# ELECTRONIC CONTROL DEVICE LEGAL OUTLINE

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2.) Any inappropriate use of the word "TASER" or inappropriate use of the word "gun" to refer to an electronic control device (ECD or device) are only because of how the terms were inappropriately or misused within a particular case.
3.) A TASER ECD is not a "firearm" or a "gun".

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# Basic Law Enforcement Use of Force Concepts

1. "[T]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001).

2. "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Conner*, 490 U.S. 386, 396 (1989).

3. " ... [T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application ..." *Graham v. Conner*, 490 U.S. 386, 396 (1989), citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

4. "Almost every use of force, however minute, poses some risk of death." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280, n.12 (11th Cir. 2004).

5. "Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue." (deeming use of wrist locks applied by nonchakus on peaceful abortion protestors (*i.e.*, middle age soccer moms) to be reasonable forces despite injuries including nerve damage and a broken wrist). *Forrester v. City of San Diego*, 25 F.3d 804, 808 (9th Cir. 1994).

6. How much force is acceptable? ----------The Most Simplistic Answer:
   "A law enforcement officer may use that amount of force upon a person that the law allows. A law enforcement officer may not use more force upon a person than the law allows."

7. Officers must have an acceptable legal basis (justification) for everything that they do that negatively impacts a person and/or his/her property.

8. Just because the law allows officers to use force, does not automatically mean that using the force is the most prudent course of action.

9. There are consequences to adopting use-of-force standards that are more restrictive than the legal standards.

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## ECD Misuse - Court Decisions

1. **4th Amendment Seizures - ECD misuse**:
   a. Use of ECD on a passive, non-aggressive, non-verbal, person:
      i. Use of a TASER ECD on a passive, non-aggressive, non-verbal six year old, who posed no threat to anyone's safety including his own, and with no warning or verbal command was given is a violation of the 4th Amendment and the officers were not entitled to qualified immunity. *Moretta v. Miami-Dade County*, 2007 WL 701009 (S.D.Fla. Jan 23, 2007) (NO. 06-CIV-20467) [see page 13].

   b. Use of ECD to crying traffic stop suspect off ground and into car:
      i. Three uses of ECD drive stun to get a crying suspect off the ground and into the squad car after a traffic stop -- officer's actions were "so plainly unnecessary and disproportionate, no reasonable officer could have had a mistaken understanding as to whether [the] particular amount of force [was] legal in the circumstances." *Buckley v. Haddock*, Slip Copy, 2007 WL 710169 (N.D.Fla. March 6, 2007) [see page 11].

   c. Use of ECD on non-resisting, fully compliant handcuffed person:
      i. No objectively reasonable officer would have thought that striking, kicking, dragging, choking and repeatedly using a ECD against a non-resisting, fully compliant citizen would constitute either "reasonable force in light of the facts and circumstances" or "a good faith effort to maintain or restore discipline." Qualified immunity denied officers for excessive force during multi-hour mental health detention transport. *Batiste v. City of Beaumont*, 421 F.Supp.2d 1000 (E.D.Tex. March 10, 2006). Case settled. [see page 10].

2. **8th Amendment - use of ECD on "*convicted/incarcerated person*"**:
   a. ECD cannot be used to punish inmate/prisoner:
      i. The district court held that taser guns may be reasonably used to quell disorders and to compel obedience, but they cannot be used to punish a prisoner. *Hernandez v. Terhume*, Not Reported in F.Supp.2d, 2000 WL 1847645 (N.D.Cal. 2000) [see page 31].

      ii. Evidence that prison guards beat and shocked handcuffed and leg-shackled prisoner repeatedly, without justification, would support a finding that prison officials applied force "maliciously and sadistically." *Shelton v. Angelone*, 183 F.Supp.2d 830, 835 (W.D.Va. 2002) [see page 43].

   b. ECD use - factual dispute:
      i. Fact that the Ultron [stun gun] was used on the plaintiff does not *per se* violate the Eighth Amendment. Rather, the manner it which it was used

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determines whether the Eighth Amendment is implicated. The Ultron may be used to maintain or restore discipline. Its use runs afoul of the Constitution, however, if the purpose is to punish or to inflict pain upon a prisoner. *Williams v. Schueler*, 2006 WL 3469597 (E.D.Wis. Nov 29, 2006) (NO. 04-C-65) [see page 43].

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## ECD Abbreviated Case Outline

1. **ECD Weapons Confusion Cases** - firearm used when ECD intended [see page 32].

2. **Use of firearm when confronted by suspect armed with ECD**:
   a. Use of firearm deadly force not unreasonable against handcuffed (in front) person threatening officers with ECD (in drive stun) [very narrow holding].*Henderson v. Inabinett*, 2006 WL 2547435 (M.D.Ala. Sep 01, 2006) [see page 15].

3. **Accidental ECD discharge**:
   a. Officer accidentally discharged TASER device on his daughter – *Williams v. City of Daytona Beach*, Slip Copy, 2006 WL 354635, M.D.Fla. (Feb. 15, 2006 [see page 35]).

4. **Threat of ECD device "on its way" gains compliance**:
   a. Threat of TASER device "on its way" gains compliance. *U.S. v. Yandal*, Slip Copy, 2006 WL 517608 (W.D.Ky. March 1, 2006) [see page 37].

5. **Threat of ECD gains compliance**:
   a. Threat of TASER device brought 17 year old burglar comes out of attic. *In re J.D.*, 275 Ga.App. 147, 619 S.E.2d 818 (Ga.App. 2005) [see page 39].

6. **Rattling of ECD electricity gains fleeing suspect's surrender**:
   a. "[R]attling of electricity" from TASER device causes fleeing man to surrender. *People v. Young*, Not Reported in Cal.Rptr.3d, 2006 WL 1688992 (Cal.App. 2 Dist. June 21, 2006) [see page 40].

7. **Pointing ECD gains compliance**:
   a. Firearm pointing does not gain compliance, pointing TASER device does. *U.S. v. Ackerman*, Slip Copy, 2006 WL 224028, M.D.Fla. (Jan. 30, 2006) [see page 35].

   b. Pointing TASER device gains compliance of juvenile. *In re Francisco B.*, 2005 WL 2856335 (Cal.App. 5 Dist. Nov 01, 2005) (NO. F048025) [see page 39].

8. **4th Amendment Seizures - ECD use**:
   a. Threat of ECD use without submission is not a seizure:
      i. Drawing and pointing ECD (on 58 year old man who had heart surgery two months prior) where suspect did not submit is not a seizure. *Policky v. City of Seward (NE)*, 433 F.Supp.2d 1013 (D.Neb. May 25, 2006) [see page 8].

   b. Threat of ECD use with submission/compliance is a 4th Amendment Seizure:

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i. Threat with TASER device causing compliance is a 4th Amendment "seizure." *Pino v. City of Sacramento*, Slip Copy, 2006 WL 193181, E.D.Cal. (Jan. 19, 2006) [see page 29].

c. Firearm pointing does not gain compliance, pointing TASER device does. *U.S. v. Ackerman*, Slip Copy, 2006 WL 224028, M.D.Fla. (Jan. 30, 2006) [see page 35].

d. Use of ECD on a passive, non-aggressive, non-verbal, person:
   i. Use of a TASER ECD on a passive, non-aggressive, non-verbal six year old, who posed no threat to anyone's safety including his own, and with no warning or verbal command was given is a violation of the 4th Amendment and the officers were not entitled to qualified immunity. *Moretta v. Miami-Dade County*, 2007 WL 701009 (S.D.Fla. Jan 23, 2007) (NO. 06-CIV-20467) [see page 13].

e. Use of ECD to crying traffic stop suspect off ground and into car:
   i. Three uses of ECD drive stun to get a crying suspect off the ground and into the squad car after a traffic stop -- officer's actions were "so plainly unnecessary and disproportionate, no reasonable officer could have had a mistaken understanding as to whether [the] particular amount of force [was] legal in the circumstances." *Buckley v. Haddock*, Slip Copy, 2007 WL 710169 (N.D.Fla. March 6, 2007) [see page 11].

f. Use of ECD on uncooperative man told under arrest for domestic violence:
   i. Officer's use of TASER ECD was reasonable, since suspect was failing to cooperate after being told that he was under arrest for domestic violence. "What option other than physical force was there?," the court asked. "The nature and severity of the force used was reasonably calculated to effect the arrest while minimizing risks of physical injury to the suspect or the officers." Plaintiff also failed in his attempt to assert a claim for municipal liability on the basis of alleged inadequate training on the use of ECD. *Magee v. City of Daphne*, 2006 WL 3791971, 2006 U.S. Dist. Lexis 93183, Civil No. 05-0633-WS-M, (S.D. Ala. Dec. 20, 2006) [see page 12].

g. QI for officer, ECD used to force man to release grip on basketball pole. Issue of "passive resistance" discussed - "Eighth Circuit law draws no distinction between active or passive resistance in resisting a police officer's requests." *Schumacher v. Halverson*, 467 F.Supp.2d 939 (D.Minn. December 15, 2006) [see page 7].

h. Use of ECD on a belligerent person:
   i. Use of TASER ECD on belligerent driver appropriate. *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004) [see page 1].

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ii. Summary Judgment Granted to Officers - Car Stop - 3 TASER devices uses on belligerent driver, including 2 while handcuffed – *Willkomm v. Mayer (WI Dells)*, USDC W.D. WI (Slip Copy 2006 WL 582044) March 9, 2006 [see page 27].

i. Use of ECD to remove person from vehicle:
   i. TASER device to neck used to remove man from car. *Warren v. State of Maryland*, 164 Md.App. 153, 882 A.2d 934 (Md.App. 2005) [see page 39].

j. Use of ECD on person having hypoglycemic (diabetic) attack:
   i. Summary judgment granted on officer's use of TASER device on man suffering a hypoglycemic (diabetic) attack. *Gruver v. Borough of Carlisle*, Slip Copy, 2006 WL 1410816 (M.D.Pa. May 19, 2006) [see page 25].

k. Use of ECD on resisting person in ambulance - "Community Care Taker":
   i. "Community Care Taker" Function [officer's use of TASER ECD on resisting person in medical distress in ambulance; Summary Judgment granted to defendants]. *Stanley v. City of Baytown*, Texas, Slip Copy, 2005 WL 2757370 (S.D.Tex.), No. Civ.A. H-04-2106, U.S. Dist. Ct, S.D. Texas, Houston Division, decided Oct. 25, 2005 [see page 24].

l. Use of ECD to stop fleeing arrestee:
   i. Summary judgment granted to defendants on officer's use of TASER device on fleeing arrestee. *U.S. ex rel. Thompson v. Village of Spring Valley, N.Y.*, Slip Copy, 2006 WL 1889912 (S.D.N.Y. July 10, 2006) [see page 19].

   ii. Summary judgment granted for TASER device use, suspect resisted arrest, attempted to flee. Court gave a use-of-force risk management analysis (dart to top of head). *Wylie v. Overby*, Slip Copy, 2006 WL 1007643, E.D.Mich. (April 14, 2006) [see page 21].

m. Use of ECD to stop threatening man:
   i. TASER device used to control threatening man. *People v. Powers*, Not Reported in Cal.Rptr.3d, 2006 WL 1737353, (Cal.App. 2 Dist. June 27, 2006) [see page 40].

   ii. Suspect walked towards officer with fists raised in aggressive manner and TASER ECD used. *Fletcher v. State*, Not Reported in S.W.3d, 2006 WL 3411348 (November 28, 2006, Tex.App. - Dallas) [see page 41].

n. Use of ECD to control resisting man:
   i. TASER device used to gain control of resisting man. *Shouse v. State*, 849 N.E.2d 650 (Ind.App. June 20, 2006) [see page 40].

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   ii. TASER device used to capture struggling, resisting escapee. *State v. Farrar*, 631 S.E.2d 48 (N.C.App. June 20, 2006) [see page 41].

o. Use of ECD to stop resisting arrest and attempt to flee:
   i. Summary judgment granted for TASER device use, suspect resisted arrest, attempted to flee. Court gave a use-of-force risk management analysis (dart to top of head). *Wylie v. Overby*, Slip Copy, 2006 WL 1007643, E.D.Mich. (April 14, 2006) [see page 21].

p. Use of ECD to stop fight:
   i. Summary judgment (qualified immunity) granted to defendants when TASER device was used on a 14 year old female fighting on school property. *Maiorano ex rel. Maiorano v. Santiago*, Slip Copy, 2006 WL 2024951 (M.D.Fla. July 15, 2006) [see page 15].

   ii. (Two) TASER device discharges stopped fleeing man. *U.S. v. Stephens*, Slip Copy, 2006 WL 1663351 (E.D.Mo. June 14, 2006 [see page 37].

q. Suspect raised hands as threat or surrender:
   i. Defendants motion for summary judgment denied due to genuine issues of material fact: (1) suspect raised his hands with his fingers spread apart in a gesture of surrender or raised them in a threatening manner, and (2) TASER probe removal that left scars was controverted de minimis. *Fletcher v. Schwend*, Slip Copy, 2006 WL 1867890 (N.D.Tex. July 6, 2006) [see page 19].

r. Use of ECD on resisting arrestee:
   i. Summary judgment granted for TASER device use, suspect resisted arrest, attempted to flee. Court gave a use-of-force risk management analysis (dart to top of head). *Wylie v. Overby*, Slip Copy, 2006 WL 1007643, E.D.Mich. (April 14, 2006) [see page 21].

   ii. Qualified immunity granted to officer’s use of TASER device on kicking handcuffed arrestee. *Carroll v. County of Trumbull*, Slip Opinion, 2006 WL 1134206 (N.D.Ohio April 25, 2006) [see page 26].

   iii. TASER ECD to stop suspect resisting and attempting to flee. *State v. Woodmansee*, 203 S.W.3d 287 (October 17, 2006, Mo.App. S.D.,2006) [see page 42].

s. Use of ECD to subdue resisting man - kicking and biting:
   i. The appellate court held that the use of a stun gun to subdue man who was resisting arrest by kicking and biting was an appropriate use of force. *Hinton v. City of Elwood,* 997 F.2d 774 (10th Cir.(Kan.) 1993) [see page 3].

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t. Use of ECD on knife-wielding suspect - no longer an immediate threat:
   i. Officer entitled to qualified immunity despite his using TASER ECD multiple times on knife-wielding suspect who was no longer an immediate threat; noting that officer's "actions were intended to avoid having to resort to lethal force." *Russo* upheld a Taser use to "avoid having to resort to lethal force" where a lack of training in dealing with mentally ill may have caused shooting death of known paranoid schizophrenic. *Russo v. Cincinnati*, 953 F.2d 1036 (6th Cir. 1992) [see page 2].

u. Use of ECD on armed, volatile, potentially homicidal suspect:
   i. Use of ECD to subdue a potentially homicidal individual did not transgress clearly established law. The court further held that the use of ECD against an armed and volatile suspect does not constitute excessive force and concluded that the defendant police officers are entitled to qualified immunity on the Plaintiff's excessive use-of-force claim. *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. (Ohio) 2002) [see page 1].

v. Use of ECD to avoid use of deadly force:
   i. The court affirmed *Russo v. Cincinnati* which held that the taser, which was deployed in an effort to obviate the need for lethal force, did not violate clearly established law. *Nicholson v. Kent County Sheriff's Dept.*, 839 F.Supp. 508 (W.D.Mich. 1993) [see page 11].

   ii. TASER device use prevented need to use deadly force. *State [of Ohio] v. Gentry*, Slip Copy, 2006 WL 1461030 (Ohio App. 2 Dist. May 19, 2006) [see page 38].

w. Use of ECD stopped man reaching for firearm:
   i. TASER device used to stop resisting suspect from reaching for gun on the ground. *People v. Villegas*, Not Reported in Cal.Rptr.3d, 2006 WL 1992407 (Cal.App. 4 Dist. July 18, 2006) [see page 38].

x. Use of ECD on suspect with firearm:
   i. TASER device used to apprehend fleeing suspect armed with firearm. *U.S. v. Stephens*, Slip Copy, 2006 WL 2009066 (M.D.Ala. July 18, 2006) [see page 35].

9. **Use of ECD on a juvenile**:
   a. Use of a TASER ECD on a passive, non-aggressive, non-verbal six year old, who posed no threat to anyone's safety including his own, and with no warning or verbal command was given is a violation of the 4th Amendment and the officers were not entitled to qualified immunity. *Moretta v. Miami-Dade County*, 2007 WL 701009 (S.D.Fla. Jan 23, 2007) (NO. 06-CIV-20467) [see page 13].

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b. Threat of TASER device causes 17 year old burglar to come out of attic. *In re J.D.*, 275 Ga.App. 147, 619 S.E.2d 818 (Ga.App. 2005) [see page 39].

c. Pointing TASER device gains compliance. *In re Francisco B.*, 2005 WL 2856335 (Cal.App. 5 Dist. Nov 01, 2005) (NO. F048025) [see page 39].

d. Use of TASER device to subdue female juvenile who was kicking, screaming, jerking, biting, and pushing was reasonable. *RT v. Cincinnati Public Schools*, 2006 WL 3833519 (S.D.Ohio Dec 29, 2006) (NO. 1:05CV605). [see page 15].

e. Summary judgment granted to officers who used a ECD on handcuffed, struggling, resisting 14 year old male. *Johnson ex rel. Smith v. City of Lincoln Park*, 434 F.Supp.2d 467 (E.D.Mich. June 8, 2006) [see page 7].

f. Summary judgment (qualified immunity) granted to defendants when TASER device was used on a 14 year old female fighting on school property. *Maiorano ex rel. Maiorano v. Santiago*, Slip Copy, 2006 WL 2024951 (M.D.Fla. July 15, 2006) [see page 15].

g. Officer accidentally discharged TASER device on his daughter. *Williams v. City of Daytona Beach*, Slip Copy, 2006 WL 354635, M.D.Fla. (Feb. 15, 2006 [see page 35]).

h. Summary judgment granted for use of TASER device on suicidal 16 year old male. *N.A. ex rel. Ainsworth v. Inabinett*, 2006 WL 2709850 (M.D.Ala. Sep 20, 2006) (NO. 2:05 CV 740 DRB) [see page 36].

