LAAW International, Inc.
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TASER® Electronic Control Device
Legal Issues Outline: Restraint Cases

[1] Electronic control devices (ECDs) are a force option often used by law enforcement officers (LEOs) to capture and possibly control a person, or to defend against a perceived threat. At times an ECD may be used on a person who is handcuffed or otherwise restrained (*e.g.,*, in a restraint chair).	
Issue: Can an ECD be legally used on a person who is handcuffed and/or otherwise restrained (*e.g.*, restraint chair, leg shackles, etc.)?	"Yes" – in some circumstances: an ECD may be able to be used on a restrained person under circumstances that the ECD utilizing LEO does not violate federal and/or state law, and/or department policy and/or training when using the ECD in such a deployment on a person who is handcuffed or otherwise restrained.
When an ECD may be able to be used on a restrained subject:	An ECD may be able to be used on a restrained subject when that subject is endangering themselves or others or the subject is resisting. Meaning, if the restrained subject is an immediate threat and/or attempting to flee the LEO may be permitted to utilize an ECD on the subject in response to the immediate threat or preventing the subject from fleeing.
Use of ECD on a handcuffed or otherwise restrained person may be constitutionally appropriate:	Handcuffed Arrestee: **Officer did not use excessive force by employing a TASER device against a handcuffed arrestee –** *Zivojinovich v. Barner,* 525 F.3d 1059 (11th Cir. 2008) – 4th amendment Analysis. The Plaintiff was arrested for resisting an officer with violence. A TASER device was employed (in drive-stun) against the handcuffed Plaintiff arrestee whom the officer reasonably believed was intentionally spraying blood toward the officer through Plaintiff's broken nose. Person in Restraint Chair: **Use of TASER device on man's neck – summary judgment granted in favor of police –** *McBride v. Clark*, No. 04-03307-CV-S-REL, 2006 WL 581139 (W.D. Mo. March 8, 2006) – 4th Amendment Analysis. ECD was deployed on Plaintiff's neck while he was in a restraint chair. After being placed in restraint chair Plaintiff yelled, screamed, dislodged his IV causing himself to bleed, and stated that he had Hepatitis C. Plaintiff does not dispute that the ECD deployment was in the best interest of the officer's and the Plaintiff's safety.

Handcuffed Resisting Arrestee: **Summary judgment granted to officer for use of ECD on handcuffed arrestee in detention who had kicked officer –** *Rose v. City of Lafayette,* No. 05-cv-00311-WDM-MJW, 2007 WL 485228 (D. Colo. Feb. 12, 2007) – 4th Amendment Analysis.

> "It is undisputed that the [TASER device] was not employed until after Plaintiff intentionally or unintentionally kicked Franek and appeared to be grabbing at Franek's weapon. I note that Plaintiff [was] 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."

Handcuffed Resisting 14-Year-Old Arrestee: **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. 2006) – 4th Amendment Analysis.

> Use of a TASER device on a handcuffed, resisting, struggling, unarmed 14-year-old male (in school) who was resisting a search and struggled during arrest after swinging and biting at officer, was reasonable under the circumstances.

Handcuffed Resisting Arrestee: **Qualified immunity granted to officer for officer's use of TASER device on kicking handcuffed arrestee –** *Carroll v. County of Trumbull*, No. 4:05CV1854, 2006 WL 1134206 (N.D. Ohio April 25, 2006) – 4th Amendment Analysis.

> "Defendant Mann asserts… he [used the TASER device on] 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 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 [use the TASER device on] Plaintiff in order to gain his compliance so that he could be handcuffed behind his back without injury to himself or to the officers."

Handcuffed Resisting Arrestee: **Summary Judgment Granted to Officers – Car Stop – three TASER device uses on belligerent driver, including two while arrestee handcuffed –** *Willkomm v.Mayer*, No. 05 C 523 S, 2006 WL 582044 (W.D. Wis. March 9, 2006) – 4th Amendment Analysis.

After being arrested, the Plaintiff – while in the back of the patrol car – was able to reposition his handcuffed hands to the front of his body. The officers removed the Plaintiff from the car and repositioned his handcuffs and secured his legs with flexcuffs. Plaintiff was told to swing his legs into the patrol car, he did not, and after a warning he was shocked with a TASER device. Again, the Plaintiff attempted to reposition his handcuffs. The Plaintiff was removed again and one officer used the TASER device in order to reposition the Plaintiff's handcuffs. Both TASER device applications were deemed reasonable.

