TASER law update

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TASER / Excessive Force / Fourteenth Amendment.

Orem v. Rephann, 523 F.3d 442 (4th Cir. W. Va. 2008)

Facts: Orem was arrested for violation of a family protective order against a former Deputy and an associate of Deputy Rephann. During her initial arrest she became extremely agitated and was restrained with a hobble prior to being transported to jail. On the way down to jail she struggled so violently that the device became loose forcing Deputy Rephann to pull his cruiser over to the side of the road. Deputy Boyles who was following Rephann pulled behind him and immediately began to secure the hobbling device. However, Deputy Rephann (who weighed over 280 lbs) decided to enter into a conversation with Orem (who weighed just 100 lbs) and ordered her to calm down several times. When she failed to do so he proceeded to drive stun her with his TASER; once under her left breast and once on her inner left thigh. She was then transported to jail without further incident. Orem sued the deputies in federal court alleging excessive force. The Deputies moved for summary judgment on the grounds that that they did not violate her Fourth Amendment right to be free from an unreasonable seizure and for this reason were entitled to qualified immunity. The District court denied the Deputies' motion and they appealed.

Issue: What is the proper for the District Court to review Orem's claim under the Fourth Amendment's "objective reasonable" standard?

Rule: No. "The Fourth Amendment governs claims of excessive force during the course of an arrest, investigatory stop, or other 'seizure' of a person. Whereas, excessive force claims of a pretrial detainee or arrestee are governed by the Due Process Clause of the Fourteenth Amendment."

Discussion: The Fourth Amendment attaches during the "course of an arrest "or seizure." Here, Orem was already under arrest and being transported to a detention facility. Consequently her status was that of an arrestee. An arrestee's excessive force claim must be analyzed on the 14th Amendment's due process standard.

Issue: What factors determine whether an officer's use of force violates the 14th Amendment's Due Process Clause?

Rule: To succeed on an excessive force claim under the Due Process Clause of the Fourteenth Amendment, a plaintiff must show that the officer "inflicted unnecessary and wanton pain and suffering." A court must look to such factors "as the need for the application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted, and whether the force

was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

Analysis: The court found that a reasonable juror might find that Rephann's decision to use the TASER was not a good faith effort to restore order but was done maliciously for the purpose of causing harm. The Court noted that Deputy Rephann never tried to secure the hobbling device as did Deputy Boyles. Instead, he used his TASER only after Orem refused to show him the proper respect by stating "fuck you." In addition, it reasoned that the decision to apply the TASER just under her left breast and on the inner part of her thigh might be an indication of a malicious and sadistic act. Finally, the Court noted that administering an electric shock was not a de minimus injury. The court noted that shocking someone is "torment without marks" which if inflicted without reason is unconstitutional.

Update on TASER cases

Federal Appellate Cases

1. District Court's denial of summary judgment for officers overturned because law not clearly established.

Russo v. Cincinnati, 1992 U.S. App. LEXIS 437, 21-23 (6th Cir. 1992)

Bubenhofer, a diagnosed paranoid schizophrenic, refused to return to his treatment center. His sister called police for assistance and upon their arrival they found Bubenhofer in a highly agitated state. Officers attempted to talk him out of his sister's apartment, but to no avail. When Bubenhofer came to the door he was holding two knifes. He quickly shut the door. Officers again tried to talk him out, but with no success. One officer forced his way into the apartment and observed Bubenhofer holding a knife. The officer fired a TASER at him striking him and causing him to temporarily falter. The officer discharged his TASER a second time which temporarily stunned Bubenhofer; however he immediately recovered and charged at the officer who was only a few feet away. In response to his actions, two other officers immediately discharged their firearms at Bubenhofer who fell down a flight of steps and came to rest still holding the knife. He refused to drop the knife and as he stood up he was struck with another TASER barb in the face. When this did not have any significant the officer fired a fourth dart. According to officers, Bubenhofer charged up the steps with the knife

in his hand. At that point several officers discharged their firearms striking him but he remained conscious with a knife in his hand. Officers again pleaded with him to put down the knife and at for a moment he did, however he picked it up and once again charged back up the stairs. Officers discharged their firearms for a third time and this time he remained still. Bubenhofer died a short time later. In addressing whether the officers used excessive force the court stated the following:

“The initial use of the Taser.”

“At the time of Sizemore's initial use of the Taser, Bubenhofer stood facing the officers a few feet within his apartment doorway with a knife in each hand. Sizemore knew that Bubenhofer was potentially homicidal and suicidal.”