10. **Use of ECD on older persons**:
    a. 59 year old female. *Autin v. City of Baytown*, Slip Copy, 2005 WL 3556677, (5th Cir. (Tex.) Dec 29, 2005). Case settled. [see page 5].

    b. 58 year old man recent heart surgery - Drawing and pointing ECD (on 58 year old man who had heart surgery two months prior) where suspect did not submit is not a seizure. *Policky v. City of Seward (NE)*, 433 F.Supp.2d 1013 (D.Neb. May 25, 2006) [see page 1].

11. **Use of ECD on suicidal person**:
    a. Summary judgment granted for use of TASER device on suicidal 16 year old male. *N.A. ex rel. Ainsworth v. Inabinett*, 2006 WL 2709850 (M.D.Ala. Sep 20, 2006) (NO. 2:05 CV 740 DRB) [see page 36].

12. **Use of ECD to prevent swallowing drugs**:
    a. *Florida v. Damion Terrell Johnson*, In the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, Case No. 48-2003-CF-015024-0, Division 17. Court did not suppress evidence [see page 32].

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b. *US v. Jason Malone*, United States District Court, Central District of Illinois, Peoria Division, Case No. 05-10012. Court did not suppress evidence [see page 32].

c. City settled excessive force claim (for $82,500) brought by man hit with TASER ECD17 times in an effort to make him cough up drugs he was believed to have swallowed. *Kevin Alexander v. City of Lafayette, Ronald Boureaux, individually, Randy Hundley, individually and in his office capacity as Lafayette Police Department Chief of Police, Officer(s) John Doe, XYZ Insurance Company, and ZYX Insurance Company*, USDC WD LA, Lafayette - Opelousas Division, Civil Action No. 05-CV-0976. [see page 32].

13. **Use of ECD to facilitate handcuffing of a resisting person**:

14. **Use of ECD on a handcuffed person**:

a. Use of ECD on non-resisting, fully compliant handcuffed person:

i. No objectively reasonable officer would have thought that striking, kicking, dragging, choking and repeatedly using a ECD against a non-resisting, fully compliant citizen would constitute either "reasonable force in light of the facts and circumstances" or "a good faith effort to maintain or restore discipline." Qualified immunity denied officers for excessive force during multi-hour mental health detention transport. *Batiste v. City of Beaumont*, 421 F.Supp.2d 1000 (E.D.Tex. March 10, 2006). Case settled. [see page 10].

b. Use of ECD on “resisting” handcuffed person:

i. Summary judgment granted to officer for use of ECD on handcuffed arrestee, who had kicked officer, in detention. *Rose v. City of Lafayette, Colo.*, 2007 WL 485228 (D.Colo. Feb 12, 2007) (NO. CIV.A. 05-CV-00311WD). [see page 3].

ii. Summary judgment granted to officers who used ECD on handcuffed, struggling, resisting 14 year old male. *Johnson ex rel. Smith v. City of Lincoln Park*, 434 F.Supp.2d 467 (E.D.Mich. June 8, 2006) [see page 7].

iii. Qualified immunity granted to officer’s use of TASER device on kicking handcuffed arrestee. *Carroll v. County of Trumbull*, Slip Opinion, 2006 WL 1134206 (N.D.Ohio April 25, 2006) [see page 26].

iv. Summary Judgment Granted to Officers - Car Stop - three TASER device uses on belligerent driver, including two while handcuffed. *Willkomm v. Mayer (WI Dells)*, USDC W.D. WI (Slip Copy 2006 WL 582044) March 9, 2006 [see page 27].

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    v. Summary judgment granted for use of TASER device in drive stun on handcuffed resisting arrestee. *Devoe v. Rebant*, Slip Copy, 2006 WL 334297, E.D.Mich. (Feb 13, 2006) [see page 29].

15. **Use of ECD on a person in a restraint chair**:
    a. Restraint Chair - Use of TASER Device on Neck - Summary Judgment Granted. *McBride v. Clark*, USDC W.D. MO (Slip Copy 2006 WL 581139) March 8, 2006 [see page 27].

16. **ECD injuries**:
    a. ECD no injury - temporary discomfort:
        i. There is nothing in the record to even indicate any injury other than the temporary discomfort to be expected. The record in fact indicates that no injury was sustained. *Larson v. Bunt*, Slip Copy, 2006 WL 3423894 (November 28, 2006, D.S.D,2006) [see page 15].

    b. ECD marks (scars) - controverted *de minimis*:
        i. Defendants motion for summary judgment denied due to genuine issues of material fact: (1) suspect raised his hands with his fingers spread apart in a gesture of surrender or raised them in a threatening manner, and (2) TASER probe removal that left scars is controverted *de minimis*. *Fletcher v. Schwend*, Slip Copy, 2006 WL 1867890 (N.D.Tex. July 6, 2006) [see page 19].

    c. ECD probe into skull:
        i. Summary judgment granted for TASER device use on suspect who resisted arrest and attempted to flee. Court gave a use-of-force risk management analysis (dart to top of head). *Wylie v. Overby*, Slip Copy, 2006 WL 1007643, E.D.Mich. (April 14, 2006) [see page 21].

    d. Use of ECD on pregnant female:
        i. Use of TASER device on pregnant inmate - 8th Amendment analysis – *Alford v. Osei-Kwasi*, 203 Ga.App. 716, 418 S.E.2d 79 (Ga.App. 1992) [see page 31].

17. **ECD use in drive stun**:
    a. Summary judgment granted for use of TASER device in drive stun on handcuffed resisting arrestee. *Devoe v. Rebant*, Slip Copy, 2006 WL 334297, E.D.Mich. (Feb 13, 2006) [see page 29].

18. **ECD use - risk management analysis by court**:
    a. Summary judgment granted for TASER device use on suspect who resisted arrest and attempted to flee. Court gave a use-of-force risk management

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analysis (dart to top of head). *Wylie v. Overby*, Slip Copy, 2006 WL 1007643, E.D.Mich. (April 14, 2006) [see page 21].

19. **5th/14th Amendment - use of ECD on "*pre-trial detainee*"**:
    a. Summary judgment granted for threat to use TASER device (laser dot compliance). *Price v. Busbee*, Slip Copy, 2006 WL 435670 (M.D.Ga. February 21, 2006) [see page 30].

20. **8th Amendment - use of ECD on "*convicted/incarcerated person*"**:
    a. ECD cannot be used to punish inmate/prisoner:
        i. The district court held that taser guns may be reasonably used to quell disorders and to compel obedience, but they cannot be used to punish a prisoner. *Hernandez v. Terhume*, Not Reported in F.Supp.2d, 2000 WL 1847645 (N.D.Cal. 2000) [see page 31].

        ii. Evidence that prison guards beat and shocked handcuffed and leg-shackled prisoner repeatedly, without justification, would support a finding that prison officials applied force "maliciously and sadistically." *Shelton v. Angelone*, 183 F.Supp.2d 830, 835 (W.D.Va. 2002) [see page 43].

    b. ECD use - factual dispute:
        i. Fact that the Ultron [stun gun] was used on the plaintiff does not *per se* violate the Eighth Amendment. Rather, the manner it which it was used determines whether the Eighth Amendment is implicated. The Ultron may be used to maintain or restore discipline. Its use runs afoul of the Constitution, however, if the purpose is to punish or to inflict pain upon a prisoner. *Williams v. Schueler*, 2006 WL 3469597 (E.D.Wis. Nov 29, 2006) (NO. 04-C-65) [see page 43].

    c. Use of ECD for refusal to comply with order:
        i. The only conduct of the plaintiff was his adamant refusal to comply with the order. He did not present any threat of physical violence. The device was used to shock him three times while he was on the ground and obviously incapacitated. Officers' motion for summary judgment denied. *Preston v. Pavlushkin*, Slip Copy, 2006 WL 686481 (D.Colo. March 16, 2006) [see page 30].

    d. Use of ECD on disruptive prisoner to restore discipline:
        i. Use of stun gun against disruptive prisoner to restore discipline and order does not violate the Eighth Amendment. *Caldwell v. Moore*, 968 F.2d 595, 600-601 (6th Cir. (Ky.) 1992) [see page 42].

        ii. Prison guards' use of force, including a stun gun, against a disruptive inmate did not amount to cruel and unusual punishment where the inmate

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had become loud and aggressive and expressed the desire to get into a physical altercation. *Rubins v. Roetker*, 737 F.Supp. 1140, 1141- 44 (D.Colo.1990) [see page 43].

e. Use of ECD to compel obedience by inmates:
   i. The court held that prison officials are entitled to use physical force, including devices such as tasers, to compel obedience by inmates. *Drummer v. Luttrell*. 75 F.Supp.2d 796 (W.D.Tenn. 1999) [see page 11].

   ii. Court affirmed *Michenfelder v. Sumner* where 9th Circuit held that ECDs are not *per se* unconstitutional as long as they are "used to enforce compliance with [an order] that had a reasonable security purpose. The legitimate intended result of a shooting is incapacitation of a dangerous person, not the infliction of pain. *Parker v. Asher*, 701 F.Supp. 192 (D.Nev. 1988) [see page 11].

f. Use of ECD on inmate refusing to be handcuffed:
   i. The appellate court upheld the holding of the district court which concluded that the correctional officers used taser weapons in a good faith effort to maintain and restore discipline after the inmate refused orders to be handcuffed before being moved from his cell. *Jolivet v. Cook*, 48 F.3d 1232 (Table) (10th Cir. (Utah) 1995) [see page 6].

g. Use of ECD on inmate refusing strip search:
   i. The appellate court held that the use ECD was not cruel and unusual punishment and a policy of allowing use of ECDs on an inmate who refuses to submit to a strip search does not constitute cruel and unusual punishment. *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. (Nev.) 1988) [see page 3].

   ii. Court affirmed *Michenfelder v. Sumner* where the court held that the threatened use of a taser to enforce compliance with a search had a reasonable security purpose and was not unconstitutional. *Walker v. Sumner*, 8 F.3d 33 (Table) (9th Cir. (Nev.) 1993) [see page 6].

h. Use of ECD on pregnant female:
   i. Use of TASER device on pregnant inmate - 8th Amendment analysis – *Alford v. Osei-Kwasi*, 203 Ga.App. 716, 418 S.E.2d 79 (Ga.App. 1992) [see page 31].

21. **ECD Policy - Constitutional Violation**:
   a. Officer's use of TASER ECD was reasonable, since suspect was failing to cooperate after being told that he was under arrest for domestic violence. "What option other than physical force was there?," the court asked. "The nature and severity of the force used was reasonably calculated to effect the

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arrest while minimizing risks of physical injury to the suspect or the officers." Plaintiff also failed in his attempt to assert a claim for municipal liability on the basis of alleged inadequate training on the use of ECD. *Magee v. City of Daphne*, 2006 WL 3791971, 2006 U.S. Dist. Lexis 93183, Civil No. 05-0633-WS-M, (S.D. Ala. Dec. 20, 2006) [see page 12].

22. **ECD Training - Adequacy of Program**:
    a. Officer’s use of TASER ECD was reasonable, since suspect was failing to cooperate after being told that he was under arrest for domestic violence. "What option other than physical force was there?," the court asked. "The nature and severity of the force used was reasonably calculated to effect the arrest while minimizing risks of physical injury to the suspect or the officers." Plaintiff also failed in his attempt to assert a claim for municipal liability on the basis of alleged inadequate training on the use of ECD. *Magee v. City of Daphne*, 2006 WL 3791971, 2006 U.S. Dist. Lexis 93183, Civil No. 05-0633-WS-M, (S.D. Ala. Dec. 20, 2006) [see page 12].

    b. The court ruled that a police ECD training program consisting of approximately three (3) to four (4) hours was not inadequate training. *Mateyko v. Felix*, 924 F.2d 824 (9th Cir. (Cal.) 1990) [see page 2].

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## Electronic Control Device (ECD) Cases

**ECD Cases - Federal Court of Appeals Cases**:

**ECD Cases - 4th Amendment Reported - Federal Court of Appeals Cases:**

1. **4th Amendment - Use of TASER ECD on belligerent driver appropriate** – *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004).

    In the circumstances of this case, Reynolds's (the officer's) use of the taser gun to effectuate the arrest of Draper was reasonably proportionate to the difficult, tense and uncertain situation that Reynolds faced in this traffic stop, and did not constitute excessive force. From the time Draper met Reynolds at the back of the truck, Draper was hostile, belligerent, and uncooperative. No less than five times, Reynolds asked Draper to retrieve documents from the truck cab, and each time Draper refused to comply. Rather, Draper accused Reynolds of harassing him and blinding him with the flashlight. Draper used profanity, moved around and paced in agitation, and repeatedly yelled at Reynolds. Because Draper repeatedly refused to comply with Reynolds's verbal comments, starting with a verbal arrest command was not required in these particular factual circumstances. More importantly, ***a verbal arrest command accompanied by attempted physical handcuffing, in these particular factual circumstances, may well have, or would likely have, escalated a tense and difficult situation into a serious physical struggle in which either Draper or Reynolds would be seriously hurt.*** Thus, there was a reasonable need for some use of force in this arrest.

    Although being struck by a taser gun is an unpleasant experience, the amount of force Reynolds used - a single use of the taser gun causing a one-time shocking - was reasonably proportionate to the need for force and did not inflict any serious injury. Indeed, the police video shows that Draper was standing up, handcuffed, and coherent shortly after the taser gun stunned and calmed him. ***The single use of the taser gun may well have prevented a physical struggle and serious harm to either Draper or Reynolds.*** Under the "totality of the circumstances," Reynolds's use of the taser gun did not constitute excessive force, and Reynolds did not violate Draper's constitutional rights in this arrest.

2. *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. (Ohio) 2002).

    The court affirmed the decision in *Russo v. Cincinnati*, and held that the defendant police officer's use of Taser non-lethal force to subdue a potentially homicidal individual did not transgress clearly established law. The court further held that the use of Taser non-lethal force against an armed and volatile

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suspect does not constitute excessive force and concluded that the defendant police officers are entitled to qualified immunity on the Plaintiff's excessive use of force claim.

The court further held that in cases in which officers must choose among alternative use of force options, a plaintiff must show that the police "knowingly and unreasonably" opted for a course of conduct that entailed a substantially greater total risk than the available alternatives.

"We are aware of no controlling precedent since *Russo* holding that the use of non-lethal force against an armed and volatile suspect constitutes excessive force." *Ewolski v. Brunswick*, 287 F.3d 492, 508 (6th Cir. 2002).

3. **Use of TASER ECD on knife wielding schizophrenic - no longer a threat** – *Russo v. Cincinnati*, 953 F.2d 1036 (6th Cir. 1992).

   Held - officer entitled to qualified immunity despite his using TASER ECD multiple times on knife-wielding suspect who was no longer an immediate threat; noting that officer's "actions were intended to avoid having to resort to lethal force." *Russo* upheld a Taser use to "avoid having to resort to lethal force" where a lack of training in dealing with mentally ill may have caused shooting death of known paranoid schizophrenic.

   In *Russo*, 953 F.2d at 1044-45, we held that the defendant police officers were entitled to qualified immunity as to the claim that they used unreasonable force in firing multiple times with a non-lethal Taser gun upon a mentally disturbed suspect wielding two knives. We noted that "although the plaintiffs' allegations may raise a genuine issue of material fact as to whether the use of the Taser was reasonable," we could not conclude that the defendant's "use of non-lethal force to subdue a potentially homicidal individual transgressed clearly established law." *Id.* In reaching this conclusion, we emphasized that the defendant "deployed the Taser in an effort to obviate the need for lethal force." *Id.* at 1044.

4. **TASER ECD Training Program** - *Mateyko v. Felix*, 924 F.2d 824 (9th Cir. (Cal.) 1990).

   The court ruled that a police taser training program consisting of approximately three (3) to four (4) hours was not inadequate training.

5. *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. (Conn.),1999).

   In this case the plaintiff argued in his reply brief that the City of Bridgeport could also be liable because it failed to issue "widely accepted and non-lethal means [by] which to apprehend Thomas," such as "Tasers" to the officers. The

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court took note of this argument, but could not consider it due to a legal technicality since it was raised for the first time in plaintiff's reply brief. However, as noted in the *Ewolski v. City of Brunswick* decision some courts are beginning to discuss a failure to provide "optimal equipment" to its police officers.

6. *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir.(Kan.) 1993).

   The appellate court held that the use of a stun gun to subdue man who was resisting arrest by kicking and biting was an appropriate use of force.

**ECD Cases - 8th Amendment Reported - Federal Court of Appeals Cases:**

7. 8th Amendment - *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. (Nev.) 1988).

