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Use of Electronic Control Weapons Against Handcuffed or Restrained Persons

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❖ **Introduction**

Electronic Control Weapons (ECWs) such as the Taser[®] are increasingly used by police agencies throughout the civilized world. In the hands of well-trained officers, they provide a welcome alternative in many circumstances to the use of firearms, impact weapons or physical altercations to restrain and control arrestees and persons in need of medical attention or psychiatric intervention.

Adequate training requires that officers be familiar with a variety of situational circumstances that commonly occur, and stay abreast of changes in the law on the use of force, including ECWs. AELE has contributed to the knowledge base by creating and regularly updating an Internet portal for locating, reading and printing or saving ECW judicial decisions. See, [Electronic Control Weapons - AELE Case Summaries](#).

In the course of analyzing hundreds of such judicial decisions, patterns emerge. It is clear that one area in which there has been, and most likely will continue to be, a large amount of litigation is over the use of ECWs against handcuffed or restrained persons. The purpose of

this brief article is to provide a quick overview of some of the important decisions on this topic.

This two-part article does not discuss, in any detail, those cases where the controversy depends on whether the person was factually handcuffed or restrained or not at the time the ECW was deployed. Plaintiffs and defendants will frequently disagree about what actually happened, and judges and juries have to sort that out on the basis of the available evidence. There is little to be gained by speculating about it. Rather, our focus is on what law applies when it is agreed or determined that the person was handcuffed or otherwise securely restrained when an ECW was used.

After reviewing case law on various circumstances in which officers might have occasion to use ECWs against handcuffed or restrained persons, Part 2 offers some recommendations to consider.

An earlier article in this publication, [Civil Liability for the Use of Handcuffs: Part II - Use of Force Against Handcuffed Persons](#), 2008 (11) AELE Mo. L.J. 101 discusses the use of force against handcuffed persons, without focusing on the use of ECWs alone. It may be useful to read in conjunction with this article.

Also at the conclusion of the second part of the article, there is a brief listing of relevant resources and references.

❖ **Persons no longer resisting**

To begin with the easiest scenario, what about the use of an ECW against a person who has been placed in handcuffs, and who, regardless of the nature of his or her earlier actions, is no longer actively resisting? They certainly may not be happy about being arrested or detained, and it hardly is surprising if they are grumbling and even cursing. But they are not attempting to flee and escape, to harm an officer, themselves or a third party, or to destroy property -- such as kicking out a patrol car's windows, or otherwise causing unacceptable chaos.

Under the Fourth Amendment's objective reasonableness standard for the use of force under [Graham v. Connor](#), #87-6571, 490 U.S. 386 (1989), there would appear to be little or no justification for the use of force such as an ECW at this point in time. Force cannot be used for the purpose of "punishing" arrestees; its purpose is to subdue the person and

prevent them from continuing to commit an offense or to harm persons (including officers and themselves).

In [*Orem v. Rephann*](#), #07-1696, 523 F.3d 442, 2008 U.S. App. Lexis 9178 (4th Cir.), for example, a deputy's use of a Taser in the stun mode against an arrestee when she was handcuffed and in foot restraints was unnecessary and excessive if the arrestee's version of the incident was true. While the Taser was only applied for 1.5 seconds, it was allegedly applied in a wanton and sadistic manner, and not as part of a good faith effort to restore discipline. The use of the Taser caused the plaintiff to experience pain and electric shock, and to develop a scar. The use of a Taser to intimidate or punish an arrestee is not objectively reasonable and violates clearly established law, and the deputy was not entitled to qualified immunity.

In [*Harris County, Tex. v. Nagel*](#), #14-09-00780-CV, 349 S.W.3d 769, 2011 Tex. App. Lexis 6830, a Texas appeals court upheld a jury's award of \$3 million in a wrongful death lawsuit after the deceased was handcuffed and shocked 18 times with a Taser in the stun mode. Deputy constables were attempting to take him to a mental health institution.