“Plaintiffs rely on the testimony of Bauer to contend that Bubenhofer in no way threatened the officers prior to the initial discharge of the Taser, and to suggest that Bubenhofer may have even been sitting on the backs of his heels at this point. Furthermore, plaintiffs point out that Sizemore's use of the Taser violated official policy, because section 12.546 of the C.P.D.P.M. states in relevant part that "officers should obtain sufficient back-up prior to using the Taser to control the suspect. Personnel should be deployed in such a manner that would enable them to use other appropriate means to subdue the suspect if the Taser is, ineffective."

“Our review of the uncontested facts, however, leads us to conclude that, although plaintiffs' allegations may raise a genuine issue of material fact as to whether the use of the Taser was reasonable, plaintiffs have failed to show that clearly established law at the time of the incident declared such actions unconstitutional, or that an officer in Sizemore's position would reasonably have known that his conduct transgressed constitutional law. Sizemore was aware that Bubenhofer was armed with knives, that he had made a number of threatening statements to the officers, and that RPI considered him potentially homicidal. The uncontested record indicates that Sizemore deployed the Taser in an effort to obviate the need for lethal force. Although in hindsight his choice proved tragic, we cannot say that Sizemore's use of non-lethal force to subdue a potentially homicidal individual transgressed clearly established law. We therefore conclude that the district court erred in refusing to grant summary judgment to Sizemore with respect to plaintiffs' claim that the initial use of the Taser constituted excessive force.”

“The subsequent use of the Taser.”

“The district court found, and all the parties agree, that Sizemore fired the Taser at Bubenhofer while he lay at the bottom of the stairwell, that the dart struck Bubenhofer in the face, and that at this point Bubenhofer posed no immediate threat to the officers. The district court reasoned that "it should have been clear [to Sizemore] after its first use under an objectively reasonable standard that the use of the Taser gun effectively escalated the incident instead of preventing a suicide or inducing Thomas Bubenhofer to surrender." J.A. at 28-29. The court thus held that, "applying the objective reasonableness test, the Court cannot conclude that the further use of the Taser by Sizemore . . . was objectively reasonable. . . . Thus, this Court cannot declare that Sizemore is immune from suit in this regard as a matter of law." Id. at 32.”

“We suspect that the district court may have misapprehended the qualified immunity inquiry. As discussed above, the issue is not simply whether Sizemore acted in a reasonable manner, but also whether his actions violated clearly established law, and whether an officer in Sizemore's position would reasonably have known that his conduct was illegal. Although Sizemore's subsequent firings of the Taser present a closer question than his initial use of the Taser, **we note again that his actions were intended to avoid having to resort to lethal force.** While Sizemore's later uses of the Taser, after its initial ineffectiveness, might appear questionable, we cannot conclude that they constituted a show of excessive force. We conclude, therefore, that Sizemore was entitled to qualified immunity in his use of the Taser and, accordingly, reverse the district court's denial of summary judgment.”

2. Officers entitled to qualified immunity where mentally ill subject ultimately kills his family and himself after a standoff.

Ewolski v. City of Brunswick, 287 F.3d 492, 508 (6th Cir. 2002)

“Even if a constitutional injury had occurred, the law is not sufficiently clearly established on this question to overcome qualified immunity. See *Russo, 953 F.2d at 1044-45; In re City of Philadelphia Litig., 49 F.3d at 972* (granting qualified immunity to police where fire used to smoke out barricaded group after gun battle, because it could not conclude that "in the light of pre-existing law the unlawfulness of either dropping the explosive or letting the fire burn should have been apparent" (quotation omitted)). 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." Similarly, here the defendants did not employ lethal force, except during those occasions when Mr. Lekan fired directly upon them. 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. We therefore conclude that the defendants are entitled to qualified immunity on the Appellant's excessive force claim."

3. Single Discharge of a TASER was objectively reasonable where truck driver repeatedly failed to follow commands to retrieve documents from his truck and was belligerent.

Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004)

"In the circumstances of this case, Reynolds'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 . . . **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."

4. A seizure under the Fourth Amendment occurs when officer mistakenly believes he is using his TASER but unintentionally shoots a suspect with his firearm.