   The appellate court held that the use of Taser guns was not cruel and unusual punishment and a policy of allowing use of Taser guns on an inmate who refuses to submit to a strip search does not constitute cruel and unusual punishment. The court noted that Nevada's Department of Prison authorities believe the Taser is the preferred method for controlling prisoners because it is the "least confrontational" when compared to the use of physical restraint, billy clubs, mace, or stun guns. By disabling the inmate, it prevents further violence. The court held that the Taser gun is not *per se* unconstitutional.

**ECD Cases - 4th Amendment Not Reported - Federal Court of Appeals Cases:**

8. **Summary judgment granted to officer for use of ECD on handcuffed arrestee, who had kicked officer, in detention. (4th Amendment analysis)**. *Rose v. City of Lafayette, Colo.*, 2007 WL 485228 (D.Colo. Feb 12, 2007) (NO. CIV.A. 05-CV-00311WD).

   "Officer Franek then entered the cell with the taser. Plaintiff contends that he was suffering an anxiety attack and believed that Franek was pointing a gun at him and so reacted to protect himself; in the process, his foot made contact with Franek's chest and the taser fell to the floor. Franek attempted to restrain Plaintiff but Plaintiff continued to struggle. Franek and Thatcher believed that Plaintiff was grabbing at Franek's gun. Thatcher then picked up the taser and used it on Plaintiff. Plaintiff did not calm down or respond to the officers' instructions and Thatcher used the taser again."

   "Plaintiff alleges that Thatcher's use of the taser and Franek's physical take-downs of Plaintiff in the holding cell were unreasonable. Considering the

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circumstances as a whole, I conclude that no reasonable jury would find that the officers' use of force in these circumstances was objectively unreasonable. Although the initial crimes for which Plaintiff was arrested were relatively minor, his behavior in the holding cell was physically violent and included threats against the officers. In addition, the unpredictability of Plaintiff's behavior is relevant. He had alternated between being compliant and aggressive/confrontational, which meant that the officers could not know whether and to what degree he would react physically when they entered the cell. It is undisputed that the taser was not employed until after Plaintiff intentionally or unintentionally kicked Franek and appeared to be grabbing at Franek's weapon. I note that Plaintiff wearing handcuffs at the time, which lessens the threat of harm he may have presented at the time; nonetheless, in light of his previous conduct and the uncertainty presented in the struggle, it was not objectively unreasonable to believe that the gun could be released and cause injury. Finally, although Plaintiff was not resisting "arrest," since he was already in custody, he was certainly physically resisting the officers and was not complying with verbal commands."

9. **Plf's case dismissed for failure to follow discovery orders for release of medical information and examination.** *Daggett v. Wollangk*, Slip Copy, 2006 WL 1847172 (C.A.7 (Wis.) June 20, 2006).

   John Daggett sued officers of the Oshkosh (WI) Police Department under 42 U.S.C. § 1983 for using excessive force in subduing him with a TASER device. Daggett alleged various injuries and sought $2.5 billion in damages. The district court dismissed Daggett's case with prejudice for failing to follow its discovery orders. The 7th Circuit Court of Appeals affirmed.

10. *Schmittling v. City of Belleville*, Slip Copy, 2006 WL 1308577 (S.D.Ill. May 10, 2006).

   According to Plaintiff's complaint, when his vehicle came to a resting position, he and Schmittling walked back to the road and waited for emergency assistance.

   Officers Vernatti, Netemeyer, and Heffernan then arrived on the scene. At this point, Plaintiff alleges that he requested medical assistance and gave Officer Vernatti his identification. Vernatti then allegedly told Plaintiff that he was going to jail, and Plaintiff responded by placing his wrists together to facilitate cuffing.

   Plaintiff alleges that Vernatti then called him a "smart ass" and shot him with a Taser. While Plaintiff was suffering from the Taser shock, Vernatti allegedly ordered him to lie on the ground, but Plaintiff failed to comply due to the shock he received. As a result, Plaintiff alleges that Vernatti shot Plaintiff with a Taser again and ordered him to place his hands behind his back. While face-down on

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the ground, Plaintiff indicates that he attempted to comply, but was unable to due to pre-existing injuries to his shoulder. (Id.) Vernatti then allegedly applied a third Taser shock to Plaintiff for resisting arrest and forced Plaintiff's hands together behind his back for cuffing. Plaintiff alleges that Vernatti shocked him a fourth time in response to his request for medical assistance.

As a result of this incident, Plaintiff claims that, among other things, he lost consciousness and control over his bodily functions, suffered traumatic injury to his head, and suffered burn injuries.

Viewing these facts in a light most favorable to Plaintiff, Plaintiff's complaint must survive Defendants' motion to dismiss. Application of four Taser shocks when Plaintiff was cooperating or attempting to cooperate with the Officer's demands, taken as true as the Court must, is excessive and outrageous. Additionally, the officers' failure to aid Plaintiff both during the Taser shots as well as at the police station, and the omission of such events in police records could be considered outrageous. While the Court recognizes that some of Plaintiff's injuries were a preexisting result of the vehicle accident, Plaintiff also alleges to have suffered pain, loss of consciousness, loss of bodily control, and burn injuries as a result of the excessive Taser shots, head trauma as a result of Officer Vernatti's conduct while escorting Plaintiff to the patrol vehicle, and emotional distress as a result of the entire course of events. These allegations exceed the threshold for extreme and outrageous conduct.

11. *Autin v. City of Baytown*, Slip Copy, 2005 WL 3556677, (5th Cir. (Tex.) Dec 29, 2005). Case settled.

(On a summary judgment motion where in this case the court took the view of the facts most favorable to Autin.) On July 11, 2003, 59 year-old Autin went to her brother's house to check the mail. When no one answered the door, she became concerned about the occupant, who she had reason to believe was seriously ill. Because she could hear the television loudly through the door, Autin began knocking on the door with a brick she found in the yard, thinking this might get the occupant's attention. She then went to a neighbor's house to telephone her brother's house.

When this was unsuccessful, she contacted the Baytown Police Department, and Officer Aldred came to the scene. Autin requested Aldred's help in getting someone to answer the door. When Aldred told her he could not make anyone come to the door, Autin dismissed Aldred and returned to the door to continue knocking on it with the brick.

As Autin picked up the brick and approached the door, Aldred attempted to use his taser on her, but it malfunctioned, so he approached her and attempted a contact tase, but the taser again malfunctioned, causing a taser dart to

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penetrate Autin's skin. Aldred then repeatedly contact-tased Autin while physically forcing her to the ground. Autin hit her head on a pole and suffered a severe laceration.

Not only was Autin not resisting arrest, but Aldred's tasing of her was allegedly the first indication he gave to her that she was doing anything wrong. He tased her when her back was to him, he gave her no notice of his intention to do so, and he continued to tase her repeatedly, even after she was subdued on the ground. In judging the objective reasonableness of Aldred's use of force, it should not be forgotten that Autin was 59 years old and 5'2" tall. Given these alleged facts, Aldred's use of force was both excessive to the need and objectively unreasonable. The district court correctly found that the facts as alleged show a violation of Autin's Fourth Amendment rights.

Autin was objectively unthreatening, she was not resisting arrest in any way, and her crime was minor.

A jury trial may reveal other facts that justified Aldred's use of force. At the summary judgment stage, however, we are bound to take Autin's version of the facts as true.

12. *Lifton v. City of Vacaville*, 72 Fed.Appx. 647, 2003 U.S. App. LEXIS 16286 (9th Cir. (Cal.) 2003).

    The appellate court held that the officers' decisions to surround the individual, shout at him, and use a Taser to disable him were not violations of clearly established Fourth Amendment law governing excessive force.

**ECD Cases - 8th Amendment Not Reported - Federal Court of Appeals Cases:**

13. *Jolivet v. Cook*, 48 F.3d 1232 (Table) (10th Cir. (Utah) 1995).

    The appellate court upheld the holding of the district court which concluded that the correctional officers used taser weapons in a good faith effort to maintain and restore discipline after the inmate refused orders to be handcuffed before being moved from his cell.

14. *Walker v. Sumner*, 8 F.3d 33 (Table) (9th Cir. (Nev.) 1993).

    The court affirmed *Michenfelder v. Sumner* where the court held that the threatened use of a taser to enforce compliance with a search had a reasonable security purpose and was not unconstitutional.

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**ECD Cases - Federal District Court Cases:**

**ECD Cases - 4th Amendment Reported - Federal District Court Cases:**

15. **Qualified immunity for officer, use of TASER ECD to force man to release grip on basketball pole. Issue of "passive resistance" discussed - "Eighth Circuit law draws no distinction between active or passive resistance in resisting a police officer's requests."** Plaintiff claims Officer Halverson violated his Fourth Amendment right to be free from unlawful search and seizure when he walked onto plaintiff's deck and placed him under arrest. Plaintiff also claims Officer Halverson subjected him to unconstitutional excessive force by using a taser to force him to release his grip from the basketball pole. Upon review, the Court finds no constitutional violation, making qualified immunity appropriate. *Schumacher v. Halverson*, 467 F.Supp.2d 939 (D.Minn. December 15, 2006) (D.Minn. December 15, 2006).

    "Plaintiff argues that the taser constituted excessive force because his resistance was merely passive. But Eighth Circuit law draws no distinction between active or passive resistance in resisting a police officer's requests. See e.g., id. at 1066-67 ("When a suspect is passively resistant, somewhat more force may reasonably be required [to effect an arrest]."); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir.1990) (finding no constitutional violation in officers' use of force to arrest suspect who resisted arrest by refusing to get out of his car and clinging to his car's door frame); *Agee v. Hickman*, 490 F.2d 210, 212 (8th Cir.1974) (force may be used to overcome physical resistance). The Court has no difficulty, contrary to plaintiff's characterization, in finding plaintiff's resistance was active. But even if passive, the legal analysis of the use of force would not change.

    Officer Halverson's use of a taser to effect plaintiff's arrest does not rise to a constitutional violation. Accordingly, Officer Halverson is entitled to qualified immunity as to plaintiff's claim of excessive force."

16. **Summary Judgment Granted to Officers who used a TASER device on a handcuffed, struggling, resisting 14 year old male.** *Johnson ex rel. Smith v. City of Lincoln Park*, 434 F.Supp.2d 467 (E.D.Mich. June 8, 2006) - Use of a TASER device on a handcuffed, resisting, struggling, unarmed 14 year old male (in school) who refused to hand over his Nintendo Game Boy (possession of which was against school rules) and then resisting searching and struggled during arrest after swinging at officer.

    The Court granted summary judgment to the officers in ruling:

    1. The search of the boy was constitutionally lawful.
    2. The arrest of the boy for resisting and assaulting an officer was supported by probable cause and lawful.

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3. Police officers used reasonable force in subduing high school student and effectuating his arrest for assaulting police officer and resisting arrest, and thus, officers were not liable to student under § 1983 for use of excessive force, or under Michigan law for assault and battery; after student resisted pat-down search for video game that student possessed in violation of school rules, officers twice took him to the floor and shocked him with taser, student suffered no injuries from being tasered, and his only injury was a rug burn from being taken to floor, student continuously struggled and resisted officers and bit officer, and he admitted that he was warned to stop struggling but refused to do so.

"The evidence of record is undisputed--indeed Plaintiff himself admits as much--he continuously struggled and resisted the officers and bit Officer Cochran. He admitted that he was warned to stop struggling but refused to do so. He further acknowledged that if had simply turned over the Gameboy when Assistant Principal Phillips had demanded it, none of this would have happened.

Under these circumstances, it is simply impossible to say that the amount of force employed by Officers Cochran and McFarland was unreasonable. To the contrary, the Court concludes that the amount of force was reasonable under the Fourth Amendment."

17. **Drawing and pointing ECD where (58 year old man had heart surgery 2 months prior) suspect did not submit is not a seizure.** *Policky v. City of Seward (NE)*, 433 F.Supp.2d 1013 (D.Neb. May 25, 2006) - TASER device use of force case – Drawing and pointing of a TASER device where person did not submit – is not a seizure and officer and employer were granted summary judgment on the issue. Concern – man was concerned about dying due to TASER device – because of heart surgery 2 months prior to incident.

    Mother called police on her 58 year old acting funny son who had not left his room in 2 days – for a possible diabetic emergency.

    Officers and paramedics arrived and took him into medical health – community care taken custody.

    Mr. Policky does not mention this renewed exchange of words, but merely states that he "was sitting on the stool in [his] bathroom" and that when he looked up he saw Officer Shook standing "about 3 feet from [his] bathroom door ... [with] a taser gun pointed at [him]." Officer Shook states that he drew his taser gun before opening the unlocked bedroom door and kept it pointed at the ground; that he and the two rescue squad members entered the bedroom and saw that Mr. Policky was in the bathroom, fully clothed, sitting on the toilet; that he put away his taser gun when he saw that Mr. Policky had nothing in his

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hands; and that he directed one of the paramedics to remove a knife or pair of scissors that was lying on a dresser in the bedroom. Officer Shook denies that he ever pointed the taser gun at Mr. Policky.

At some point, Mr. Policky stood up and closed the bathroom door, locking it. He states that he was worried that Officer Shook was going to use the taser gun on him, and was especially concerned about this because he had undergone heart surgery only two months earlier and did not think that he could survive the electrical shock.

Thus, the important TASER related points are:

- Officer removed TASER device from holster.
- Officer kept TASER device pointed at the ground.(suspect states TASER device was pointed at him)
- When officer saw that Policky had nothing in his hands the officer “put away his taser gun”.
- Policky was “worried that Officer Shook was going to use the taser gun on him, and was especially concerned about this because he had undergone heart surgery only two months earlier and did not think that he could survive the electrical shock.”

The court granted the police motion for summary judgment on the TASER device related issue – “(4) dismiss in part the Fourth Amendment excessive force clam alleged against Officer Shook, insofar as complaint is made about (a) his use of handcuffs and (b) his display of a taser gun.”

The court concluded “that no constitutional violation occurred in connection with the officer using handcuffs or drawing a taser gun, and that summary judgment should be granted with respect to these precautionary measures.”

In regard to the drawing of the TASER device, the court concluded, “as a matter of law that Officer Shook's act of drawing a taser gun, and allegedly pointing it at Mr. Policky, did not constitute an excessive use of force. In Edwards v. Giles, 51 F.3d 155, 157 (8th Cir.1995), the Eighth Circuit held that an officer's conduct in drawing his gun and pointing it at the plaintiff, without any indication that he intended or attempted to fire the gun, did not rise to the level of a constitutional violation. [FN12] If the act of drawing and pointing a gun loaded with bullets does not violate the Fourth Amendment, then the act of drawing and pointing a gun charged with electricity can hardly give rise to a claim of excessive force. Thus, summary judgment will also be entered with respect to the plaintiff's allegations concerning the taser gun.”

> “FN12. The Court of Appeals also found in Edwards that the because the plaintiff did not submit to the officer's authority when the gun was pointed at him, there was no seizure. The same is true in the present case.”

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As to the alleged improper TASER device procedures – “Mr. Policky alleges in his complaint, as part of his state-law claim, that the City of Seward "failed to supply proper policies to train Officer Shook with the proper procedures when using a taser gun, restraining Plaintiff ..., and ... determin[ing] what facts and circumstances merit the use of force" (Complaint, ¶ 26), but he has presented no evidence in support of this allegation and has failed to demonstrate that the City of Seward has been deliberate indifferent in this regard. Thus, the City is also entitled to summary judgment on the section 1983 claim. [FN15]”

> “FN15. In any event, the City has no liability under § 1983 for Officer Shook's using handcuffs, displaying the taser gun, or damaging the bathroom door, since these actions did not violate Mr. Policky's constitutional rights. See Schulz v. Long, 44 F.3d 643, 650 (8th Cir.1995) ( "It is the law in this circuit ... that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located.").”

Thus, the important legal points include - The drawing of a TASER device and pointing it at a suspect – if ths suspect “did not submit to the officer’s authority when the gun was pointed at him, there was no seizure” – quoting a firearms case.

18. **Qualified immunity denied officers for excessive force during multi-hour mental health detention transport.** *Batiste v. City of Beaumont*, 421 F.Supp.2d 1000 (E.D.Tex. March 10, 2006). Case settled.

[The court taking all of plaintiff’s allegations as true in ruling on officers’ qualified immunity defense.] “Whether analyzed under the Fourth Amendment or the Fourteenth Amendment, [the officers’] alleged actions violated clearly established rights of which an objectively reasonable police officer would have been aware. Simply put, no objectively reasonable officer would have thought that striking, kicking, dragging, choking and repeatedly using a taser gun against a non-resisting, fully compliant citizen would constitute either "reasonable force in light of the facts and circumstances" or "a good faith effort to maintain or restore discipline." Defendants Wisby and Perrit simply cannot reasonably argue that they or any objectively reasonable police officer would not have understood that such conduct would violate a citizen's rights in the circumstances alleged.”

Handcuffs - “The officers initially acted within their lawful discretion when handcuffing plaintiff upon her arrest. Moreover, handcuffing too tightly, without more, does not amount to actionable excessive force. ... However, plaintiff alleges that she complained of her handcuffs over a period of three hours; that the handcuffs had cut her skin by the time she reached the second of four hospitals; and that staff at the third hospital requested officers to loosen the

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handcuffs. These circumstances, if true, could demonstrate violation of a well-established constitutional right of which an objectively reasonable officer would have known. See *Heitschmidt v. City of Houston*, 161 F.3d 834, 839-40 (5th Cir.1998) (declaring that a court should give "appropriate weight" to the fact that the officers who refused to loosen her handcuffs were the ones who placed the detainee in that position to begin with)."

