, with Myers only  
9 disagreeing on two points - clothing removal or hyperthermia and the brief quiet period  
10 before collapse. Thus, giving every benefit to Myers' agreed-upon positions, there  
11 remain 13 of 15 criteria satisfied for a causation diagnosis of excited delirium. This  
12 yields a chi-square statistic of 13.393, which leads to a probability of 0.0002526 that Mr.  
13 Heston did not have excited delirium. This number inverts to an odds ratio of 3,959 to  
14 1 that Mr. Heston succumbed to drug induced excited delirium caused metabolic  
15 acidosis.

16           33. Thus, Myers' opinion rejecting excited delirium as the cause of Mr.  
17 Heston's death is not supported by the scientific evidence.

18           34. Myers' changing causation theories demonstrate his inconsistent opinions.  
19 Myers' changing causation theories demonstrate another reason why Myers is not  
20 qualified to testify as an expert witness and his proffered expert opinions do not have  
21 adequate support. Myers' inconsistency is shown by his changes in causation theories  
22 with each report:

23 ///

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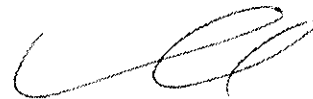
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<u>Report Date</u>	<u>Ventricular fibrillation</u>	<u>Vasovagal</u>	<u>R h a b d o - myolysis</u>
11-28-06	Yes	No	Yes
1-2-07	Maybe (“need not have been”)	Introduced	Yes
3-11-07	Yes	Silent	Yes
4-27-07	“Unlikely”	Yes	Dropped

35. Myers has lacked one consistent theory supported by scientifically reliable and valid literature from the beginning.

I declare under penalty of perjury of the laws of the State of California, United States, that the foregoing is true and correct.

Executed this 27 day of March, 2008, at Crystal Bay, Minnesota.



MARK W. KROLL, PhD, FACC