Henry v. Purnell, 501 F.3d 374, 381-382 (4th Cir. 2007)

"We are not presented with a case where police stopped someone by mere happenstance, such as the passerby who is pinned when a police car slips its brake, or by the unintended consequences of an attempted seizure, such as the fleeing suspect who crashes his vehicle. Instead, the undisputed evidence in the record establishes that Purnell's specific intent was to stop Henry from fleeing by means of firing a weapon, and Henry was in fact stopped by the very instrumentality (i.e., the Glock) that Purnell set in motion. We recognize that Purnell did not intend to use the Glock, but we are also mindful of the Brower Court's admonition that **we should not draw too fine a line in determining whether the means that terminate a person's freedom of movement is the very means that an officer intended.** If, as the Court noted, a seizure would occur when a person is stopped by the accidental discharge of a gun that an officer meant to use only as a club, then we believe that a seizure surely occurred here where Purnell intended to stop Henry by firing a weapon at him and succeeded in doing so. n9 Accordingly, we affirm the portion of the district court's order finding that Purnell seized Henry. *See 428 F. Supp. 2d at 395-96. n10*

5. Use of TASER to arrest a nonviolent misdemeanant who was contesting a traffic ticket was not objectively reasonable.

Casey v. City of Federal Heights, 509 F.3d 1278, 1283 (10th Cir. 2007).

"Officer Sweet grabbed and then tackled Mr. Casey without ever telling him that he was under arrest. Nor did he give Mr. Casey a chance to submit peacefully to an arrest. While the reasonableness of his force must be judged from the officer's perspective, Mr. Casey also testified that he repeatedly asked, "What are you doing?" as he was grabbed and tackled. App. 100. **Given this, a reasonable officer should, at a minimum, have ordered Mr. Casey to submit to an arrest or used minimal force to grab him while informing him that he was under arrest. Taking the facts in the light most favorable to Mr. Casey, Officer Sweet's treatment was not reasonable for a nonviolent misdemeanant who was neither dangerous nor fleeing**."

"This conclusion is reinforced by comparison with our recent decision in *Mecham v. Frazier, 500 F.3d 1200, 2007 WL 2608624 (10th Cir. 2007).* There, we held that officers had not violated the Fourth Amendment in using pepper spray to arrest a woman who was uncooperative during a traffic stop. Although we acknowledged that the "unfortunate" conduct of the officers was possibly wrong in hindsight, we held that it was justified by two of the three factors under

Graham--safety concerns and Ms. Mecham's resistance to arrest. *500 F.3d 1200, [WL] at *3-*4.* In particular, Ms. Mecham repeatedly ignored the officers' warnings that she would be arrested, thus turning "what should have been a routine encounter . . . into a fifty-minute ordeal." *500 F.3d 1200*, *[WL]at *3.* Even when given one last warning to get out of her car or face arrest, she refused. She also remained in control of her car on a "narrow shoulder of a busy interstate highway," and thus may have been "a danger to herself or others." *500 F.3d 1200, [WL] at *4."*

"In contrast, the confrontation with Mr. Casey did not give Officer Sweet reason to fear for his safety. Nor did Officer Sweet give Mr. Casey any indication that he was, or would soon be, under arrest. Furthermore, Mr. Casey's arrest was transformed from "a routine encounter" only by Officer Sweet's use of force. In light of Graham and Mecham, a reasonable jury could find Officer Sweet's use of force to be excessive and therefore unconstitutional."

"Mr. Casey sued Officer Sweet not only for directly using excessive force against him, but also "for his failure to intervene and prevent the use of excessive force by his fellow officers." Aplt's Op'g Br. 25. Mr. Casey raised this claim below, although the district court did not discuss it in dismissing his § 1983 claim. *Casey, 2006 U.S. Dist. LEXIS 67936, 2006 WL 2711760.* Genuine issues of material fact remain on this argument for § 1983 liability as well.

As we have held, **"a law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983."** *Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996).* In Mick, a police officer was accused of pulling the defendant out of her car, throwing her to the pavement, stepping on her, and dragging her across the ground, in violation of the Fourth Amendment. We held that a Secret Service agent who was present could be constitutionally liable for his failure to intervene if he "watched the incident and did nothing to prevent it." Id. at 1137. We cited several cases from our Circuit and others holding that there is an affirmative constitutional duty to stop other officers from using unconstitutionally excessive force. Id. at 1136 (citing *Lusby v. T.G. & Y. Stores, Inc*., *749 F.2d 1423, 1433 (10th Cir. 1984),* vacated on other grounds sub nom. *City of Lawton v. Lusby, 474 U.S. 805, 106 S. Ct. 40, 88 L. Ed. 2d 33 (1985); O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); Fundiller v. City of Cooper City, 777 F.2d 1436, 1441-42 (11th Cir. 1985)). n4*