19. **SJ Denied due to Plf's lay statements.** *Batiste v. City of Beaumont*, 426 F.Supp.2d 395 (E.D.Tex. March 28, 2006). Case settled.

20. *Drummer v. Luttrell*. 75 F.Supp.2d 796 (W.D.Tenn. 1999).

    The court held that prison officials are entitled to use physical force, including devices such as tasers, to compel obedience by inmates.

21. *Nicholson v. Kent County Sheriff's Dept.*, 839 F.Supp. 508 (W.D.Mich. 1993).

    The court affirmed the *Russo v. Cincinnati* decisions which held that the taser, which was deployed in an effort to obviate the need for lethal force, did not violate clearly established law.

**ECD Cases - 8th Amendment Reported - Federal District Court Cases:**

22. *Parker v. Asher*, 701 F.Supp. 192 (D.Nev. 1988).

    The court affirmed *Michenfelder v. Sumner* where the Ninth Circuit held that Taser guns are not per se unconstitutional as long as they are "used to enforce compliance with [an order] that had a reasonable security purpose. The legitimate intended result of a shooting is incapacitation of a dangerous person, not the infliction of pain.

**ECD Cases - 4th Amendment Not Reported - Federal District Court Cases:**

23. **Three uses of ECD drive stun to get a crying suspect off the ground and into the squad car after a traffic stop -- officer's actions were "so plainly unnecessary and disproportionate, no reasonable officer could have had a mistaken understanding as to whether [the] particular amount of force [was] legal in the circumstances."** *Buckley v. Haddock*, Slip Copy, 2007 WL 710169 (N.D.Fla. March 6, 2007).

    Buckley was stopped by Officer Rackard on March 17, 2004, for speeding. After Buckley repeatedly refused to sign the citation, Rackard arrested

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Buckley. Buckley was handcuffed without any active resistance on his part. As Buckley was being led back to Rackard's patrol car, Buckley sat down on the ground with his legs crossed. Rackard repeatedly ordered Buckley to stand up, but Buckley refused and continued to sit on the ground crying. To get Rackard to move, Buckley administered a taser gun to Buckley's torso, without the darts, three successive times, causing multiple direct contacts with the electrodes. The only apparent purpose for using the taser was to cause the restrained Buckley, who had not been violent or dangerous, to get into Rackard's car. A few minutes later, Rackard placed a willing and non-violent Buckley back in his patrol car. Because of the taser applications, Buckley suffered several burn marks, resulting in intense pain and keloid growth at the site of some burns.

In this case, Buckley was pulled over for a minor traffic violation, pulled out of his car, handcuffed, and after he was secured, the arresting officer tased him three successive times (two in rapid succession followed by a third application more than a minute later) with the electrodes directly touching Buckley's body, resulting in burns on his back.

While "the right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," under the facts of this case, no reasonable officer could believe that using such extreme force was lawful. Id. at 1200. As the Eleventh Circuit stated, "once an arrest has been fully secured and any potential danger or risk of flight vitiated, a police officer cannot employ ... severe and unnecessary force." Id. In a situation very similar to that in Lee, Rackard's actions were "so plainly unnecessary and disproportionate, no reasonable officer could have had a mistaken understanding as to whether [the] particular amount of force [was] legal in the circumstances." Id. (Internal quotations and citation omitted). Rackard is not entitled to qualified immunity.

24. **Officer's use of TASER ECD was reasonable, since suspect was failing to cooperate after being told that he was under arrest for domestic violence. "What option other than physical force was there?," the court asked. "The nature and severity of the force used was reasonably calculated to effect the arrest while minimizing risks of physical injury to the suspect or the officers." Plaintiff also failed in his attempt to assert a claim for municipal liability on the basis of alleged inadequate training on the use of ECD.** *Magee v. City of Daphne*, 2006 WL 3791971, 2006 U.S. Dist. Lexis 93183, Civil No. 05-0633-WS-M, (S.D. Ala. Dec. 20, 2006).

    Officers attempted to use a TASER ECD to cause a non-cooperating domestic violence suspect to fall to the ground, to enable them to handcuff him without further incident. The officers stated that they acted to prevent a physical

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altercation between the suspect and themselves. In actuality, however, one TASER ECD shot malfunctioned because one of the darts missed him, and the other shot failed because the suspect slammed the door of the residence immediately after being hit, severing the wires. The suspect was able to race out the back door to his home and hide in some nearby woods until the officers left.

The suspect subsequently claimed that the officers used excessive force against him and that the employing city should be held liable on the basis of an unconstitutional policy and inadequate training. The court found that the use of the TASER ECDs against the suspect was reasonable, since he was failing to cooperate after being told that he was under arrest for domestic violence. "What option other than physical force was there?," the court asked.

"The nature and severity of the force used was reasonably calculated to effect the arrest while minimizing risks of physical injury to the suspect or the officers."

As for the claims against the city, the court easily disposed of them also. Given that it had concluded, as a matter of law, that the use of the TASER ECDs in these circumstances was reasonable, there could be no municipal liability on the basis of a supposedly unconstitutional policy sanctioning the officer's use of the TASER devices.

The inadequate training claim was based on the fact that the only specific training on TASER ECDs the two officers had received was in March of 2002, with no subsequent recertification prior to the November 2003 incident. The court rejected the inadequate training claim, since any supposed "deficiencies in the depth or breadth" of the officers' training had obviously not caused any excessive use of force or other violation of the plaintiff's rights.

25. **Use of a TASER ECD on a passive, non-aggressive, non-verbal six year old, who posed no threat to anyone’s safety including his own, and with no warning or verbal command was given is a violation of the 4th Amendment and the officers were not entitled to qualified immunity.** *Moretta v. Miami-Dade County*, 2007 WL 701009 (S.D.Fla. Jan 23, 2007) (NO. 06-CIV-20467).

    The court found – in a motion to dismiss analysis (taking plaintiff’s bald complaint assertions as undisputed fact that) – The officers violated the child’s constitutional right to be free from unreasonable seizures and are also not entitled to qualified immunity -- from the moment the police officers arrived on the scene, through the time the Officers deployed a TASER ECD into Allen's body and handcuffed him, Allen posed no threat to anyone's safety including himself. In light of these facts, no reasonable officer objectively could have

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believed that the circumstances that Officers Abbott and Rivera confronted warranted the application of the force used against a passive, non-aggressive, non-verbal six year old, where no warning or verbal command was given.

For purposes of evaluating this Motion to Dismiss, [the Court] assumed that Allen's misbehavior, if a crime at all, was not a severe crime. Next, [the Court] must examine whether Allen posed a threat to the officers or others and whether he attempted to flee or evade arrest. As already stated, [the Court] must take all allegations of the Second Amended Complaint as true. According to the Second Amended Complaint, from the moment the police arrived, and continuing throughout the entire event, Allen stood in the corner of the room motionless, “as if in a trace.” (Second Amended Complaint, ¶¶ 34-36) According to the Second Amended Complaint, the police officers kneeled in front of him in a non-defensive posture, sat in a chair directly in front of him, and just prior to tasering, positioned themselves within one foot, so as to prevent him from falling to the ground after the tasering. (Second Amended Complaint, ¶¶ 35, 36, and 46). Furthermore it is alleged that at no time did Allen provide any resistence or attempt to evade or flee, instead he remained totally motionless and frightened while being confronted by the police officers. Lastly, from the face of the Second Amended Compliant, it is not alleged that Allen threatened to harm himself with the piece of glass in his hand. Also, Allen did not make any confrontational gestures or react in a belligerent or aggressive manner once the Officers were on the scene. In light of these facts, Plaintiff argues, “[t]aking the facts as alleged in the Second Amended Complaint in a light most favorable to [Allen], and balancing the three considerations set forth in Graham, clearly demonstrates that the individual Defendant officers used unreasonable force in detaining [Allen].” (Plaintiff's Response, 5). I agree because the facts as alleged in the Second Amended Complaint support a finding that the Officers violated Allen's Fourth Amendment rights.

In reaching this conclusion, [the Court] closely ... examined the allegations of the Second Amended Complaint. It is alleged that from the moment the police officers arrived on the scene, through the time the Officers deployed a taser into Allen's body and handcuffed him, Allen posed no threat to anyone's safety including himself. In light of these facts, no reasonable officer objectively could have believed that the circumstances that Officers Abbott and Rivera confronted warranted the application of the force used against a passive, non-aggressive, non-verbal six year old, where no warning or verbal command was given. Therefore, I conclude that Officers Abbott and Rivera FN6 are not entitled to qualified immunity based on Plaintiff's allegations contained in the Second Amended Complaint.

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26. **Use of TASER device to subdue female juvenile who was kicking, screaming, jerking, biting, and pushing was reasonable.** *RT v. Cincinnati Public Schools*, 2006 WL 3833519 (S.D.Ohio Dec 29, 2006) (NO. 1:05CV605).

27. **ECD use - no injury.** Plaintiff filed a pro se complaint against defendants, alleging among other things that defendants used excessive force in arresting him, thus violating his constitutional rights. Specifically, he alleges that a taser was improperly used against him, causing him injury. The allegation as to injury is that the plaintiff suffered "psysical (sic) trauma." There is nothing in the record to even indicate any injury other than the temporary discomfort to be expected. The record in fact indicates that no injury was sustained. After the taser was used once, plaintiff was able to continue to resist arrest and to assault defendants, breaking defendant Bunt's finger and straining defendant Carda's rotator cuff. These strenuous activities by plaintiff would indicate "no injury" to plaintiff. All questions of injury are, however, immaterial given the default by plaintiff. *Larson v. Bunt*, Slip Copy, 2006 WL 3423894 (November 28, 2006, D.S.D,2006).

28. **Use of firearm deadly force not unreasonable against handcuffed (in front) person threatening officers with ECD (in drive stun).** Any reasonable officer would believe that deadly force was necessary where a shackled arrestee, (1) after a prolonged and violent resistance to arrest and continuous attempts to flee, (2) who is a cuffed with his hands in front of his body, (3) is seemingly unaffected by commands, strikes, chemical sprays, and TASER shocks, and (4) has somehow managed not only to take a TASER away from an officer, (5) but also to shock that officer causing him to fall to the ground, (6) nevertheless continues to come toward another officer with a TASER in his hands. [FN11] It bears repeating that this is a very narrow holding based on all of the facts present here. *Henderson v. Inabinett*, 2006 WL 2547435 (M.D.Ala. Sep 01, 2006) (NO. 2:05-CV-00064-WKW).

    [FN11] In this last regard, it is also irrelevant whether Mr. Shaw was coming toward Deputy Motley or Captain Inabinett. That he was approaching any person, let alone a law enforcement officer, with a weapon and the intent to use it, justified the use of deadly force against Mr. Shaw. See *Graham*, 490 U.S. at 396 (reiterating that "whether the suspect poses an immediate threat to the safety of the officers or others" is circumstance that must be considered in adjudging reasonableness).

29. **Summary judgment (qualified immunity) granted to defendants when TASER device was used on a 14 year old female fighting on school property.** *Maiorano ex rel. Maiorano v. Santiago*, Slip Copy, 2006 WL 2024951 (M.D.Fla. July 15, 2006).

    On April 14, 2004, Gilberto Santiago, a deputy sheriff with the Orange County Sheriff's Office (OCSO), was a school resource officer at Freedom High School

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(FHS) in Orange County, Florida. At approximately 11:30 a.m. when FHS students were changing classes between 4th and 5th period, Santiago observed several students running across the courtyard yelling "fight," "fight." Santiago looked in the direction that the students were running and observed two fights going on simultaneously in the courtyard area of the school. Jessica Maiorano and Keri Cuda were fighting with each other, and Jaclyn Costello and Ashley Horner were fighting with each other. Santiago observed the 4 students fighting violently, pulling each other's hair, and punching each other. Santiago estimated that at least 100 or more students had already formed around the fight, and he pushed his way through the crowd of students which continued to grow. According to Santiago's account of the incident, droves of other students continued to run towards the fight. After he arrived at the scene of the fight, Santiago claims that the 4 girls continued to fight, and he was unable to pull them apart. Santiago yelled at the girls to "break it up," but they did not stop fighting. While the students were fighting, Santiago heard one male student encourage the fighting students to become more violent by yelling words like "kill her, kick her ass." Santiago also heard one of the girls yelling fighting words to the effect, "I'm going to kill you, I'm going to kill you, I'm going to kick your ass ." FHS Dean Youtz and Dean Lebron arrived on the scene at that time.

At one point, Santiago claims that another student from the crowd got between him and the students who were fighting. Unsure as to whether the student intentionally got between him and the fighting students or whether the student had been pushed by the crowd into the fighting area, Santiago found the situation to be volatile and dangerous.

At the time of the incident, Santiago had been previously contacted by the OCSO gang suppression unit and had been notified about the unit's suspicions regarding gang-related activity at FHS. Santiago was convinced that if he did not get the situation under control very quickly, the school could erupt into even more violence. Having been a school resource officer for more than 6 years, Santiago was aware that it was not uncommon for students to bring weapons to school campuses. Normally, there are 2 school resource officers on duty at FHS However, the other officer was not at school on April 14, 2004, and Santiago was the only officer there.

Because of the volatility of the situation, Santiago felt that he needed to stop the fight as soon as possible and that it would be safest and most effective to use his agency-issued M26 taser which is an electronic device. Santiago had received 4 hours of training on the M26 taser prior to its issuance to him during which he had learned that the taser is a non-lethal device used to immediately subdue a subject with no real injury. Santiago was concerned that the use of a chemical agent to stop the fight could cause cross-contamination to students, administrators, and himself and that the use of an expendable baton might

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cause serious injury to the girls involved in the fight and the students surrounding him. Because he wore a gun, Santiago considered that one of the students might become so excited that he or she could grab his gun and create an even more violent situation.

In order to control the situation, Santiago states that he administered one contact tase of the M26 taser to Maiorano as she was holding Cuda's hair. At that point, Cuda lunged forwarded aggressively towards Maiorano, and Santiago administered one touch tase to Cuda. FHS Dean Youtz and Dean Lebron tried to control Maiorano and Cuda.

Because his efforts to stop the fight between Costello and Horner had been unsuccessful, Santiago conducted a touch tase to both Costello and Horner. Initially, Costello disengaged upon being tased. However, Horner became more aggressive and attacked Costello again. In response, Santiago administered a second touch tase to Horner who continued to be agitated and even became aggressive towards Santiago as he tried to restrain her. As a result, Santiago administered a third touch tase to Horner who finally stopped resisting. Santiago testified that it was possible that Maiorano or Costello brushed against the taser or were pushed against the taser by other students but that he never intentionally administered his taser to Maiorano or Costello more than once.

(As for the use of the M26) Applying the *Graham* and *Draper* factors to Plaintiffs' version of the incident, the use of the taser was necessary because Plaintiffs were a threat to each other and to others and created a chaotic, unruly situation at the school. Defendant Santiago was faced with two violent physical altercations involving 4 students occurring simultaneously with 50 or more students surrounding the altercations chanting and screaming fighting words in an effort to escalate the fight and with many more students running to the location while 700 students left lunch and others were changing classes. All of this was observed within the context of his knowledge of potential gang activity. While Plaintiffs and Defendant Santiago disagree as to whether Defendant Santiago warned Plaintiffs before he used his taser, given the fact that the physical altercation created a dangerous, volatile situation, it was both reasonable and necessary to use the taser on Plaintiffs, even without a previous warning.

***Defendant Santiago's use of the taser gun to subdue Plaintiffs was reasonably proportionate to the "difficult, tense and uncertain situation" that he faced in light of the altercation and did not constitute excessive force.*** See *Draper*, 369 F.3d at 1278. Plaintiffs were hostile, belligerent, and uncooperative, and there was a reasonable need for the use of some force in order to control the situation. See *id.* ***Although being struck by a taser is an***

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***unpleasant experience, the use of such force was reasonably proportionate to the need for force and did not inflict serious injury on either Plaintiff.***

***In light of the volatile situation that Defendant Santiago faced, the fact that both Plaintiffs were fighting when being tased, and the fact that Plaintiffs did not suffer any injuries as a result of the tasings, such force was de minimis in nature.*** See, e.g., *Durruthy v. Pastor*, 351 F.3d 1080, 1094 (11th Cir.2003) (explaining that some use of force by a police officer when making an arrest is necessary and lawful, regardless of the severity of the alleged offense); see also *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir.1997) (the minor nature of an injury reflects that only minimal force was used). ***Thus, there is no genuine issue of material fact as to whether Defendant Santiago violated the Constitution, and Defendant Santiago is entitled to qualified immunity.***

(As for the OCSO) Defendant Beary's Argument that Summary Judgment is Appropriate in his Favor Because Defendant Santiago did not violate the Constitution and there is no Custom Sanctioning the Use of Excessive Force. The Court finds that the reasoning from Heller applies because the Court has already found that Defendant Santiago's actions did not violate the Constitution. Because Plaintiffs have failed to prove that Defendant Santiago violated the Constitution, the Court finds that Defendant Beary is not liable under section 1983.

- those cases do not hold, nor has the Court's independent research produced a case holding, that a use of force policy must contain an explanation of the Graham and Ferraro factors in order to demonstrate that a policy does not sanction the use of excessive force.

- The record further reflects that deputies are continuously trained in making proper and lawful arrests and the appropriate use of force through annual block training and evaluations.

- Because the Use of Force Policy does not sanction the use of excessive force and because Plaintiffs have failed to meet their burden of production on this issue, summary judgment in favor of Defendant Beary is appropriate on this additional ground as well.

a. **(Prior case) SJ not granted - use of TASER device without warning on 14 year old, 100 pound girl in a physical confrontation with another female student** – *Maiorano ex rel. Maiorano v. Santiago*, Not Reported in F.Supp.2d, 2005 WL 1200882, M.D.Fla. 2005 (May 19, 2005).