Handcuffed Resisting Arrestee: **Summary judgment granted for use of TASER device in drive-stun on handcuffed resisting arrestee –** *Devoe v. Rebant*, No. 05-71863, 2006 WL 334297 (E.D. Mich. Feb. 13, 2006) – 4th Amendment Analysis.

Plaintiff, while handcuffed, was told to get into the officers' patrol car. Plaintiff would not comply and was then drive-stunned with one single TASER device discharge. The officer's action was objectively reasonable.

	Handcuffed Fleeing Arrestee: **Use of a TASER device on a fleeing handcuffed arrestee is objectively reasonable –** *Yarnall v. Mendez,* 509 F.Supp.2d 421 (D. Del. 2007) – 4th Amendment Analysis. The use of a TASER device on a handcuffed arrestee who is running from the police, even when the facts are taken in the light most favorable to the arrestee, the use of the TASER device is objectively reasonable.
When an ECD cannot be used on a restrained subject:	An ECD cannot be used on a non-resisting, fully compliant subject who is not endangering themselves or others. To put it another way, a LEO usually will not be able to use an ECD on a restrained subject who is not an immediate threat and/or is not attempting to flee. Some courts also factor in whether the person claiming excessive force was warned that a TASER device would be deployed. If the person claiming excessive force was warned, this may be one factor that may weigh against a finding of excessive force.
Use of ECD constitutionally unreasonable:	Unruly Arrestee not Endangering Self or Others: **Deputy's use of a TASER device on unruly arrestee after she forcefully stated "fuck you" and was not endangering herself or others qualified as wanton and sadistic –** *Orem v. Rephann,* 523 F.3d 442 (4th Cir. 2008) – 14th Amendment analysis. A 280 pound sheriff's deputy's use of a TASER device (in drive stun) on an unruly handcuffed (and in a hobbling device) 100 pound female - under arrestee's breast and on her inner thigh qualified as wanton and sadistic. The deputy used the TASER device on the arrestee after she forcefully stated "fuck you" to the deputy. The arrestee was not endangering herself or others since she was handcuffed and in a hobbling device while locked in the back seat of a squad car. The arrestee received more than de minimus injuries although the TASER device

was only applied for 1.5 seconds it caused pain, electric shock, and the development of a sunburn-like scar on Plaintiff's thigh. In addition, the deputy's use of the TASER device was not objectively reasonable.

Non-Resisting Handcuffed Arrestee: **Non-resisting arrestee has a triable excessive force claim for a TASER device being deployed against him after he was handcuffed –** *Sleeman v. Oakland County,* No. 06-10953, 2007 WL 1343403 (E.D. Mich. May 7, 2007) – 4th Amendment Analysis.

(Taking Plaintiff's facts as true) Plaintiff was not resisting, had a TASER device used against him after he was handcuffed and did not try to assault any of the officers or flee. These facts create a triable excessive force claim.

Handcuffed Non-Resisting Arrestee: **Three uses of ECD drive-stun to get a handcuffed 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,* No. 5:06cv53-RS, 2007 WL 710169 (N.D. Fla. March 6, 2007) – 4th Amendment Analysis. (Case is appealed to the 11th Circuit Court of Appeals.)

Buckley was stopped by Officer Rackard for speeding. After Buckley refused to sign the citation, Buckley was arrested. While handcuffed, Buckley sat down on the ground, not willing to move. After repeatedly ordering Buckley to stand up, Officer Rackard used a TASER device in drive-stun mode three times to Buckley's torso causing burn marks. The Court stated that once a suspect has been fully secured and any potential danger or flight risk is non-existent, a police officer cannot use severe or unnecessary force. No reasonable officer could believe that using such extreme force was lawful.

Non-Resistant, Fully Compliant Handcuffed Person: **Qualified immunity denied officers for excessive force during multi-hour mental health detention transport –** *Batiste v. City of Beaumont*, 426 F.Supp.2d 395 (E.D. Tex. 2006) – 4th Amendment and 14th Amendment Analysis.

> (Taking the Plaintiff's facts as true) Striking, kicking, dragging, choking and repeatedly using a TASER device against a fully compliant docile arrestee would constitute "wanton and unnecessary infliction of pain" and thus would be considered excessive and unreasonable force.

Person not Imposing Immediate Danger or Resisting: **Officers' motion for summary judgment denied – Plaintiff posed no threat to police and was not resisting arrest –** *Parker v. City of South Portland,* No. 06-129-P-S, 2007 WL 1468658 (D. Me. May 18, 2007) – 4th Amendment Analysis.