6. Repeated Use of TASER on suicidal suspect was not objectively reasonable.

Massey v. Hess, 2007 U.S. Dist. LEXIS 68786 (D. Tenn. 2007)

"There is a "built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Graham, 490 U.S. at 396*; accord *Saucier v. Katz, 533 U.S. 194, 205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); Burchett, 310 F.3d at 944.* "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. *Graham, 490 U.S. at 396*. The reasonableness inquiry allows for the fact that police officers must often make split-second judgments about the necessary amount of force. Id.

"However, taking the facts in the light most favorable to Plaintiff, there was excessive force used on the bus, where the Chattanooga Defendants repeatedly used a taser on Plaintiff as she sat. Her attempts to resist the seizure did not warrant the repeated application of the taser. At worst, Plaintiff was believed to be a potential harm to herself. She was not accused of a crime and was not a risk to the officers or other passengers. To the extent she was resisting arrest, it was because she had done nothing wrong and wanted to be left alone. In those circumstances, there is a genuine dispute of material fact as to whether the force used was excessive. By participating with the Chattanooga Defendants, Defendant Oelschlegel is also liable for excessive force. Even though the Chattanooga Defendants and Defendant Oelschlegel believe they had good intentions in pulling Plaintiff from the bus, officers' good intentions do not make their actions constitutional. Graham, *490 U.S. at 397."*

"To summarize the Fourth Amendment claims, there was no constitutional violation in the course of the Virginia Defendants' interview of Plaintiff; Plaintiff has a constitutional claim against Defendant Oelschlegel for false arrest but not excessive force resulting from grabbing Plaintiff as she left the building; and Plaintiff has a constitutional claim against Defendant Oelschlegel and the Chattanooga Defendants for false arrest and excessive force for being seized on the bus."

6. Multiple uses of TASER not justified for failure to follow commands

Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137 (D. Wash. 2007)

"In part, the purpose of the two-prong *Saucier* analytical framework is to force courts to establish contours of the law involving potential violations of civil rights. *See Saucier,* 533 U.S. at 201 (observing that the second prong of the test "serves to advance understanding of the law . . . ."). In this case, because the case law on use of Tasers is not well developed, liability for violations of Mr. Beaver's rights caused by the fourth and fifth tasings cannot be imposed. It has been said that qualified immunity exists because police officers "cannot be expected to predict what federal judges" might decide is constitutionally unacceptable. *See Smiddy v. Varney,* 665 F.2d 261, 266 (9th Cir. 1981) (citation and internal quotation omitted). **However, at least as far as the undersigned is concerned, the following issues are now clearly established. First, the use of a Taser involves the application of force. Second, each application of a Taser involves an additional use of force. Third, multiple applications of a Taser cannot be justified solely on the grounds that a suspect fails to comply with a command, absent other indications that the suspect is about to flee or poses an immediate threat to an officer. This is particularly true when more than one officer is present to assist in controlling a situation. Fourth, any decision to apply multiple applications of a Taser must take into consideration whether a suspect is capable of complying with an officer's commands."**

7. The repeated use of a Taser against an unarmed arrestee was not objectively reasonable.

Stephens v. City of Butler, 509 F. Supp. 2d 1098, 1112-1113 (D. Ala. 2007).

"The instant case presents an issue closer to *Vinyard* than to *Draper*, in that the plaintiff was under more control of the three officers than the plaintiff in *Draper*. Nonetheless, even if the court were to accept that a single application of the taser would have been appropriate under Draper, **the issue before the court is the repeated use--at least four separate trigger pulls by Lovette followed by one use by Jackson--of a taser in such an instance. The repeated use of a taser on an unarmed arrestee who had made no effort to escape, no movement that could be deemed an attack or threat to any officer, who was in custody, in the jail, and was surrounded by three officers, would be objectively unreasonable and excessive, particularly where the use of force was over something as minor as being verbally unruly and refusing to don jail garb."**

8. Failure to choose alternative course of action was not objectively unreasonable where subject failed to follow commands.