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On April 14, 2004, Gilbert Santiago, an Orange County Sheriff's Deputy, approached Jessica Maiorano (14 years old, 100 pounds) while Maiorano was in a physical confrontation with another female student at Freedom Highschool. Without warning, Santiago allegedly applied his M26 taser to the left side of Maiorano's back, causing severe pain, even though Maiorano contends that she never verbally or physically threatened Santiago. As a direct and proximate result of the use of force, Maiorano alleges that she suffered severe physical pain and psychological damage in the past and will continue to suffer in the future.

In other words based on the bare allegations of the Amended Complaint, it cannot be said that an objectively reasonable officer could believe that it would be reasonable to use a TASER device against Plaintiff, without advance warning or a verbal command to desist, because of Plaintiff's action of engaging in an unspecified type of physical altercation with another student.

30. **Summary judgment granted to defendants on officer's use of TASER device on fleeing arrestee.** *U.S. ex rel. Thompson v. Village of Spring Valley, N.Y.*, Slip Copy, 2006 WL 1889912 (S.D.N.Y. July 10, 2006).

    Assuming arguendo that deploying a taser when a person resists arrest is a custom adopted by the Spring Valley Police Department, such a claim is to be analyzed under the Fourth Amendment "objective reasonableness" standard.

    Officer Charles advised Garnell Thompson that he was under arrest, Thompson pushed his arm and attempted to flee. Officer Charles then repeatedly warned Thompson to stop or he would be shot with a taser. Thompson does not dispute these facts. Thus the undisputed facts indicate that Thompson actively resisted arrest and attempted to evade arrest by flight, and Officer Charles acted reasonably in deploying the taser in light of the circumstances. Accordingly, Defendants' motion for summary judgment on the excessive force claim is granted, and Thompson's motion for summary judgment on that claim is denied.

31. **Defendants motion for summary judgment denied due to genuine issues of material fact – (1)** ***raised his hands with his fingers spread apart in a gesture of surrender or raised them in a threatening manner*****, and (2) TASER probe removal that left scars is controverted de minimis.** *Fletcher v. Schwend*, Slip Copy, 2006 WL 1867890 (N.D.Tex. July 6, 2006).

    (As the case pertained to TASER device use) – Officer Schwend's claim that he reasonably believed that Fletcher posed a serious threat of harm that called for his use of the taser centers almost entirely upon his claim that Fletcher

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"***raised his fists aggressively toward him***." Taking Fletcher's (acting *pro se*) verified pleadings and viewing them in the light most favorable to the non-moving party (Fletcher), the Court finds they raise a fact question as to whether Fletcher ***raised his hands with his fingers spread apart in a gesture of surrender or raised them in a threatening manner***. Thus, a factual dispute over the material issue of the objective reasonableness of Officer Schwend's actions exists, which, until resolved, leaves the issue of qualified immunity for later resolution.

(Underlying incident) At approximately 5:45 p.m., officers observed Fletcher riding a bicycle in the middle of the street, southbound on Beckley. Fletcher was not wearing a helmet. Officers had received information from a reliable informant that a heavy-set black male was selling narcotics from a bicycle. Fletcher matched the informant's description, and officers detained him. Fletcher appeared nervous and was shaking. At that point, Fletcher backed away and ran into an alley.

Officer Schwend followed on foot and Foster drove the squad car to block Fletcher's flight. Officers observed Fletcher throwing down clear baggies containing a white substance. Officers believed--from their police experience and training--that the substance was crack cocaine. Schwend weighed the suspect substance and performed field tests which determined that it was crack cocaine. Fletcher was arrested for evading arrest and possession of cocaine. He was later charged with, and convicted of, possession of cocaine, a controlled substance.

Parties' sworn statements of the facts begin to differ significantly at the point where Fletcher was forced to surrender to Officers. Officers swear that when Foster blocked Fletcher with the squad car, Fletcher turned around and raised his fists aggressively to Officer Schwend. Officers contend that Fletcher disobeyed Schwend's order to Fletcher to lie down on the ground and place his hands behind his back, necessitating Schwend's use of a taser gun on Fletcher. Officers aver that, in any event, they are entitled to judgment because Fletcher cannot show that he suffered more than *de minimis* injuries.

Fletcher swears that Foster wrecked the squad car and knowingly struck Fletcher with the squad car after Fletcher stopped to surrender. Fletcher also contends that when he stopped to surrender, he put both hands up in the air in full view with his fingers spread apart to show Schwend that he had no weapon or any way to hurt Schwend or Foster. Fletcher also claims that after he was in hand cuffs and was leaning forward on the trunk of the squad car, Foster walked over and pushed Fletcher’s head onto the trunk of the squad car. Fletcher alleges that Foster told him the push was payback for making him wreck the squad car.

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***(De minimis injuries - TASER probes)*** Fletcher contends that the paramedic who examined him at the scene told Schwend to take Fletcher to the hospital to have the TASER probes removed. Fletcher alleges that Schwend ignored the paramedic's advice and jerked the TASER probes out of Fletcher's stomach. Fletcher claims that Schwend's removal of the TASER probes left him with three open wounds to his stomach that later scarred. He alleges that although a nurse at the Dallas County Jail examined him, she did not clean the wounds. According to Fletcher's verified pleadings, he sustained open TASER wounds that left scars. Thus, officers' claim that Fletcher's injuries are *de minimis* is controverted.

32. **Summary judgment granted for TASER device use - resisted arrest, attempted to flee. Court gave a use-of-force risk management analysis (dart to top of head)** – *Wylie v. Overby*, Slip Copy, 2006 WL 1007643, E.D.Mich. (April 14, 2006).

    Wylie had two outstanding warrants, one of the deputies had learned of Wylie's history of assaultive behavior, and Deputy Overby felt threatened by Wylie's actions. There were two outstanding warrants for Wylie's arrest, that Wylie resisted the deputies' efforts to arrest him, and that Wylie attempted to flee.

    After Wylie was hit by Deputies' TASER darts (one dart hitting Wylie in the top of the skull - requiring removal by a neurosurgeon) (from two TASER devices), he fell to the ground and was handcuffed.

    **Removing the dart from skull** – Wylie was then transported to the hospital to have the darts removed. At the hospital, a neurosurgeon examined Wylie and determined that his two options were to pull the prongs out of his skull which would leave metal shards in his head or remove the prongs surgically by cutting out a small portion of his skull and replacing it with a metal plate. Wylie decided to have the prongs pulled out. Wylie claims that, as a result of this incident, he suffers from headaches, sensitivity to light, and has trouble reading for long periods of time due to blurred vision.

    **Wylie's Guilty Plea** – At the threshold of the analysis of this issue is whether Wylie's guilty plea to a charge of resisting arrest and assaulting an officer in state court precludes him from arguing that he did not resist the officers' attempt to arrest him. ***The answer is that it does.***

    The foregoing conclusion, however, may not fully resolve the question of excessive force, as "[a] conviction for resisting arrest does not preclude a § 1983 claim for excessive force." ***The court will therefore examine the question of whether the officers used more than an reasonable degree of force in their use of TASER devices.***

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Quoting *Russo* - "It is clear that the taser was designed to be used in this type of circumstance: to stun and to disable temporarily rather than to inflict more serious or more permanent injury."

Within the circumstances of this Fourth Amendment case, Wylie having twice broken from the officer's grasp and continuing his attempt to escape, a reasonable officer could well have chosen to use escalated, non-lethal force. The only non-lethal choices known to the court not involving a firearm are 1) physically subduing Plaintiff by engaging him (e.g., striking with fists or tackling), 2) striking him with a weapon such as a baton, 3) using a chemical agent such as pepper spray or 4) applying an electronic device such as a TASER device.

***Personal Force*** – The use of personal force carries with it some risk of injury to the officer himself, and requires that the officer get close enough to the subject to apply the force.

***Baton*** -- The use instrumental force, by striking with a baton or something similar, implicates the same requirement of proximity, and carries with it some risk of serious injury to the subject, such as broken bones. "The baton ... can be used as an offensive or defensive weapon.... The baton should be used only in an emergency, and when blows are struck, it should be with the intention of stunning or temporarily disabling, rather than inflicting injury. Blows to the head should be avoided. The baton used as an extension of the arm is generally more effective than when used as a bludgeon, or club." *Morgan v. Rhodes*, 456 F.2d 608, 617 (6th Cir.1972) (quoting Prevention and Control of Mobs and Riots, Federal Bureau of Investigation, U.S. Dept. of Justice, J. Edgar Hoover, 89-91 (1967)). See also *United States v. Koon*, 833 F.Supp. 769, 781 (C.D.Cal.1993) (citing testimony of biomechanics expert "that the side-handle baton can deliver sufficient force to cause loss of consciousness and significant localized damage of facial bones").

***Chemical Spray*** - To use a chemical spray also requires the officer to get fairly close to the subject and carries some risk of the spray hitting and incapacitating an officer. (An officer's treatment for over-spray inhalation of pepper spray potentially a basis sufficient to support a defendant's guilty plea to "causing" bodily injury to the officer).

***OC*** - There is little risk of lasting harm to the subject, although pain is felt until the substance is flushed away. "OC is a derivative of hot cayenne peppers and is the newest defensive spray agent. It is not an irritant like the tear gases, but an inflammatory agent. Contact with mucous membranes (eyes, nose, throat and lungs) will cause immediate dilation of the capillaries of the eyes, resulting in temporary blindness and instant inflammation of the breathing tube tissues,

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cutting off all but life-support breathing. OC does not deteriorate with age and unlike the tear gasses, does not cause lasting aftereffects."

***TASER Device*** - "The proper use of a Taser requires neither close proximity nor carries any serious risk of lasting injury to the subject." quoting *Nicholson*, 839 F.Supp. at 515, n. 4.

"The court finds that under the circumstances in this case, a decision to use the Taser device did not cross the 'hazy border between excessive and acceptable force.'" Deputies' "use of force, in the form applied here, was reasonably needed to subdue a person who had assaulted them and resisted their efforts to arrest him."

"It is entirely clear to this court that, from the perspective of a reasonable objective officer, an assaultive subject trying to escape who suddenly turns and raises his hands to shoulder height could as easily be assuming an aggressive posture in preparation for fighting as trying to indicate a surrender. The most [Wylie] could argue at trial is that he had changed his mind about escaping. He cannot reasonably argue that any officer who saw him in action must be held to have known what he was thinking."

Wylie's "assaultive acts in resisting arrest and his attempt to evade arrest by flight are important factors that locate [the Deputies'] use of the Taser well within the realm of reasonable use of force. *Gaddis*, 364 F.3d at 772. Plaintiff's injuries, sustained as an understandable consequence of the decision to deploy the Tasers, do not change--nor even substantially inform-- the court's analysis in this case. *Martin*, 106 F.3d at 311-12. There is no indication in this record of pain being inflicted gratuitously, *i.e.*, independently of the need to apprehend [Wylie]. [Wylie] was hit in the top of his head only because he was beginning to bend over either as a result of a Taser shock being deployed by the first officer's unit, or a result of trying to avoid it. No other sensible explanation has been proffered that could explain landing a Taser dart on top of a person's head, even if, as here, the officer were appreciably taller than the subject."

"FN12. The court recalls, but rejects as unrealistic, [Wylie's] suggestion at oral argument that one of the officers involved in this case, being larger than [Wylie], should be, in essence, required to chose a physical attack on [Wylie], chasing and tackling him in lieu of using a device such as a Taser to subdue him. The court believes that Tasers and similar devices were developed in part to protect police officers--and citizens--from the dangers of hand-to-hand combat and from escalated, lethal force. A man being placed under arrest must be considered potentially dangerous even if smaller than the arresting officer, as Goliath cannot be guaranteed unscathed victory."

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"Even taking as true [Wylie's] testimony about starting to "give up" in the heat of the few tense and uncertain seconds in which these events occurred, the court nonetheless concludes that no reasonable officer would be expected to read [Wylie's] mind and instantly know that what had theretofore been [Wylie's] attitude of insolence, struggle and flight had suddenly become cooperation, surrender and peace ... based only upon [Wylie] turning and beginning to raise his hands."

"Analysis of qualified immunity presupposes the existence of a constitutional violation. Where a plaintiff fails to prove the existence of an underlying violation, the court need not address immunity."

State Law - Assault and Battery - "[T]here were two outstanding warrants for [Wylie's] arrest, that [Wylie] resisted the deputies' efforts to arrest him, and that [Wylie] attempted to flee. ... For the reasons stated above, there is no issue of fact as to whether [Wylie] was in fact resisting the arrest, and thus no question whether [Deputies'] acted reasonably in their attempt to effectuate the arrest. Even viewing the facts in a light most favorable to [Wylie], a reasonable jury could determine only that [Deputies] did not employ excessive force against [Wylie] in order to subdue him. Therefore, the court will grant [Deputies'] motion on [Wylie's] assault and battery count as well."

33. **"Community Care Taker" Function [officer's use of TASER ECD on resisting person in medical distress in ambulance - Summary Judgment granted to defendants]** - *Stanley v. City of Baytown, Texas*, Slip Copy, 2005 WL 2757370 (S.D.Tex.), No. Civ.A. H-04-2106, U.S. Dist. Ct, S.D. Texas, Houston Division, decided Oct. 25, 2005.

When Officer Elizondo confronted Mr. Stanley inside the ambulance Stanley was a volatile and very muscular man who was on a cycle of steroids; Stanley was dressed only in boxer shorts and was sweating profusely, making it difficult to grasp or hold him; Stanley was resisting the efforts of the EMTs and at least two firemen to restrain him physically and he was making movements sufficiently forceful and severe to cause the EMTs to abandon their attempts to provide medical treatment because of fear for their own safety; and Stanley was unresponsive to the EMTs' verbal pleas and may not have been "fully functioning mentally at this point." Before using the TASER device (in push stun mode), Elizondo spent three to five minutes using verbal control tactics in an unsuccessful effort to calm Stanley down, after which Elizondo's only use of force consisted of a one to two second TASER device use in push-stun mode that inflicted no serious injury upon Stanley. This measured use of force, however, successfully defused the situation. Under the totality of these circumstances, Elizondo's use of the Taser was not unreasonably disproportionate to the need for force. In fact, Elizondo's decision to use the Taser may well have prevented much greater harm to Stanley and/or to other

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people in the ambulance had Elizondo engaged in a physical struggle to restrain Stanley. See *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir.2004) (holding that officer's single use of TASER device to effect arrest of person who was agitated and uncooperative did not constitute excessive force, even though officer did not start with a verbal arrest command or an attempted physical handcuffing, because those actions "would likely have escalated a tense and difficult situation into a serious physical struggle in which either [the plaintiff] or [the officer] would be seriously hurt.").

Elizondo's intervention in the ambulance was reasonable and in keeping with his community care taking function and therefore did not constitute an unlawful seizure. Because Elizondo's actions did not violate Plaintiff's constitutional right to be free from unreasonable seizures, Elizondo is entitled to summary judgment on Stanley's unlawful seizure claim.

Also, since Stanley cannot show that Elizondo's actions violated any of Stanley's constitutional rights, Stanley's municipal and supervisory liability claims fail as a matter of law.

34. **Summary judgment granted on officer's use of TASER device on man suffering a hypoglycemic (diabetic) attack.** *Gruver v. Borough of Carlisle*, Slip Copy, 2006 WL 1410816 (M.D.Pa. May 19, 2006).

Plaintiff suffered a hypoglycemic attack (diabetic) and was driving erratically. After failing to heed the Officers' repeated commands, warnings and instructions to cease resistance, Officer Mace tased Plaintiff with his Taser stun gun three times.

After Plaintiff was secured in a patrol car, the Officers noticed a medical alert tag on the necklace Plaintiff was wearing and realized Plaintiff was a diabetic experiencing a hypoglycemic attack.

"As the videotape reveals, the Plaintiff struggled against the Officers for several minutes in their attempt to restrain him, and only became subdued once he was tasered. We cannot, in good conscience, find that the Officers' conduct was objectively unreasonable. They were attempting to restrain a man who appeared to be intoxicated or in some state of distress, in order to protect the Plaintiff himself, as well as others and themselves. It appears that the Officers' use of force, including the application of the taser gun, was consistent with the level of the Plaintiff's resistence and there is no indication that the Officers applied any gratuitous force to the Plaintiff."

"Accordingly, we find that the Defendant Officers did not use excessive force against the Plaintiff while detaining him in the Sheetz parking lot, we will enter

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summary judgment in favor of the Defendant Officers on Count I of the complaint."

35. **Qualified immunity granted to officer's use of TASER device on kicking handcuffed arrestee.** *Carroll v. County of Trumbull*, Slip Opinion, 2006 WL 1134206 (N.D.Ohio April 25, 2006).

Law enforcement officers responded to a domestic disturbance call between Earl Carroll and his wife. It is alleged that Mr. Carroll is deaf and that "in a confused, upset and disoriented state [an officer] pushed him into the backseat of the police cruiser after handcuffing him in the front." Mr. Carroll further alleged "that after he began kicking the back of the front seat of the police cruiser and yelling, [the officer] called for backup ... [two officers] and members of the SWAT team arrived." Allegedly "'the SWAT team members' pulled him out of the backseat and 'put [him] on the ground still in handcuffs and strapped his legs with leather.'" Officers "twisted his arms while he was on the ground and he was thereafter shot with a STUN gun". He then allegedly "passed out and was thrown in the backseat of the cruiser." Mr. Carroll asserts that he "suffered physical injuries as a result of these actions, including a rotator cuff tear with impingement which required surgery and physical therapy, and he suffered emotional distress, pain and suffering and a sense of outrage."