The appellate court ruled that no reasonable officer could believe that it was legally permissible to use pain compliance measures to stop someone who was mentally ill from flinching in response to an electric shock. The decedent was compliant and also restrained, and posed no threat. The appeals court also found that there was sufficient evidence to support a jury finding that the county had ratified the deputies' conduct.

Similarly, in [*Batiste v. City of Beaumont*](#), #1:05-CV-109, 421 F. Supp.2d 1000 (E.D.Tex. 2006), the court ruled that officers were not entitled to qualified immunity for repeatedly using a Taser in the stun mode against a handcuffed, fully-compliant woman they had in custody to take to mental health facilities. The officers also allegedly kicked, dragged and choked her during the several hours they were transporting her. If those claims were true, no objectively reasonable officer could have thought that the level of force used was legal under the circumstances. A settlement was subsequently reached in the case.

Police officers in [*Michaels v. City of Vermillion*](#), #1:05cv2991, 539 F. Supp.2d 975 (N.D. Ohio 2008), Tasered a handcuffed 17-year-old male approximately twenty-five times in the stun mode, including in the testicles, according to the plaintiff. The officers claimed to have used the Taser fewer times than that. The qualified immunity defense did not apply because "... the use of non-lethal, temporarily incapacitating force on a handcuffed suspect

who no longer poses a safety threat, flight risk, and/or is not resisting arrest constitutes excessive force.” The officers claimed that the juvenile resisted, despite being handcuffed, while he claimed that he had not resisted and that the use of the Taser had been completely gratuitous.

The use of a Taser may be fully justified initially by a person’s actions, yet that justification may come to an end once the person has been subdued. In [*Olsen vs. City of Hooper Bay*](#), #S-13455, 251 P.3d 1024 (Alaska 2011), a man acted belligerently towards officers when they came to his home to conduct a welfare check after receiving a report that he was intoxicated while in charge of taking care of small children. They began removing him from the home, but he allegedly resisted their efforts, kicking and attempting to bite the officers. They attempted twice to use a Taser in the dart mode, but this was ineffective because the probes did not make a complete circuit. They then used Tasers in the stun mode multiple times, shocking him approximately 15-18 times.

The court held that the initial force used by the officers was objectively reasonable, but that the need for continued force -- after the arrestee was handcuffed, seated on the floor, and then placed on his stomach -- had changed. The trial court erred in failing to consider whether the department’s policy on use of the Taser had put the officers on notice that they may have used excessive force after the arrestee arguably no longer posed a threat to them.

In [*Austin v. Redford Twp. Police Dept.*](#), #11-2319, 2012 U.S. App. Lexis 16432, 2012 Fed App. 0256 (6th Cir.), an officer was not entitled to qualified immunity for his third use of his Taser (in the stun mode) against a man who allegedly, at the time was pinned on the ground by another officer, was handcuffed and was no longer actively resisting.

❖ **Persons continuing to resist**

The mere fact that a person has successfully been placed in handcuffs does not necessarily mean that they are no longer a threat to anyone. Some people who are placed in handcuffs actively continue to resist, by using their feet to kick, their mouth to bite, or their head or other body parts to butt. In such instances, an officer may be fully justified in using a Taser against the person to make them cease their resistance, in order to protect members of the public, fellow officers, and even the person himself. In some cases, the individual may continue resisting as a result of being under the influence of drugs, alcohol, or suffering from a mental disease or an illness interfering with their ability to control their actions.

In [*LaCross v. City of Duluth*](#), #10-3922, 2012 U.S. Dist. Lexis 66681 (D. Minn.), for example, the court found that an officer was entitled to summary judgment in an excessive force lawsuit. It ruled that he did not act unreasonably in using the Taser once in the stun mode to subdue a handcuffed, non-compliant drunk for the purposes of transporting him to the hospital.