Chung v. Anderson, 2007 U.S. Dist. LEXIS 60760, 10-13 (D. Neb. 2007)

"While it may appear that some alternative course of action could have been used to isolate Garcia, or that a lesser use-of-force could have disabled Garcia, it is undisputed that the officers' earlier use of a Taser and their repeated commands and display of weapons failed to subdue or deter Garcia, and that he did pose an immediate and serious threat to the officers' safety at the time the shots were fired." When faced with an "hysterical" man in close quarters, screaming and yelling, and advancing on officers with a sharp boning knife, a reasonable officer on the scene could conclude officers were confronted with an imminent threat.

9. Discharge of TASER was objectively reasonable when intoxicated and agitated subject was struck with a TASER after he attempted to re-enter his house shortly after he threaten officers and implied he had a weapon.

Biggers v. Lowe, 2007 U.S. Dist. LEXIS 51650, 7-10 (D. Ohio 2007)

"Defendant Stephens' actions, under the circumstances described above, were not so unreasonable as to amount to excessive force in violation of the Fourth Amendment. The uncontroverted facts establish that plaintiff had refused to come out of the house for more than two hours, conduct on plaintiff's part that certainly qualifies as resisting arrest. Stephens had been informed that plaintiff was intoxicated and armed and that plaintiff had made threatening statements to other officers at the scene. Although plaintiff had finally emerged from the house, he appeared to reenter the house. Defendant Stephens' action in firing the taser was reasonable under the circumstances and therefore did not amount to excessive force in violation of the Fourth Amendment."

10. Follow Up Medical Care/Simple Response by EMT or Fire Department is sufficient to overcome 14th Amendment claim of deliberate indifference.

Biggers v. Lowe, 2007 U.S. Dist. LEXIS 51650, 7-10 (D. Ohio 2007)

"Even accepting as true plaintiff's factual assertions related to the lack of follow-up medical care he received for his wounded hand, plaintiff has simply not stated a substantive due process claim cognizable under the Fourteenth Amendment. Plaintiff describes that, on April 11, 2004, immediately after his

arrest, he "was taken to an awaiting EMS vehicle … to be treated for a laceration on the LEFT hand as a result of the taser dart. Plaintiff does not allege any facts or present any evidence that would suggest that defendants acted with deliberate indifference to his serious medical needs. Plaintiff received prompt medical attention for the taser dart wound, and he offers no specific information that would suggest that the medical care administered at the scene was inadequate or that additional medical care was warranted. Similarly, plaintiff offers no evidence that there was a substantial risk of serious harm to his health. See Farmer, 511 U.S. at 835-37. At most, plaintiff's complaint reflects a disagreement on his part with the treatment actually administered by medical personnel. **However, the United States Court of Appeals for the Sixth Circuit has distinguished between cases where a prisoner has received no medical care and those where the prisoner claims that he did not receive adequate treatment.** *Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976)***. "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." Id**.

11. It was objectively reasonable for officers to deploy TASER on subject who was suspected of selling drugs who failed to follow commands.

McGee v. City of Cincinnati Police Dep't, 2007 U.S. Dist. LEXIS 28665, 20-21 (D. Ohio 2007)

Subject who was suspected of selling drugs led police on brief pursuit. He was struck by a TASER when he refused to get on the ground and follow commands. According to the subject he was simply trying to place his hat back into the vehicle

“The Court finds that the officers actions, under the circumstances, were not so unreasonable as to amount to excessive force in violation of the Fourth Amendment. The facts show that the officers were attempting to arrest McGee for fairly serious criminal activity, that at least initially McGee attempted to evade the officers, and that once stopped McGee failed to comply with Officer Rackley's instruction to him to get down on the ground.”

“There exist a multitude of cases in which courts have held that the use of non-deadly force, such as pepper-spray or a taser, to subdue a defendant who is armed or who poses an immediate threat does not amount to excessive force. See, e.g., Gaddis ex rel. Gaddis v. Redford Twp., 364 F.3d 763, 774-75 (6th Cir. 2006) (holding that the officer's use of pepper spray against an armed suspect

who was resisting arrest was reasonable). While McGee had not brandished a weapon in this case, Officer Rackley had reason to believe that he posed a threat. Because the officers had information McGee had recently sold illegal drugs, the officers also had reason to believe that McGee was armed and possibly dangerous. *See, e.g., U.S. v. Richardson, 40 Fed. Appx. 7, 13, 2002 WL 261824, [*15] at *4 (6th Cir. 2002)* (noting that "Officers who rely on their experience and training in concluding that weapons are frequently used in drug transactions act reasonably when the officers use intrusive force to stop a drug suspect." (internal quotations omitted)); *U.S. v. Heath, 259 F.3d 522, 530 (6th Cir. 2001); U.S. v. White, 53 F.3d 332, 1995 WL 244069, *4 (6th Cir. April 26, 1995)* (finding that "[i]n light of the drug activity that was taking place at the house [where the officers found the defendant] and the common knowledge that individuals involved in buying and selling drugs often carry guns, it was reasonable for the officers to fear that [the defendant] could be carrying a gun").”