"The Court concludes that Defendant Mann is entitled to qualified immunity with regard to the tasering of Plaintiff. Defendant Mann asserts on summary judgment that during his six-minute time at the scene, he tasered Plaintiff because he was thrashing about and resisting after officers removed the handcuffs from the front of Plaintiff's person in order to recuff him behind his back. Defendant Mann stated that he and the other officers were concerned that Plaintiff could harm himself or harm others if they did not cuff Plaintiff behind his back as he observed Plaintiff continue to flail, kick and bang his head against the back of the police cruiser while he was seated in the back of Defendant Darby's police car handcuffed in the front of his person"

Defendant Mann further attested that when they decided to remove Plaintiff from the back seat in order to cuff him behind his back, Plaintiff continued to resist and officers therefore forced him to the ground. Defendant Mann further stated that when they removed his handcuffs from the front, Plaintiff lifted his left arm and thrashed about again, so he decided to taser Plaintiff in order to gain his compliance so that he could be handcuffed behind his back without injury to himself or to the officers."

The Court stated, "[c]learly, the issue of whether Plaintiff was handcuffed when tasered and/or resisting while being recuffed is in dispute. However, Plaintiff nevertheless fails to meet his reciprocal burden on summary judgment as he fails to cite to any law involving the tasering of a suspect, handcuffed or not

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handcuffed, and the reasonableness or unreasonableness of the tasering and whether the law on tasering and its circumstances is clearly established under either of these conditions."

The Court further stated, "[n]ot only does Plaintiff in this case fail to establish that he was not resisting at the time that he was tasered, but he also fails to establish that Defendant Mann's actions in tasering him were unreasonable and whether the law at the time of this incident clearly established that his actions violated the Constitution. Accordingly, the Court GRANTS Defendant Mann's motion for summary judgment on this claim."

36. **Restraint Chair - Use of TASER Device on Neck - Summary Judgment Granted** – *McBride v. Clark*, USDC W.D. MO (Slip Copy 2006 WL 581139) March 8, 2006.

    An officer deployed a TASER device on Plaintiff's neck while he was restrained in a restraint chair. The Court granted summary judgment to the officer by ruling (as a matter of law) that under the circumstances the use of the TASER device on Plaintiff's neck was "objectively reasonable."

    Plf was yelling vulgarities while in the jail. His yelling and screaming was both disrupting and upsetting other inmates and interfering with officer's ability to do her job. Additionally, Plf bit the straps of his safety suit until successful in removing the suit, which the officer interpreted as an attempt at escape.

    After being place in the restraint chair, Plf continued to yell and scream. He also dislodged his IV and caused himself to bleed, all after having informed the officer that he had Hepatitis C. Morever, Plf does not dispute that the officer deployed the TASER device for Plf's safety, officer safety in preventing the spread of communicable disease(s), to maintain control of the jail population, and to gain Plf's compliance with verbal commands.

    Under these circumstances, the officer was objectively reasonable in applying force, summary judgment was granted.

37. **Summary Judgment Granted to Officers - Car Stop - 3 TASER devices uses on belligerent driver, including 2 while handcuffed** – *Willkomm v. Mayer* (WI Dells) USDC W.D. WI (Slip Copy 2006 WL 582044) March 9, 2006.

    On a car stop (for throwing a beer can from the car) of a belligerent driver, on 3 uses of a TASER device (2 while the man was handcuffed), the Court ruled on defendants' motion for summary judgment that under the 4$^{th}$ Amendment's objective reasonableness standard the 3 uses of the TASER device were objectively reasonable.

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On September 1, 2003 at about 12:30 a.m. in the City of Wisconsin Dells defendant Clausen saw the driver of a vehicle throw a beer can from the driver's side window of the vehicle. The driver was later identified as plaintiff Todd Willkomm. The vehicle turned left into a Mobil gas station parking lot. As the vehicle turned, Clausen activated his emergency lights and siren. The vehicle stopped in the parking lot and Clausen spoke with the driver.

Clausen told Willkomm that he had stopped him for throwing a beer can from the car. Willkomm told Clausen he did not know what he was talking about. Clausen asked Willkomm for his driver's license and identification. Plaintiff responded that he did not have any identification with him. Willkomm admitted that he had been drinking alcohol prior to driving.

Willkomm exited the vehicle and agreed to submit to field sobriety tests. Willkomm argued with Clausen about the tests. Sgt Mayer arrived on the scene. Willkomm walked away from Clausen and approached Sgt. Mayer. Clausen then grabbed Willkomm, told him he was under arrest, directed him against a nearby squad car and moved Willkomm’s right arm behind his back. Sgt. Mayer told Willkomm he would shock him with a TASER device if he did not place his left arm behind his back. When plaintiff did not comply Sgt. Mayer shocked Willkomm.

**TASER Device Use # 1 – Use of TASER device because of resisting handcuffing:** It is undisputed that when Officer Clausen stopped plaintiff's vehicle he failed to produce identification and admitted to drinking alcohol before driving. Plaintiff also admits that while performing field tests he walked away from Officer Clausen. At that point Officer Clausen could reasonably have believed that plaintiff was trying to flee or resist arrest by not completing the tests. At that point Officer Clausen grabbed plaintiff and put his right arm behind his back. Plaintiff was told to place his left arm behind his back by Sgt. Mayer and did not do so. Although plaintiff states he flexed his arm in an attempt to pull it out from between his chest and the squad car where it was stuck, Sgt. Mayer could have reasonably concluded that plaintiff was resisting the handcuffing. Sgt. Mayer's application of force by use of the TASER device to handcuff plaintiff was reasonable in light of the facts and circumstances confronting him.

**TASER Device Use #2 – Use of TASER device because of failure to comply with orders to swing legs into car (while handcuffed):** Plaintiff does not dispute the following facts. When he was in the squad car plaintiff moved around, yelled, banged his hands on the back window of the car and repositioned his handcuffed hands to the front of his body. He was told to exit the car and refused. The officers removed him from the car and placed him on the ground to reposition his handcuffs and secure his legs with flexcuffs. The

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officers carried him to the car and told plaintiff to swing his legs into the car. He was told if he did not do so he would be shocked. After he failed to comply he was shocked. From the time plaintiff was placed in the squad car he was disruptive and failed to comply with the officers' orders. The use of force by Officer Mayer to gain defendant's compliance in returning him to the squad car was reasonable.

**TASER Device Use #3 - Use of TASER device to reposition handcuffs:** After plaintiff was in the squad car he again attempted to move his handcuffed hands and caught them on his feet. He was removed from the car. Sgt. Mayer used force for the third time by use of the TASER device in order to reposition plaintiff's handcuffs. The use of force was reasonable to gain compliance with the officers order and to secure plaintiff for transportation to the hospital.

38. **Threat with TASER device causing compliance is a 4th Amendment "seizure"** – *Pino v. City of Sacramento*, Slip Copy, 2006 WL 193181, E.D.Cal. (Jan. 19, 2006).

    Plaintiff alleges that her 4th Amendment right to be free from unreasonable seizures was violated when one of the defendants threatened to tase her with a stun gun. When plaintiff attempted to explain to officers that tasing her son with a stun gun could be fatal, a female officer responded, "Back off, or I will tase you, too." At the time, the officer had her stun gun drawn. These allegations satisfy the definition of a seizure. See *Florida v.. Bostick*, 501 U.S. 429, 434 (1991) ("Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968)). Whether this seizure was reasonable depends upon the circumstances surrounding the officer's conduct and involves a question of fact that is not capable of determination on a motion to dismiss. Therefore, plaintiff has sufficiently alleged a violation of her own Fourth Amendment rights.

39. **Summary judgment granted – use of TASER device in drive stun on handcuffed resisting arrestee** – *Devoe v. Rebant*, Slip Copy, 2006 WL 334297, E.D.Mich. (Feb 13, 2006).

    When Mr. DeVoe resisted, Officer Sommerfeld administered a short "drive stun" with his taser gun to Mr. DeVoe's lower right back. At that point, Mr. DeVoe voluntarily sat down inside the patrol car.

    In this case, as Mr. DeVoe conceded at his deposition, the only force defendants used against him was Officer Sommerfeld's single discharge of his taser gun when Mr. DeVoe refused to get into the officers' patrol car.

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Immediately upon being approached by the officers, Mr. DeVoe was hostile and uncooperative. He responded to Officer Rebant's request to "come here" with an expletive and walked away. Mr. DeVoe repeatedly ignored Officer Rebant's requests for identification, accusing the officer of harassing him and yelling at the officer. Even after being handcuffed, Mr. DeVoe continued to argue with the officers and refused to comply with the officers' verbal commands to enter the patrol car. Attempting to physically force Mr. DeVoe into the vehicle likely would have escalated the situation into a physical struggle in which Mr. DeVoe or the officers could have been seriously injured. The Court therefore concludes that Officer Sommerfeld's single use of the taser gun causing a one-time shocking which did not inflict any serious injury was a reasonable use of force under the circumstances.

While Mr. DeVoe was handcuffed when he was stunned with the taser gun, there is no genuine issue of material fact that he still was resisting the officers' commands to enter the police car and was arguing with them.

In summary, the Court believes Officer Sommerfeld's use of the taser gun was objectively reasonable under the circumstances and thus did not constitute excessive force. But even if the officer's conduct was not reasonable, the Court finds that the conduct did not violate clearly established law. As such, Defendants are entitled to qualified immunity with respect to Mr. DeVoe's excessive force claim.

40. **Summary judgment granted for threat to use TASER device (laser dot compliance).** *Price v. Busbee*, Slip Copy, 2006 WL 435670 (M.D.Ga. February 21, 2006).

    Ronald Price was being disruptive while in a holding cell. In an attempt to subdue Price, Kilgore took a TASER device and shone the red beam against Price's chest. As a result, Price calmed down. Kilgore threatened to use the TASER device because of Ronald Price's disruptive behavior in a holding cell. The threat was used in a good faith attempt to restore discipline, which, in fact, it did do, as Price calmed down as a result of Kilgore's threat. Thus, even assuming Price would have a constitutional claim of excessive force for Kilgore's threatened use of the TASER device, and such an assumption is certainly not clear, such claim would fail under these circumstances as there is no violation of Price's constitutional rights.

**ECD Cases - 8th Amendment Not Reported - Federal District Court Cases:**

41. **8th Amendment - Officers' motion for summary judgment denied.** *Preston v. Pavlushkin*, Slip Copy, 2006 WL 686481 (D.Colo. March 16, 2006).

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Officers summary judgment motion denied in an Eighth Amendment excessive force claim for use of a TASER device. What supports the plaintiff's claim in this case is that the deputies used the device to enforce their order when they and the plaintiff inmate were the only occupants of the common area, the other inmates being closed in their cells. ***The only conduct of the plaintiff was his adamant refusal to comply with the order. He did not present any threat of physical violence. The device was used to shock him three times while he was on the ground and obviously incapacitated.***

42. *Hernandez v. Terhume*, Not Reported in F.Supp.2d, 2000 WL 1847645 (N.D.Cal. 2000).

    The district court held that taser guns may be reasonably used to quell disorders and to compel obedience, but they cannot be used to punish a prisoner.

**ECD Cases - State Court Cases:**

43. **Use of TASER device on pregnant inmate - 8th Amendment analysis** – *Alford v. Osei-Kwasi*, 203 Ga.App. 716, 418 S.E.2d 79 (Ga.App. 1992).

    Prisoner who was pregnant when she was subdued with Taser, and her child who was subsequently born. Alford was creating a disturbance in the jail by incessantly kicking the door, and the guards on the scene deemed it appropriate to call in a supervisor, Lt. Osei-Kwasi, after they were unable to stop Alford from causing the disturbance. The parties also agree Osei-Kwasi first attempted to stop the disturbance by entering Alford's cell and ordering her to stop kicking the door, but as soon as Osei-Kwasi left the cell and closed the door, Alford immediately began kicking the door again. Although at this point agreement ceases, there is no dispute that Osei-Kwasi re-entered the cell and ultimately used the Taser to put an end to the disturbance. Although disputing the need for the use of the Taser, Alford admits she did not intend to stop disturbing the cell block until she gained what she wanted.

    Although we also are concerned about using a device like a Taser, we cannot agree that its use is inherently wanton, malicious, or sadistic. If used properly, it avoids the physical injuries associated with other means of force. Further, although incapacitated by the Taser, Alford produced no credible evidence that the Taser caused her or Sterling Alford any serious injury or that it routinely caused serious injuries in others. Moreover, Tasers are used in other state penal systems (see e.g., *Michenfelder v. Sumner*, 860 F.2d 328, 334-336 (9th Cir.1988)) and have been used for years in the DeKalb County Jail without

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report of serious injury. Further, even Alford's expert did not condemn their use generally. Therefore, we do not find that using the Taser, per se, constituted a violation of the Eighth Amendment.

**ECD Used to Extract Evidence While Attempting to Swallow:**

44. *Florida v. Damion Terrell Johnson*, In the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, Case No. 48-2003-CF-015024-0, Division 17. Court did not suppress evidence.

45. *US v. Jason Malone*, United States District Court, Central District of Illinois, Peoria Division, Case No. 05-10012. Court did not suppress evidence.

46. City settled excessive force claim (for $82,500) brought by man hit with TASER ECD17 times in an effort to make him cough up drugs he was believed to have swallowed. *Kevin Alexander v. City of Lafayette, Ronald Boureaux, individually, Randy Hundley, individually and in his office capacity as Lafayette Police Department Chief of Police, Officer(s) John Doe, XYZ Insurance Company, and ZYX Insurance Company*, USDC WD LA, Lafayette - Opelousas Division, Civil Action No. 05-CV-0976.

**ECD Weapons Confusion Cases - firearm used when ECD intended:**

47. *Henry v. Purnell*, 428 F.Supp.2d 393 (D.Md. April 21, 2006). *Henry v. Purnell*, 119 Fed.Appx. 441 (4th Cir. (Md.) 2005). Date of incident - October 20, 2003.

48. *Christofar Atak v. City of Rochester, et. al.*, United States District Court for the District of Minnesota, Case No. 04-2720 DSD/SRN.

49. *Torres v. City of Madera*, Not Reported in F.Supp.2d, 2005 WL 1683736 (E.D.Cal. 2005).

50. *Yount v. City of Sacramento*, 35 Cal.Rptr.3d 563, Cal.App. 3 Dist. (Nov. 9, 2005) - Arrestee's conviction for obstructing an officer did not bar his federal civil rights lawsuit for excessive force by an officer who shot him in the buttocks with his firearm while the officer intended to draw and fire his TASER device instead. *Petition for review granted: Yount v. City of Sacramento*, 129 P.3d 320, 40 Cal.Rptr.3d 118 (Feb 01, 2006).

51. (Thursday) June 22, 2006 -- Kitsap County (WA) Sheriff's Office - deputy shot and wounded a man in a tree when she used a gun instead of a TASER device. The man had climbed high up a fig tree and had been there for several hours. Deputies were unsure whether the man was intoxicated, on drugs, or possibly experiencing a psychotic episode. One deputy attempted to discharge a TASER device at the man,

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but when it did not work asked another deputy to fire a TASER device. Instead of grabbing the TASER device, the deputy grabbed and fired her gun.

**Non Case Law - ECD Guidance**:

52. PERF - Police Executive Research Forum (October 18-19, 2005):
    a. *(02/24/07)* Conducted Energy Devices: Development of Standards for Consistency and Guidance, The Creation of National CED Policy and Training Guidelines, by James M. Cronin and Joshua A. Ederheimer. U.S. Department of Justice, Office of Community Oriented Policing Services.

    b. PERF Conducted Energy Device, Policy and Training Guidelines for Consideration:
        i. (PERF Guideline) “1. CEDs should only be used against persons who are actively resisting or exhibiting active aggression, or to prevent individuals from harming themselves or others. CEDs should not be used against a passive suspect.”

        ii. (PERF Guideline) “6. That a subject is fleeing should not be the sole justification for police use of a CED. Severity of offense and other circumstances should be considered before officers’ use of a CED on the fleeing subject.”

        iii. (PERF Guideline) “7. CEDs should not generally be used against pregnant women, elderly persons, young children, and visibly frail persons unless exigent circumstances exist.”

        iv. (PERF Guideline) “8. CEDs should not be used on handcuffed persons unless they are actively resisting or exhibiting active aggression, and/or to prevent individuals from harming themselves or others.”

    c. PERF Conducted Energy Device (CED) Glossary of Terms:
        i. "Active Aggression - A threat or overt act of an assault (through physical or verbal means), coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent."

        ii. "Actively Resisting - Physically evasive movements to defeat an officer's attempt to control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody."

53. IACP - International Association of Chiefs of Police:
    a. *(08/05)* IACP Model Policy, Electronic Control Weapons, August 2005.
        i. "C. Deployment

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1. The ECW is generally analogous to oleoresin capsicum (OC) spray on the use-of-force continuum, and decisions to use an ECW involve the same basic justification. As such, it is forbidden to use the device as follows:

(a) In a punitive or coercive manner.

(b) On a handcuffed or secured prisoner, absent overtly assaultive behavior that cannot be reasonably dealt with in any other less intrusive fashion.