> (Taking the Plaintiff's facts as true) Parker was stopped for a moving violation and posed no immediate danger to anyone. Parker did not use or attempt to use any force against the officers nor attempted to flee. At the point Gerrish fired his TASER device, Caldwell (another officer) was succeeding in completing his handcuffing of Parker. In addition, Parker was surrounded by three police officers, one of which was larger than Parker.

Person not Endangering Self or Others and Not Resisting: **Officer's summary judgment denied – genuine issue of material fact as to whether a reasonable officer would know that use of a TASER device on an unarmed, non-resisting, handcuffed suspect would violate the suspect's constitutional rights –** *Richards v. Janis,* No. CV-06-3064-EFS, 2007 WL 3046252 (E.D. Wash. Oct. 17, 2007) – 4th Amendment analysis.

> (Taking the Plaintiff's facts as true) Plaintiff was not resisting arrest when officers

began to rough up the Plaintiff by throwing him to the ground and banging his head into the concrete sidewalk. Another officer arrived and deployed his TASER device on the subject's back. There is a genuine issue of material fact in "whether a reasonable officer would know that [using a TASER device on] an unarmed, non-resisting, handcuffed suspect would violate the suspect's constitutional rights." The officer's motion for qualified immunity is denied since the law is "clearly established that a [TASER device] must not be used against a non-resisting individual."

Non-Resisting Handcuffed Arrestee: **Gratuitous force may not be used against a non-resisting handcuffed arrestee who is neither a safety or flight risk –** *Michaels v. City of Vermillion,* 539 F.Supp.2d 975 (N.D. Ohio 2008) – 4th Amendment Analysis.

The Court stated that at the time of arrest, the use of force on a subdued suspect who was not a safety or flight risk was excessive under the 4th Amendment. Thus, officer who used a TASER device multiple times after arrestee was handcuffed, not resisting and in a patrol car is not entitled to qualified immunity and is considered to be gratuitous force.

Non-Resisting Handcuffed Arrestee: **A reasonable officer would have known that using a TASER device against a subject who is not resisting and merely asked why he was being arrested is unlawful –** *DeSalvo v. City of Collinsville,* No. 04-CV-0718-MJR, 2005 WL 2487829 (S.D. Ill. Oct. 7, 2005) – 8th and 14th Amendment Analysis.

(Taking the Plaintiff's facts as true) Plaintiff was handcuffed behind his back and then asked the officer why he was being arrested. The officer would not respond and then after he was asked a second time, the officer threatened the Plaintiff that he would use his TASER device if the Plaintiff did not get into the squad car. Six (6) seconds later the officer drive-stunned the Plaintiff's neck and then placed

the TASER device against the Plaintiff's forehead threatening to use it again. Taking these facts as true, the officer's use of the TASER device constituted excessive force under the 8th and 14th Amendments. In addition, the Court finds, "a reasonable officer in Krug's position would have known that it would be unlawful to [use a TASER device on] DeSalvo (Plaintiff) under the circumstances of this case." Thus, the Court rejected Officer Krug's qualified immunity argument.

Non-resisting Arrestee: **It is unlawful for a law enforcement officer to use a TASER device on a handcuffed non-resisting arrestee –** *Wanbaugh v. Fields,* 508 F.Supp.2d 723 (W.D. Ark. 2007) – 4th Amendment Analysis.

Plaintiff was struck with a TASER device after he was in handcuffs and was not resisting officers. The state of the law gave police fair warning that repeated deployment of a TASER device on a handcuffed arrestee, was unconstitutional and the officers were not entitled to qualified immunity.

Handcuffed Arrestee: **Officer's summary judgment denied – handcuffed arrestee who was beaten with a flashlight and had a TASER device deployed against him would support an excessive force claim –** *Bareaux v. Taylor,* No. 06-1145, 2008 WL 145249 (W.D. La. Jan. 8, 2008) – 4th Amendment Analysis.

(Taking the Plaintiff's facts as true) Plaintiff claims that after he was handcuffed officers sprayed him with a whole can of mace directly in his face, beat him with a flashlight, hit his head on a concrete wall, and used a TASER device against him because he was unable to step into the Ford Expedition due to a knee brace and leg shackles. These facts would support a finding of force that was used "maliciously and sadistically for the very purpose of causing harm."