“Moreover, McGee's actions after exiting his car were not such as would dispel any belief the officers held that he may have been armed. In particular, the Court notes McGee's act of reaching into his car while ignoring Officer Rackley's orders to get down on the ground. While ostensibly McGee only reached into his car to place his hat inside, the officers could not have know his motive at the time and could reasonably have suspected that McGee reached into the car to retrieve a weapon. Officer Rackley did not deploy his taser until after McGee failed to comply with his instruction to get down on the ground and another officer shouted "Check for a Gun. Gun. Gun." Under the circumstances, a reasonable officer may have believed that McGee was indeed carrying a weapon and that the use of the taser was warranted to avoid potential violence. n4 See, e.g., *Shreve v. Jessamine County Fiscal Court, 453 F.3d 681, 688 (6th Cir. 2006)* (holding that the defendant officers' use of mace to incapacitate a woman who had allegedly jumped bail and who refused to comply with the officers' orders to come out of a closet where she was hiding did not amount to excessive force); *Kellough v. Bertrand, 22 F. Supp. 2d 602, 608 (S.D. Tex. 1998)* (holding that where the defendant officers suspected the plaintiff was a suspect in an armed robbery, "[e]ven accepting as true Plaintiff's allegation that he exited his vehicle in a nonthreatening manner, his refusal to follow Defendants' instructions to go to the ground would probably justify a reasonable officer's decision, in light of the circumstances, to employ some force to take him to the ground").

“Even if the Defendants did use unreasonable force in arresting Plaintiff, Defendants would nonetheless be entitled to qualified immunity because it has not been clearly established that the use of nonlethal force under these

circumstances violates the Fourth Amendment. Generally speaking, the Fourth Amendment right to be free from excessive force in the context of a seizure is clearly established. See *Saucier v. Katz, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2005); Adams v. Metiva, 31 F.3d 375, 386-387 (6th Cir. 1994); Belford v. City of Akron, No. 5:05cv2650, 2006 U.S. Dist. LEXIS 57704, 2006 WL 2381507, at *5 (N.D. Ohio Aug 16, 2006).* However, the Supreme Court has held that for the purposes of qualified immunity, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier, 533 U.S. at 202* (quoting *Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).* In other words, this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. at 201.

With regard to the use of non-lethal force, the unconstitutional use of gratuitous force against a helpless and incapacitated suspect has been clearly established. See *Phelps v. Coy, 286 F.3d 295, 302 (6th Cir. 2002)*. The Sixth Circuit has also held that "the use of a taser in order to avoid a dangerous situation or the resort to even greater force [does] not violate clearly established law." *Caldwell v. Moore, 968 F.2d 595, 600 (6th Cir. 1992) (applying Russo, 953 F.2d at 1044-45).* However, situations such as that at issue in the instant case, where an officer tases an individual who fails to comply with the officer's orders and who the officer has reason to believe is armed, fall into a grey area about which there does not appear to be clearly established law regarding the appropriate use of force. Indeed, Plaintiff does not cite one case in which a court has found the use of a taser unconstitutional under similar circumstances. Accordingly, Defendants are entitled to qualified immunity as to Plaintiff's excessive force claim.

12. Mere threat or display of TASER which causes momentary fear is objectively reasonable

Price v. Austin Police Dep't, 2007 U.S. Dist. LEXIS 39378 (D. Tex. 2007)

“Assuming without deciding that the officers pointed their weapons at Plaintiff, Plaintiff's allegations are insufficient to demonstrate a constitutional violation. *Johnson v. Deep East Tex. Regional Narcotics, 379 F.3d 293, 305-306 (5th Cir. 2004)* (holding district court did not err in granting motion for summary judgment regarding claim that police officers entered the plaintiff's home, had their guns drawn and told the plaintiff to turn her head back around and lay down

before she got shot); *Hinojosa v. City of Terrell, Tex., 834 F.2d 1223 (5th Cir. 1988)* (finding the momentary fear experienced by the plaintiff when a police officer pointed a gun at him did not rise to the level of a constitutional violation).