(c) On any suspect who does not demonstrate an overt intention

(1) to use violence or force against the officer or another person, or

(2) to flee in order to resist or avoid detention or arrest (in cases where officers would pursue on foot).

(d) in any environment where an officer knows that a potentially flammable, volatile, or explosive material is present (including but not limited to OC spray with volatile propellant, gasoline, natural gas, or propane).

(e) In any environment where the subject's fall could reasonably result in death (such as in water or on an elevated structure.)

2. As in all uses of force, certain individuals may be more susceptible to injury. Officers should be aware of the greater potential for injury, when using an ECW against children, the elderly, persons of small stature irrespective of age, or those who the officer has reason to believe are pregnant, equipped with a pacemaker, or in obvious ill health."

b. (01/05) Electronic Control Weapons, Concepts and Issues Paper, IACP National Law Enforcement Policy Center.

c. Electro-Muscular Disruption Technology: A Nine-Step Strategy for Effective Deployment has recently been published by the International Association of Chiefs of Police (IACP), Alexandria, Virginia. If you or your agency is thinking about adopting electronic control devices, make sure you get this 18-page Executive Brief.

d. IACP Training Keys: IACP Training Key No. 497, The TASER.

i. IACP Training Key No. 567, The Advanced TASER
ii. IACP Training Key No. 575, Electronic Control Weapons: Update
iii. IACP Training Key No. 583, Electronic Control Weapons (ECW): Update
iv. 2005 IACP Training Key No. 581, Suicide (Homicide) Bombers: Part I

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v. IACP Training Key No. 582, Suicide (Homicide) Bombers: Part II

**ECD Cases - ECD was used or discussed, but the device was not the issue**:

**Federal District Court Not Reported - 4th Amendment - - ECD was used or discussed, but the device was not the issue:**

54. **TASER device used to apprehend fleeing suspect armed with firearm.** *U.S. v. Stephens*, Slip Copy, 2006 WL 2009066 (M.D.Ala. July 18, 2006).

    Ted Dewayne Stephens continued to run across the intersection and Officers Malloy and Kinney continued to pursue. Stephens turned again and reached for his waistband. This time, Malloy saw a black object there and began to be concerned about his safety. Malloy started to unsnap his Taser and pull it out of its holding cartridge as Stephens and the officers continued to run. Stephens turned around for a third time, and began to pull the black object out of his waistband. Malloy testified that at that point he thought his life was in danger, and he fired his Taser, saw Stephens "lock up" and begin to fall down, and watched a revolver fall to the ground. Malloy told Stephens to turn on his stomach and put his hands behind his back. However, Stephens began to get up instead, so Malloy hit him with another five-second burst of the Taser. Officers placed Stephens in custody and retrieved a fully loaded .38 caliber revolver from the ground nearby.

55. **Firearm pointing does not gain compliance - TASER device does** – *U.S. v. Ackerman*, Slip Copy, 2006 WL 224028, M.D.Fla. (Jan. 30, 2006).

    "When the door opened, Weldon observed a dagger type knife on the floor near the Defendant. Weldon pulled his gun and instructed the Defendant to get down on his knees, which he refused to do. Defendant started "inching" toward Weldon in what Weldon described as an aggressive manner, at which point Officers Anderson and Smith arrived. Anderson described Defendant as "bowed up" and "angry." He also observed the knife on the floor and smelled marijuana. When Smith pulled a taser, Defendant finally complied and went to his knees on the floor."

56. **Officer accidentally discharged TASER device on his daughter** – *Williams v. City of Daytona Beach*, Slip Copy, 2006 WL 354635, M.D.Fla. (Feb. 15, 2006).

    Officer accidentally tased his daughter when testing his taser around his children, The unauthenticated documents reflect that Officer was warned for neglecting his duty after accidentally discharging his taser on his child.

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57. **Summary judgment granted – Use of TASER device on suicidal 16 year old male juvenile to force him to release headboard** – *N.A. ex rel. Ainsworth v. Inabinett*, 2006 WL 2709850 (M.D.Ala. Sep 20, 2006) (NO. 2:05 CV 740 DRB). In dismissing the case by granting officer's motion for summary judgment the court stated:

> "Guided by relevant Eleventh Circuit case law established at the time, the court readily concludes that the minimal physical force and TASER strikes applied by Deputy Inabinett against [16 year old suicidal male] fell well short of any constitutional violation. The specific force he applied must be weighed against the totality of these relevant facts and circumstances:
>
> (1) Plaintiff's propensity for, and history of mental illness attended by violence;
>
> (2) Plaintiff's history of suicidal behavior and actual attempts; Defendant's knowledge-through Plaintiff's past encounters with law enforcement officers-of Plaintiff's violent character;
>
> (3) the fact that Plaintiff's mother summoned officers to quell what she observed as Plaintiff's uncontrollable, threatening, suicidal behavior, coupled with valid governmental/law enforcement interest in preventing suicides;
>
> (4) the fact that the emergency line operator's telephone contact with Plaintiff's mother allowed her to monitor, and to receive reports on, Plaintiff's increasingly violent and threatening behavior as his family tried to calm him;
>
> (5) the fact of the emergency line operator's radioed communications to summoned officers, including Defendant, of the Plaintiff's continuing violence;
>
> (6) the fact that Defendant received a specific warning from radio dispatchers that Plaintiff threatened to harm officers and should be considered dangerous;
>
> (7) Plaintiff's actual, specific threats to Defendant in response to efforts to restrain him without the use of force coupled with Plaintiff's pledge to harm officers if they persisted in using force to restrain him;
>
> (8) Defendant's efforts first to restrain Plaintiff by reasoning with him, next by applying strategic force with his hands, and only as a last resort, by firing the TASER only once for a five-second discharge;
>
> (9) Defendant's two warnings to Plaintiff before using the TASER and his delay after each warning in order to solicit Plaintiff's cooperation;

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(10) the fact that Defendant did not fire the TASER more than the single time needed to subdue and handcuff Plaintiff; and

(11) the absence of any serious or permanent injuries to Plaintiff as a result of the force applied, and evidence that the force left no injuries which required more than a single minor examination and minimal treatment in the emergency room.

(PRIOR portion of case) *N.A. ex rel. Ainsworth v. Inabinett*, Slip Copy, 2006 WL 297222, M.D.Ala. (Feb. 07, 2006).

In a F.R.C.P. 12(b)(6) motion to dismiss (where the court must take plaintiffs' allegations in the complaint as true). The court concurs with Plaintiff that the Fourth Amendment's prohibition on excessive force is sufficiently clear so that no reasonable officer would believe it appropriate to make an unprovoked physical assault--consisting of beating with his fists and then firing a taser gun weapon--on a reportedly suicidal minor who was then not engaged in any criminal activity or other resistance which made reasonably necessary the use of any force at all.

58. **(Two) TASER device discharges stops fleeing man.** *U.S. v. Stephens*, Slip Copy, 2006 WL 1663351 (E.D.Mo. June 14, 2006.

Officer Coats got out of his patrol car and chased after Brandon Stephens, climbing over two fences. Approximately 15-30 seconds later, Officer Coats caught up with Stephens in a backyard at 2818 Euclid. When he got within 15 feet, he announced "taser," and used his taser to stop Stephens, which caused Stephens to go down. Stephens then attempted to get back up and run, but Officer Coats again used his taser, and Stephens stayed down.

59. **Threat of TASER device "on its way" gains compliance.** *U.S. v. Yandal*, Slip Copy, 2006 WL 517608 (W.D.Ky. March 1, 2006).

On June 23, 2005, detectives were parked at a well lit gas station at an intersection. Detectives saw Yandal's car drive by him, but Det. could not see into the windows of his vehicle. The detectives pulled over Yandal and asked him for his license and registration. Yandal was informed that he had been stopped because the detective thought the tint on his car was too dark as he could not see that well into his vehicle. At that time, Det. smelled an odor of marijuana coming from the Yandal's car. Det. then asked Yandal to produce a certificate stating that his windows were legally tinted, but Yandal did not produce that document. After asking him to leave his vehicle, Yandal refused. The detectives brought in a drug dog to determine the suspicion of Det., and at that time Det. wrote Yandal a citation for an excessive window tinting.

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During the standoff, Yandal admitted that he had possession of some drugs and began to ask police how much equaled enough for an arrest. ***After being informed that a taser was on its way to be used against him, Yandal passed some of the drugs through his sunroof in a backpack***, which contained 63.5 grams of crack-cocaine and 8 ounces of marijuana. ***Yandal eventually exited his vehicle before the taser was used, and advised the detectives there was a handgun in his car in plain sight.*** In addition to the .40 caliber handgun, the detectives also found a magazine containing ten (10) rounds of ammunition, another bag of marijuana, and $2,150 in U.S. currency.

**State Court Cases - ECD was used or discussed, but the device was not the issue:**

60. **TASER device used to stop resisting suspect from reaching for gun on the ground.** *People v. Villegas*, Not Reported in Cal.Rptr.3d, 2006 WL 1992407 (Cal.App. 4 Dist. July 18, 2006).

    Officer McLane tried to handcuff Augustine Villegas, but he resisted, reaching for the gun on the ground. Another officer then shot Villegas with a taser and the officers handcuffed him. The officers took Villegas and Herrera into custody.

61. **TASER device use prevents need to use deadly force**. *State [of Ohio] v. Gentry*, Slip Copy, 2006 WL 1461030 (Ohio App. 2 Dist. May 19, 2006). In a criminal case for felonious assault:

    Gentry removed all his clothes, picked up a two-foot metal pipe, and began terrorizing the neighbors on his street in Kettering, Ohio. The first call to 911 operators occurred at 7:06 a.m. The unidentified caller told the operator that a man was outside screaming obscenities and had just broken out the front window of a nearby house and that the man, later identified as Gentry, was "threatening to kill us." Shortly thereafter, the caller stated that Gentry was going into other people's houses and a woman could be heard screaming. Another call came in to 911 operators at 7:08 a.m., where the caller stated that "somebody just tried to break into the front part of our house, the window's broken ... [the caller] heard some man screaming, 'get out, get out, get out." ' Yet another individual phoned 911 at 7:09 a.m., claiming that "there's a man walking around the street ... and he's yelling obscenities that he's going to kill people." One caller observed Gentry "chasing a woman down the street with a stick ..."

    Officer Jeff Perkins, a twelve-year veteran of the Kettering Police Department, was the first to arrive on the scene. When he exited his marked cruiser,

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wearing the uniform of the day, he immediately recognized the man he was looking for, as Gentry emerged from a porch without any clothing on, carrying a two-foot long white metal pole. Perkins ordered Gentry several times to halt and lay down his weapon, but each time Gentry ignored those orders and continued towards him. Perkins noticed there was blood on Gentry's hands and on the pole. Gentry began walking toward Officer Perkins, carrying the metal pole at shoulder height, screaming that Perkins "better shoot me (Gentry), mother f*cker, because I'm going to kill you." Gentry was fifteen to twenty feet away from Officer Perkins at the time, approaching steadily when Perkins was forced to use his taser to subdue Gentry without suffering any bodily harm. It was not until he had been tased that Gentry finally dropped the metal pole he was carrying. During one of the 911 calls, the sound of the metal pole hitting the ground was clearly audible. Gentry was a mere ten feet away from Perkins when he finally fell to the ground.

62. **TASER device to neck used to remove man from car.** *Warren v. State of Maryland*, 164 Md.App. 153, 882 A.2d 934 (Md.App. 2005).

    Officer Kennedy told Warren to turn off the ignition and exit the car. Warren did not respond to the officer's request. The officer asked him three more times and, each time, Warren failed to respond. Officer Kennedy testified that he feared for the safety of the citizens present in the area should Warren drive off. He therefore took out his TASER device, pointed it at Warren, and told him that if he did not get out of the car, he was going to "get stunned." Warren still did not respond. The officer then pushed his TASER device against Warren's shoulder. Warren released his grip on the steering wheel and Officer Kennedy "help [ed] him get out of the car."

63. **Threat of TASER device - 17 year old burglar comes out of attic** – *In re J.D.*, 275 Ga.App. 147, 619 S.E.2d 818 (Ga.App. 2005).

    Detective Smithwick obtained an arrest warrant for J.D. (17 year old burglar). When Smithwick went to J.D.'s home to serve the warrant, J.D. fled into his attic and only agreed to come down after being threatened with a TASER device.

64. **Pointing TASER device gains compliance** – *In re Francisco B.*, 2005 WL 2856335 (Cal.App. 5 Dist. Nov 01, 2005) (NO. F048025), unpublished / noncitable

    In Francisco B.'s second appearance before the juvenile court, he admitted allegations that he illegally possessed a firearm (Pen.Code, § 12021, subd. (a)), trespassed on school grounds while suspended (§ 626.2), committed the trespass for the benefit of a criminal street gang (§ 186.22, subd. (d)), and violated his probation by committing the new offenses.

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***"When school officials challenged him, he resisted until a police officer arrived and pointed his taser gun at him.*** A month later, an officer conducting a probation search of Francisco's bedroom, found a loaded handgun in his dresser drawer and various gang paraphernalia."

65. **"[R]attling of electricity" from TASER device causes fleeing man to surrender.** *People v. Young*, Not Reported in Cal.Rptr.3d, 2006 WL 1688992 (Cal.App. 2 Dist. June 21, 2006).

    Rickey Gene Young, II fled when the police attempted to take him into custody. Young ran into an alley, threw his backpack over a fence, and started climbing the fence. A TASER device was fired at Young. ***Although he was not hit with the TASER device, it gave off the pronounced rattle of electricity and Young surrendered.*** Young told the police his girlfriend was upset about the marijuana, which he said he sold from time to time, although it was mostly for personal use.

66. **TASER device used to control threatening man.** *People v. Powers*, Not Reported in Cal.Rptr.3d, 2006 WL 1737353, (Cal.App. 2 Dist. June 27, 2006).

    Officer Ferrato intended to arrest Chad Powers for misdemeanor domestic violence, the outstanding warrant and violation of a protective order. Ferrato asked for a TASER device, and Officer Canizales went to the patrol car to get it. Canizales also called for backup. During this time, Powers became more agitated and moved from the living room/bedroom into the adjacent kitchen, which was dark. Ferrato heard appellant opening drawers and was concerned that Powers was looking for a kitchen knife, firearm or other weapon. Powers was still swearing and telling the officers to get out of the house and that they would have to shoot him. He was still holding the beer bottle. Ferrato located a light switch for the overhead light. Canizales entered armed with the TASER device and warned Powers at least three times that if he had to fire, it would hurt. Powers said, ***"Go ahead. You're going to have to tase me. You're going to have to tase me." Ferrato instructed Powers to put his hands up. Powers set his beer bottle down but raised both fists in a fighting stance and said again they would have to tase him. Canizales shot Powers with the TASER device; Powers fell to the floor and was handcuffed.*** Powers was taken outside, given medical treatment and transported to the station.

67. **TASER device used to gain control of resisting man.** *Shouse v. State*, 849 N.E.2d 650 (Ind.App. June 20, 2006).

    After a high-speed chase of a stolen truck, Deputy Evans applied his brakes, finally forcing Shouse to stop the truck. Deputy Evans and Chief Cotton drew

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their weapons, approached the truck, and ordered Shouse to show his hands and to exit the truck. Shouse looked at the officers, reached over, and locked the door. Deputy Evans tried to open the door, but it was locked. Shouse then grabbed a beer, turned nonchalantly to Melissa, and the two of them talked and laughed. Deputy Evans screamed for Shouse to open the door, but he refused. Shouse then looked directly at Deputy Evans, took a sip of his beer, and smiled. At this point, Deputy Evans shattered the window with the butt of his gun. Shouse began moving away from Deputy Evans, so Deputy Evans grabbed him by the hair. Deputy Evans and Chief Cotton attempted to remove Shouse from the vehicle, but Shouse continued resisting. ***Officer Nail yelled TASER several times before firing his TASER at Shouse's chest. Deputy Evans and Chief Cotton were then able to remove Shouse from the truck, and he was arrested.***

68. **TASER device used to capture struggling, resisting escapee.** *State v. Farrar*, 631 S.E.2d 48 (N.C.App. June 20, 2006).

    On November 9, 2003, Deputy Lee of the Alamance County (NC) Sheriff's Department picked up Glenn Elliott Farrar from Central Prison in Raleigh and transported him to Alamance County for a court appearance. After the hearing, Lee again placed Farrar in a holding cell while he took a lunch break. After his break, Lee began driving Farrar back to Central Prison. When Farrar complained of chest pains and asked to be taken to a doctor, Lee informed him that Central Prison had a medical unit. As Lee was driving on the highway, Farrar kicked out the rear passenger window of the car and leaned his upper body out of the window. Farrar put his feet on the plexiglass window that separated the back seat from the front seat, shattered the window and attempted to force his way into the front seat. Lee radioed for help and pulled off the highway. Farrar, despite being handcuffed and shackled, dove head first through the broken rear passenger window. Lee exited his car, grabbed Farrar, and ordered him to the ground. Farrar did not comply and Lee attempted to use "OC spray" to disable Farrar, but Farrar grabbed the can of spray from Lee. As Lee struggled with Farrar, Deputy Barrow pulled up and disabled Farrar with a TASER device.