Handcuffed Arrestee Presumed not to be Resisting: **Handcuffed arrestee who was**

	drive-stunned 15 to 20 times by a TASER device is not reasonable – *Crihfield v. City of Danville Police Dept.,* Nos. 4:07CV00010 and 4:07CV00011, 2007 WL 3003279 (W.D. Va. Oct. 11, 2007) – 4th Amendment Analysis. (Taking the Plaintiff's facts as true) Plaintiff's complaint alleges that he was drive-stunned by a TASER device 15 to 20 times after he was arrested. There is nothing in the Plaintiff's complaint or the Defendant's response that state whether or not the Plaintiff was resisting. Thus, the alleged actions are not reasonable when taken in the light most favorable to the party opposing the motion.
Policy and Training:	Deploying a TASER Device: **Under Missouri law, drawing and firing an ECD is a discretionary function –** *McBride v. Clark*, No. 04-03307-CV-S-REL, 2006 WL 581139 (W.D. Mo. March 8, 2006) – 4th Amendment Analysis. In deploying an ECD under Missouri law, an officer must use his or her professional judgment to determine when to use an ECD when not mandated by its Department's ECD policy. An ECD policy "cannot mandate each and every circumstance in which a [TASER device] should or should not be deployed." Whether Department has a Well Settled TASER Device Policy: **City's summary judgment is denied in regards to whether the City had a policy or custom serving as the moving force behind officer's TASER device usage.** *Richards v. Janis,* No. CV-06-3064-EFS, 2007 WL 3046252 (E.D. Wash. Oct. 17, 2007) – 4th Amendment analysis. The Yakima (WA) Police Department's TASER device policy provides that "Extra caution shall be given when considering use of a [TASER device] on the following individuals: juveniles under 16 years of age, pregnant females, elderly subjects, handcuffed persons and persons in elevated positions." In addition, the officer in question has used his TASER device against a handcuffed person, and

	a child who walked away from him. The Department found that these incidents fell within the TASER device policy. Based on the officer's TASER device usage history, the Department's acquiescence to the officer's TASER device usage and the Department's broad TASER device policy, the Court concluded that there is a genuine issue of material fact regarding "whether the Department had a well-settled policy serving as the moving force behind Officer Calvin's [TASER device] use."
Liability of Supervisors when Failing to Train:	**Supervisor can be held vicariously liable for their subordinate's use of excessive force "when there is a causal connection between their acts and omissions and the subordinate's acts that cause injury" –** *Batiste v. City of Beaumont*, 421 F.Supp.2d 1000 (E.D. Tex. 2006) – 4th Amendment and 14th Amendment Analysis. ***NOTE: This is not the most up to date citation of this case; however, the new cite does not contain the discussion about supervisor liability.*** "Such liability arises if the supervisor actually orders use of excessive force, fails to intervene or protect, or-in certain circumstances-fails to train or supervise. Liability for failing to train or supervise usually arises in situations involving a history of widespread abuse, and even then only when there is a causal connection between the failure to supervise or train and the constitutional violation, *and* failure to supervise or train amounts to deliberate indifference."
Liability for Municipality under 42 U.S.C. § 1983:	**Supervisory TASER device reports which provide detailed information on the incident surrounding the TASER device deployments showed no custom or deliberate indifference to Buckley's excessive force complaint –** *Buckley v. Haddock,* No. 5:06CV53-RS, 2007 WL 891662 (N.D. Fla. March 21, 2007). (Case is appealed to the 11th Circuit Court of Appeals.) Buckley was pulled over for a minor traffic violation, pulled out of his car, handcuffed, and after he was secured, the arresting officer used a TASER device

	in drive-stun mode on him three successive times. To impose § 1983 liability on a municipality, a plaintiff must show: "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." The supervisory TASER device reports provided detailed information on each TASER device used by an officer, including: how the TASER device was deployed, the nature of injuries, approximate distance between suspect and officer, whether it was a probe contact or drive-stun contact, etc. The reports were filled out in a complete fashion and thus the Department was not liable under § 1983.
Pepper Spray Restraint Cases:	Non-Resisting Handcuffed Arrestee: **Deputy who used pepper spray on arrestee who was already handcuffed and was not a threat is excessive force that is clearly established and is objectively unreasonable –** *Bultema v. Benzie County,* 146 Fed.Appx. 28 (6th Cir. 2005) – 4th Amendment Analysis. Deputy who used pepper spray on arrestee who was already handcuffed, was not a threat, and was not attempting to evade arrest constituted excessive force under the 4th Amendment. This conduct as being excessive is "clearly established" as being unlawful under the 4th Amendment. In addition, using pepper spray on a handcuffed person who is not resisting is objectively unreasonable. Non-Resisting Handcuffed Arrestee: **Officers used excessive force by pepper spraying a non-resisting mentally retarded arrestee who was immobilized by handcuffs and a hobbling device –***Champion v. Outlook Nashville, Inc.,* 380 F.3d 893 (6th Cir. 2004) – 4th Amendment Analysis. Officers who laid on top of non-resisting mentally retarded arrestee and sprayed him with pepper spray after he was in handcuffs and a hobbling device was not

objectively reasonable force. This use of force violated Plaintiff's clearly established 4th Amendment rights; thus, officers were not entitled to qualified immunity.