The plaintiff was continuing his resistance to arrest, was acting in an aggressive manner, and had threatened the officer with harm. The use of the Taser was justified because the plaintiff posed a threat, both to the officer's safety and his own. The Taser was earlier used twice in dart mode, but the man ran away with the Taser probes in his back before being captured and handcuffed. The plaintiff did not claim that the use of the Taser in the dart mode was excessive, and the officer said that this was done after he swung a fist at him.

Similarly, in [*Oakley v. Adrian*](#), #10-cv-110, 2012 U.S. Dist. Lexis 38224, 2012 WL 967505 (S.D. Ill.), an officer used a Taser once in the dart mode and three times in the stun mode against the driver of a minivan who was possibly armed, had just led police on a long pursuit, and then refused to obey commands when his van was finally stopped. One stun was after the arrestee was handcuffed, but he had continued to resist. The force used was ruled to be reasonably proportional to the need for force at the time.

See also, [*Goebel v. Taser Int'l. Inc.*](#), #5:07 CV 0027, 2007 U.S. Dist. Lexis 68560, 2007 WL 2713053 (N.D. Ohio), in which the court concluded that the officers did not use excessive force by applying a Taser first in the dart mode to a burglary suspect about to throw a vase at them, and then in the stun mode several times before and after he was handcuffed. He kept resisting after being restrained, moving from side to side and violently kicking his legs.

In accord is [*Carroll v. County of Trumbull*](#), #4:05CV1854, 2006 U.S. Dist. Lexis 23009, 2006 WL 1134206 (N.D. Ohio), holding that an officer was entitled to qualified immunity on several uses of a Taser in the stun mode against a handcuffed deaf arrestee who was resisting his arrest by kicking.

The use of a Taser in the dart mode to the back of an arrested handcuffed drunk who posed a threat from fleeing was objectively reasonable as a matter of law. He had attempted to flee when he was being placed in a patrol car for transport to jail. Considering that the arrestee admittedly was "so drunk [he] didn't know what was going on" and had been belligerent and combative for over an hour, it was reasonable for the officer to believe that

he posed a “threat to anyone he encountered.” [*Groves v. Croft*](#), #CV–10–101, 2011 U.S. Dist. Lexis 130645, 2011 WL 6130791 (D. Mont.).

In some instances, use of an ECW may be advisable when an arrestee is simply uncooperative in a manner which makes it difficult, impossible, or unsafe to transport them to a police station, jail, hospital or other facility. In [*Willkomm v. Mayer*](#), #05-C-523, 2006 U.S. Dist. Lexis 11489, 2006 WL 582044 (W.D. Wis.), officers used a Taser in stun mode three times on an intoxicated driver being arrested, including two stuns after he was handcuffed. They were entitled to summary judgment on his excessive force claims when he was uncooperative and would not obey their orders, including an order to swing his legs inside a police vehicle following his arrest.

Similarly, in [*Buckley v. Haddock*](#), #07-10988, 292 Fed. Appx. 791, 2008 U.S. App. Lexis 19482 (Unpub. 11th Cir.), a federal appeals court upheld multiple uses of a Taser against a handcuffed motorist arrested on a highway and who had refused to comply with instructions to stand up and walk to a deputy’s car. The stop was made at night on a highway in a location where there was passing traffic. The officer contended that he had to use force, including multiple applications of a Taser, to accomplish the arrest, due to the motorist’s resistance.

The appeals court found that the deputy only used the Taser after first trying other approaches -- such as persuading the motorist to stop his resistance, attempting to lift him, warning him repeatedly that the Taser would be used against him and then providing him with time to comply. The motorist, at the time, was handcuffed, but refused to stand up and go to the deputy’s car, according to the court.