69. **Suspect walked towards officer with fists raised in aggressive manner - TASER ECD used.** Not saying anything, appellant walked toward Schwend, with his fists raised in an aggressive manner. Schwend ordered appellant on the ground with his hands behind his back; appellant did not comply. Schwend deployed a Taser. The first shot misfired. Appellant continued toward Schwend. Schwend fired the Taser a second time. The second shot hit appellant with a full current. Appellant fell to the ground, and the officers handcuffed him. No drugs were found on appellant. *Fletcher v. State*, Not Reported in S.W.3d, 2006 WL 3411348 (November 28, 2006, Tex.App.-Dallas).

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70. **TASER ECD stopped man to stop resisting and attempting to flee.** After Defendant threw the knife (barely missing officer's head), he was able to get his left leg free of Kenslow's grasp. Defendant had turned and appeared ready to break free and run when Gibson fired the taser. The device incapacitated Defendant and caused him to stop resisting arrest. Aug held Defendant's hands so handcuffs could be applied and heard him say "he would rather be shot or killed than go to jail." *State v. Woodmansee*, 203 S.W.3d 287 (October 17, 2006, Mo.App. S.D.,2006).

**ECD cases - Non-TASER ECD Related Cases**:

**Federal Circuit Court Cases - ECD cases - Non-TASER ECD Related Cases:**

71. 4th Amendment use of force case - stun gun – *Moore v. Novak*, 146 F.3d 531 (8th Cir. (Neb.) 1998).

    Use of stun gun on a struggling and abusive handcuffed arrestee was not unreasonable.

72. 4th Amendment use of force - stun gun – *Calusinski v. Kruger*, 24 F.3d 931 (7th Cir. (Ill.) 1994).

    Use of a hand-held stun gun was not excessive force to overcome resistance of a domestic violence defendant.

73. 8th Amendment use of force case - stun gun – *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. (Ark.) 1993).

    Detention officers shocked an inmate with a stun gun when he refused to sweep his cell which violated his 8th Amendment right to be free of cruel and unusual punishment.

74. 8th Amendment use of force case - stun gun – *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. (Ky.) 1992). Use of stun gun against disruptive prisoner to restore discipline and order does not violate the Eighth Amendment. (*Caldwell*, 600-01).

    The court affirmed the lower court's judgment and held that defendant correction officers' use of a taser did not violate the Eighth Amendment to the U.S. Constitution, and thus were entitled to qualified immunity, because the force was applied in a good faith effort to maintain or restore discipline, and not maliciously and sadistically to cause harm. The lack of a policy regulating the use of stun guns did not render stun guns use per se unconstitutional; and as the use of a taser was held permissible, it was not unreasonable for defendants to have concluded that the use of the stun gun was necessary to

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avoid using even greater force. Further there was no deliberate indifference as plaintiff did not suffer a serious deprivation because his injuries were not serious enough to require immediate medical attention, and he produced no evidence that defendants acted with a culpable state of mind.

**Federal District Court Cases - ECD cases - Non-TASER ECD Related Cases:**

**Federal District Court Cases - Reported:**

75. **8th Amendment - Stun gun use without justification - maliciously and sadistically**. Evidence that prison guards beat and shocked hand-cuffed and leg-shackled prisoner repeatedly, without justification, would support a finding that prison officials applied force "maliciously and sadistically." Shelton v. Angelone, 183 F.Supp.2d 830, 835 (W.D.Va.2002).

76. 8th Amendment - Prison guards' use of force, including a stun gun, against a disruptive inmate did not amount to cruel and unusual punishment where the inmate had become loud and aggressive and expressed the desire to get into a physical altercation. *Rubins v. Roetker*, 737 F.Supp. 1140, 1141- 44 (D.Colo.1990).

**Federal District Court Cases - Not Reported - ECD cases - Non-TASER ECD Related Cases**:

77. **8th Amendment - Ultron - SJ not granted, factual dispute**. Correctional officer Schueler avers that he used the Ultron on the plaintiff to maintain and to restore discipline. Plaintiff, on the other hand, avers that the two [John Doe] officers held his arms down while defendant Schueler repeatedly shocked him, smiling while he did it and laughing when he was done. This factual dispute cannot be resolved on summary judgment.

    Thus, the fact that the Ultron was used on the plaintiff does not per se violate the Eighth Amendment. Rather, the manner it which it was used determines whether the Eighth Amendment is implicated. The Ultron may be used to maintain or restore discipline. Its use runs afoul of the Constitution, however, if the purpose is to punish or to inflict pain upon a prisoner. See Soto, 744 F.2d at 1270. *Williams v. Schueler*, 2006 WL 3469597 (E.D.Wis. Nov 29, 2006) (NO. 04-C-65).

**State Court Cases - Not Reported - ECD cases - Non-TASER ECD Related Cases**:

78. *People v. Gill*, 2006 WL 137416 (Cal.App. 4 Dist. Jan 19, 2006) (NO. E037087), unpublished/noncitable.

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A stun gun, however, is not an inherently dangerous or deadly weapon; it is only "capable of temporarily immobilizing a person by the infliction of an electrical charge."

**In-Custody Death Cases**:

79. **In-custody death case – neck hold, placed in prone position, did not provide CPR, medical assistance** – *Tatum v. City and County of San Francisco*, 441 F.3d 1090 (9th Cir. (Cal.) April 3, 2006).

    Arresting officer's use of a control hold on arrestee in order to place him in handcuffs was objectively reasonable, and thus, did not support excessive force claim; officer had probable cause to arrest, arrestee was behaving erratically, and arrestee spun away from officer and continued to struggle after officer told him to calm down.

    Detention of arrestee after the arrest did not rise to the level of excessive force; although officers positioned arrestee on his stomach for approximately 90 seconds, then positioned him on his side, and failed to perform emergency resuscitation on arrestee, arrestee kicked and struggled, so that the brief restraint on his stomach was necessary to protect the officers and the arrestee himself, officers monitored arrestee, and they called an ambulance as soon as they noticed that arrestee was breathing heavily.

    Just as the 4$^{th}$ Amendment does not require a police officer to use the least intrusive method of arrest, neither does it require an officer to provide what hindsight reveals to be the most effective medical care for an arrested suspect.

80. **ICD - after pepper spray, baton, physical force, WRAP, significant struggle.** *Lewis v. City of Hayward*, Slip Copy, 2006 WL 436134 (N.D.Cal. February 21, 2006). Case discusses excessive force, qualified immunity, municipal liability, motion to exclude experts.

81. **ICD woman, SJ granted to some officers.** *Giannetti ex rel. Estate of Giannetti v. City of Stillwater*, Slip Copy, 2006 WL 290583 (W.D.Okla. February 6, 2006).

82. **ICD Alleged excessive force - knee on back to restrain for 30-45 seconds, and officers' failure to intercede** -- *Abdullahi v. City of Madison*, 423 F.3d 763 (7$^{th}$ Cir. (Wis.) 2005).

    On November 20, 2002 a driver noticed a person staggering across three lanes of traffic in Madison, WI, and then saw him fall to the ground. The driver,

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a nurse, exited her vehicle and attempted to offer him assistance. The male tried to climb into her vehicle, ran back into traffic, and threw debris at her before grabbing her hair and clawing at her nurse's uniform. The nurse hit the man with her cellular telephone, and escaped, but not before the man had punched her in the face. Numerous telephone calls were made to police dispatch about this incident. Three Madison Police Officers and a Capitol Police Officer responded to the location, where they saw a man flailing his belt and making "a guttural, growling noise" (p.3). Three officers moved the man against the nurse's vehicle, and then took him to the ground. The man was on his stomach. One officer described the takedown as very "peaceful" (p.4). Kicking his feet and trying to escape, one officer placed his right knee and shin on the man's shoulder. The officer applied his weight to keep the man from arching his back and squirming. Another officer was able to handcuff the man. The officer testified that he had his knee on the man's back for about 30-45 seconds. When he removed his knee from the man's back, the man was still breathing. A decision was made to restrain the man's legs for control, and one officer went to his patrol car and obtained a kickstop restraint. After another officer approached, it was noticed that the man was not breathing and that he was limp. All restraints were removed, and fire and rescue attempted to revive the man. He died at 2:39 p.m. A lawsuit was filed, but the District Court granted Summary Judgement for the officers, in effect, ruling in their favor. The Plaintiff filed an appeal that focused on two issues: whether the defendant officer used excessive force in subduing Mohamed, and whether the remaining officers failed to intervene? The Appeals Court reversed the district court's grant of summary judgement in favor of the officers, and remanded the case back for trial. The Appeals Court reasoned that a jury should decide the two raised issues.

83. **MSJ Alleged Failure to train on ICD** -- *Watkins v. New Castle County*, 374 F.Supp.2d 379 (D.Del. 2005).

    Officers responded to a call to remove a man from a residence. The man had a "long, dazed stare in his eyes," was "incoherent" and complained about not feeling well. A person at the scene told one officer that the man had an "extreme drug habit," and that his drug of choice was crack cocaine. During handcuffing, the man "tensed up". Officers struggled with the man, striking him in the face several times, hitting him on the wrist with an ASP baton, and pepper sprayed his eyes to get compliance. One officer dropped his weight, knee first, onto the man's right side. Held in a "chest-down" position, the man's hands and ankles were cuffed together. There was continued pressure on the man's back for an "indeterminate amount of time" while being held chest-down in a prone restraint position. The man's resistance level dropped significantly. He died. The Court found a genuine issue of fact as to whether county that possessed information regarding risks of cocaine-induced excited delirium and potential serious health consequences of prone restraint and included this

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information in training its new officers was deliberately indifferent in failing similarly to train its veteran officers precluded summary judgment in county's favor in civil rights action brought following arrestee's death from cocaine-induced excited delirium and positional asphyxia.

84. **Positional Asphyxia - lateral vascular neck restraint** - *Griffith v. Coburn*, 408 F.Supp.2d 491 (W.D.Mich. 2005). Officer's use of lateral vascular neck restraint on arrestee was not excessive force when arrestee physically resisted handcuffing. The arrestee died shortly after handcuffing from positional asphyxia.

**Other Non-Death Use- of-Force Cases of Interest**:

**4th Amendment Reported - Federal Court of Appeals Cases - Other Non-Death Use- of-Force Cases of Interest:**

85. **Foot on Face (excellent language)** - *Crosby v. Monroe County*, 394 F.3d 1328 (11th Cir. Dec. 28, 2004). Plaintiff's primary focus in making this claim is that at one point the officer put his foot on Plaintiff's face. ***Except for that fact, this would be an easy case.***

    The Fourth Amendment encompasses the right to be free from the use of excessive force during an arrest. See *Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002).* As we have recently said, "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation." Kesinger ex rel. Estate of Kesinger v. Herrington, 381 F.3d 1243, 1248 (11th Cir. 2004).

    ***"In making an excessive force inquiry, we are not to view the matter as judges from the comfort and safety of our chambers, fearful of nothing more threatening than the occasional paper cut as we read a cold record accounting of what turned out to be the facts. We must see the situation through the eyes of the officer on the scene who is hampered by incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal."***

    The Supreme Court "has long recognized that the right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham, 490 U.S. at 397, 109 S. Ct. at 1872-73;* accord *Garrett, 378 F.3d 1274* (hit with baton, tackled, pepper-sprayed, and tied up); *Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004)* (taser gun); *Durruthy, 351 F.3d 1080* (knee in back). Furthermore, ***the purpose of the***

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***qualified immunity doctrine is to give meaning to the proposition that "government officials are not required to err on the side of caution" when it comes to avoiding constitutional violations.*** *Marsh v. Butler County, 268 F.3d 1014, 1030 n.8 (11th Cir. 2001)* (en banc).

Though Crosby was on the ground at the time Deputy Terry put his foot on Crosby's face, he had not yet been handcuffed. ***For all the officers knew, Crosby had other weapons concealed on his person***--as it turned out, he actually did have another weapon on him--and ***raising his head to ask why he was being arrested could have been an attempt by Crosby to distract Terry and a prelude to actual resistance.*** Given the circumstances and the risks inherent in apprehending any suspect, an officer in Terry's position reasonably could have concluded that it was imperative to keep Crosby, who had not been entirely cooperative, completely flat and immobile until he had been successfully handcuffed. ***The fact that Crosby was able to wrestle his hand loose and push Terry's foot away indicates that he had not been subdued.***

***There is also the fact that the force about which Crosby complains, while undignified in its placement, was not severe in amount***. See *Durruthy, 351 F.3d at 1094* (stating that "'the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment'" (quoting *Nolin v. Isbell, 207 F.3d 1253, 1257 (11th Cir. 2000)); Lee v. Ferraro, 284 F.3d 1188, 1198 (11th Cir. 2002)* (noting that one factor to be considered in evaluating excessive force claims is "the relationship between the need and amount of force used."

"We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.1992);

**Federal District Court Cases - Reported - Other Non-Death Use- of-Force Cases of Interest:**

86. **ADA Requires Training in Dealing With Mentally Ill** - *Schorr v. Borough of Lemoyne (PA)*, 243 F.Supp.2d 232 (M.D. Pa. 2003).

Police fatally wounded a man with bipolar disorder while executing an involuntary commitment warrant. Federal Court finds that Title II of the ADA does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with

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mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. However, the ADA requires police agencies to adopt policies and procedures for dealing with mentally ill persons, and that a failure to train police officers to peacefully deal with mentally ill persons is a violation of §12132 of the ADA.

87. **Police shooting - failure to train, supervise, provide less-lethal weapons, due process claim.** *Estate of Smith v. Silvas*, 414 F.Supp.2d 1015 (D.Colo. January 30, 2006).

**Federal District Court Cases - Not Reported - Other Non-Death Use- of-Force Cases of Interest:**

88. **Failure to respond to serious medical needs** -- *Ashworth v. Round Lake Beach Police Department, et. al.*, Slip Opinion, 2005 WL 1785314 (N.D. Ill July 21, 2005).

    Officers handcuffed a 300-pound man with his hands behind his back. Later the man showed signs that he was having trouble breathing, and slumped over the officer's squad car, still handcuffed. The Court held that a jury could find the Defendants knowingly violated the man's right to due process. The officer should not have waited six minutes before calling an ambulance, and had an obligation to move fast when he was aware that his prisoner required medication and was having trouble breathing.

**Related Legal Articles**:

89. **Article**: *Unreasonable Seizure of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Human Rights L. Rev. 261 (2003).

90. **Note:** *Jumping the Gun: Can Municipalities Be Held Liable Under 42 U.S.C. § 1983 for Failing to Provide Police Officers with Less-Lethal Weapons?* 39 Suffolk U. L. Rev. 185 (2005).

**TASER International, Inc. (defendant) cases**:

91. *Neal-Lomax v. Las Vegas Metropolitan Police Dept.*, Slip Copy, 2006 WL 2022989 (D.Nev. July 18, 2006).

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92. *Sanders v. City of Fresno*, Slip Copy, 2006 WL 1883394 (E.D.Cal. July 7, 2006). TASER International, Inc.'s motion to dismiss causes of action for express and implied warranties was granted.

93. *Williams v. Taser Intern., Inc.*, Slip Copy, 2006 WL 1835437 (N.D.Ga. June 30, 2006). Defendants' Fourth Motion for Extension of Time To Answer Cross claims; Defendant Taser International, Inc.'s Motion for Protective Order; Plaintiffs' First Motion to Compel; Plaintiffs' First Motion for Extension of Time to Complete Discovery; and Plaintiffs' Motion for Hearing on Plaintiffs' First Motion to Compel and Defendant Taser's Motion for Protective Order. Granted in part, denied in part.

94. *Howard v. Taser Intern., Inc.*, Slip Copy, 2006 WL 1642715 (D.Kan. June 13, 2006). Dismissal of duplicate case filed in second jurisdiction. Case had already been filed in Arizona.

95. *Devica L. Thompson, et. al. v. Carrollton Township Police Department, et. al.*, Circuit Court for the County of Saginaw, State of Michigan, File No. 03-050008-NO-2, Order dated June 1, 2006. TASER International's motion for summary judgment granted.

96. *Cook v. Taser Intern.*, Inc., Slip Copy, 2006 WL 1520243 (D.Nev. May 26, 2006). Court's decision on plaintiff's motion to compel discovery.

97. *Rosa v. City of Seaside*. Slip Copy, 2006 WL 581090 (N.D.Cal. March 7, 2006). TASER International's motion to dismiss denied - products liability – negligence and trict liability.

98. *Lewis v. City of Tallahassee*, Slip Copy, 2006 WL 231291 (N.D.Fla. January 30, 2006). Order granting in part TASER International's motion to dismiss.

99. *Elsholtz v. Taser Intern., Inc.*, 410 F.Supp.2d 505 (N.D.Tex. January 5, 2006).

    Parent whose son was allegedly victim of fatal shooting when a police officer's stun gun failed to deploy brought negligence action against city in state court, and later added stun gun manufacturer as a defendant. After parent filed notice of nonsuit as to her claims against city and order of dismissal was issued as to city, manufacturer filed notice of removal on basis of diversity jurisdiction. Parent moved to remand to state court. The District Court, held that equitable tolling of the one-year period for removal of a case founded upon diversity jurisdiction was warranted.

100. *Stevens v. Taser Intern., Inc.*, Slip Copy, 2006 WL 143797 (S.D.Ohio January 19, 2006). A products liability action filed by Tina Stevens against TASER International, Inc., Vance Outdoors, Inc. and Darin Fulks. With the consent of the parties, 28 U.S.C. § 636(c), this matter is before the Court on the Plaintiff's

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Motion to Remand, and on Vance Outdoors, Inc. and Darin Fulks' Motion to Dismiss, Stevens' Motion to Remand is denied and Vance Outdoors, Inc. and Darin Fulks' Motion to Dismiss is granted.

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