Handcuffed Arrestee: **State trooper was not entitled to qualified immunity for spraying arrestee with mace after he had already been handcuffed following a traffic stop (no facts supporting that suspected resisted or did not resist after being handcuffed) –** *Hall v. Alabama Dept. of Public Safety,* 249 Fed.Appx. 749 (11th Cir. 2007) – 4th Amendment Analysis.

Handcuffed Arrestee: **Police officer not entitled to qualified immunity for allegedly using pepper spray on suspect after he was handcuffed –** *Henderson v. Munn,* 439 F.3d 497 (8th Cir. 2006) – 4th Amendment Analysis.

Officer's actions were not objectively reasonable as a matter of law. When the officer used pepper spray on the suspect, the suspect was under control lying face down on the ground with both hands handcuffed behind his back.

Handcuffed Arrestee: **Officer's motion to dismiss based on qualified immunity is denied – allegations of officer using mace on a handcuffed arrestee in a police station holding cell is enough to defeat officers motion to dismiss –** *Watson v. Congemi,* 110 Fed.Appx. 391 (5th Cir. 2004).

Handcuffed Arrestee: **Officer who stopped his patrol car, grabbed the arrestee, secured and handcuffed suspect and use of pepper spray constituted unreasonable and excessive force in violation of the 4th Amendment –** *Vinyard v. Wilson,* 311 F.3d 1340 (11th Cir. 2002).

There was no indication that plaintiff was resisting arrest or posing any threat at all to the police officer. The use of pepper spray in such a situation is a violation

of the arrestee's 4th Amendment rights. "Courts have consistently concluded that using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else."

Handcuffed Non-Resisting Arrestee: **Non-resisting or fleeing plaintiff stated a cause of action by alleging facts that officers sprayed him with pepper spray after he was handcuffed –** *Galloway v. Hadl,* No. 07-3016-KHV, 2008 WL 1883595 (D. Kansas April 28, 2008) – 4th and 14th Amendment Analysis.

(Taking the Plaintiff's facts as true) Officers placed the plaintiff in handcuffs and led him to the patrol car. While walking to the patrol car one of the officers grabbed his throat while the other sprayed him with pepper spray. There was no attempt of the plaintiff to flee or resist; therefore, the plaintiff has stated a cause of action.

Non-Resisting Arrestee: **The facts claimed – plaintiff was handcuffed and lying on the ground face down when pepper spray was used – states a cause of action for excessive force –** *Roberts v. City of Hapeville,* No. 1:05-cv-1614-WSD, 2007 WL 521901 (N.D. Ga. Feb. 15, 2007) – 4th Amendment Analysis.

The claim must be allowed to proceed to trial because the plaintiff cites sufficient facts to claim excessive force. The plaintiff was handcuffed and lying on the ground face down when pepper sprayed. Furthermore, Walker claims that he did not attempt to resist arrest.

Incapacitated Arrestee: **Summary judgment for officers denied – there were genuine issues of material facts as to whether police used excessive force when plaintiff alleges that mace was sprayed even after he was incapacitated, in handcuffs, and was placed in the squad car -** *Adams v. Metiva,* 31 F.3d 375 (6th Cir.

	1994) – 4th Amendment Analysis. Arrestee in Back of Patrol Car: **Summary judgment denied – If plaintiff was not resisting and was merely sitting in the back of a patrol car handcuffed, it would be unreasonable force to use pepper spray –** *Houghton v. Culver,* 452 F.Supp.2d 212 (W.D. N.Y. 2006) – 4th Amendment Analysis. (Taking the Plaintiff's facts as true) "If in fact plaintiff was simply sitting in the back seat of the sheriff's car after his arrest, and making no attempt to resist, it is difficult to see how defendants could reasonably have believed that it was legal for them to continue spraying him with pepper spray. Under these circumstances, summary judgment is inappropriate."

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