This point is also illustrated by [*Clark v. Ware*](#), #1:10-CV-106, 2012 U.S. Dist. Lexis 76855, 2012 WL 1994788 (E.D. Mo.). The court ruled that the officers acted in an objectively reasonable manner in using a Taser in the stun mode three or four times on a physically resistant, kicking arrestee, despite the fact that he was handcuffed.

He had refused to comply with orders to stop kicking or to get into a patrol car. The court believed that attempting to physically force the arrestee into the car without the use of the Taser would have likely escalated the situation further, resulting in serious injury to either the arrestee or the officers.

When individuals are self-destructive, the use of an ECW to incapacitate them may prevent them from doing greater harm to themselves. In [*Norman v. Epperly*](#), #07-5091, 2008 U.S. Dist. Lexis 95030, 2008 WL 5099685 (W.D. Mo.), officers were found to be entitled to summary judgment on the basis of qualified immunity for their use of a Taser in the stun mode on an intoxicated and suicidal woman whom they had blindfolded and whose arms and legs were handcuffed together to keep her from harming herself or others.

She became violent in response to their attempt to restrain her—screaming, rolling around, and banging her head against the floor and walls—and they could not stop her with verbal commands or physical force.

A federal appeals court in [*Mann v. Taser International*](#), #08-16951, 588 F.3d 1291, 2009 U.S. App. Lexis 26155 (11th Cir. 2009) found that the use of a Taser on a handcuffed suspect also placed in leg shackles was not excessive when the subject continued to actively resist. The woman had been smoking methamphetamine and refused to leave a neighbor's home. Even after being placed into handcuffs and leg shackles, she violently resisted, kicking out a patrol car window and banging her head on the car.

The court found that the ECW use against her was not excessive, as she was violent and aggressive “and the evidence demonstrates that she was clearly a danger to herself and others.” She died later that day from malignant hyperthermia, with a body temperature of 107° F; the court found insufficient evidence to hold that the ECW was the cause of her death.

❖ **Misinterpreted actions**

There are a variety of circumstances in which accidental or involuntary actions by a person may be misinterpreted by an officer as resistance and result in the use of an ECW.

In [*Armbruster v. Marguccio*](#), #3:2005cv00344, (W.D. Pa. 2006) (magistrate's report and recommendations), adopted by [*Armbruster v. Marguccio*](#), #3:2005cv00344, 2006 U.S. Dist. Lexis 87559, 2006 WL 3488969 (W.D. Pa.), for instance, an officer allegedly used a Taser repeatedly in the stun mode against the head and neck of a handcuffed arrestee after he was removed from his car, and placed on the road face down. The arrestee claimed that he had not been resisting the arresting officers at the time.

The court found that the arrestee's allegedly involuntary motions after the first application of the Taser could have been interpreted as continued resistance. The plaintiff was only allowed to proceed with his claim concerning the first use of the Taser, based on his assertion that it was deployed after he was handcuffed and before he engaged in any movements which could be interpreted as resistance.

In an Iowa case, a Taser was used in the dart mode to restrain an intoxicated man who was perceived as attempting to break away from an officer after resisting an attempt to handcuff him. The man had a medical condition which caused his arm to suffer involuntary tremors.

The trial court found that the suspect's alleged crimes were two relatively minor misdemeanors, that he did not pose a threat to the officers, and that he did not struggle with the officers, resist arrest, or try to escape, so that the use of the Taser was objectively unreasonable if the facts were as the plaintiff alleged. The officer was not entitled to qualified immunity.

The trial court rejected a failure to train claim against the county, however. The federal appeals court affirmed, and found that general constitutional principles on the use of excessive force would have put reasonable officers on notice that using a Taser on an arrestee under the circumstances alleged violated clearly established law. [*Shekleton v. Eichenberger*](#), #11-2108, 677 F.3d 361 (8th Cir. 2012).

- Ultimately, of course, an officer can only act on the basis of their perception of a person's actions at the time, and the decision to deploy force, including the use of an ECW, must often be made in a split-second, without the benefit of hindsight.

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