13. Mere threat or display of TASER while making arrest is not unreasonable.

Price v. Austin Police Dep't, 2007 U.S. Dist. LEXIS 39378, 34-35 (D. Tex. 2007)

"To establish a constitutional violation, inmates raising allegations of excessive force must show that the force used was malicious and sadistic for the very purpose of causing harm rather than in a good faith effort to restore discipline. *Hudson v. McMillian, 503 U.S. 1, 6, 112 S. Ct. 995, 998, 117 L. Ed. 2d 156 (1992).* The standard announced in Hudson applies to claims of pretrial detainees. *Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993)*. The summary judgment evidence shows Defendant Davis' use of his Taser on Plaintiff was objectively reasonable under the circumstances."

14. Single Discharge of Taser on mouthy and belligerent Pre-Trial Detainee was malicious or sadistic for the purpose of causing harm.

Price v. Austin Police Dep't, 2007 U.S. Dist. LEXIS 39378, 39-40 (D. Tex. 2007)

"In sum, after considering the five Hudson factors, the Court concludes Plaintiff has not shown the use of force by Defendant Davis on June 18 was malicious and sadistic for the very purpose of causing harm. Moreover, courts have held that officers may use a taser devise in various contexts to subdue a belligerent or unruly arrestee or inmate. See *Draper v. Reynolds, 369 F.3d 1270, 1277-78 (11th Cir. 2004)* (holding that a "single use of the taser gun causing a one-time shocking" against a "hostile, belligerent, and uncooperative" arrestee in order to effectuate the arrest was not excessive force in the totality of the circumstances); Jasper v. Thalacker, 999 F.2d 353, 354 (8th Cir. 1993) (using a stun gun to subdue an unruly inmate did not violate Eighth Amendment where plaintiff failed to prove that the officers used the stun gun sadistically or maliciously to cause harm); *Caldwell v. Moore, 968 F.2d 595, 599-602 (6th Cir. 1992)* (holding that use of a taser was not a per se violation of the Eighth Amendment if use of the taser gun is necessary to avoid using greater force and the use is not with the malicious intent to inflict harm). Accordingly, the undersigned concludes Plaintiff has failed to establish a constitutional violation as to the June 18 incident."

15. Use of TASER on unarmed man was objectively reasonable based on recent threats and erratic behavior.

Keller v. Hood, 2008 U.S. Dist. LEXIS 17783, 15-16 (D. Va. 2008)

After standing in the Potomac for 2 hours and threatening police and fire, a subject was tased without warning after he got out of the river to get some beer. Immediately after the TASER was deployed, the subject fell and struck his head severely injuring himself. The Officers' claimed that his fists were balled and he was standing in a threatening manner. Family members who were present at the scene, along with the subject's, stated that the subject was following commands and was standing in a non-threatening manner.

"Reviewing all of the evidence collectively, even in the light most favorable to the plaintiff, it is apparent that Hood's decision to Taser Keller was reasonable as a matter of law despite the narrative provided by Keller's family members. Hood arrived on the scene having observed Keller unstable and violent in the past. It is undisputed that Keller was behaving erratically throughout the incident and exhibited violent behavior during the two hours he was in the Potomac River. He was screaming and punching both the water and rescue boats with his fists. All present, including Keller's family, believed that Keller could not be allowed to leave the scene on his own and needed to be taken into custody and transported to the hospital. Both Ehrlich and Pastor Warnick fully expected some confrontation between police and Keller as he attempted to leave the scene to obtain beer."

"As the Fourth Circuit has noted in multiple excessive force cases, "it will nearly always be the case that witnesses . . . differ over what occurred. That inevitable confusion, however, need not signify a difference of triable fact." Gooden v. Howard County, 954 F.2d 960, 965 (4th Cir. 1992). The relevant inquiry is "whether the officers acted reasonably upon the reports available to them and whether they undertook an objectively reasonable investigation with respect to that information in light of the exigent circumstances they faced." Sigman, 161 F.3d at 786 (emphasis in original)."

"In the final analysis, the officer's perception, if reasonable, governs. The consistency between the testimony of Sergeant Hood, Chief Taylor, and Deputy Carlson, supports the reasonableness of Hood's perceptions. As the Supreme Court noted in Graham v. Connor, 490 U.S. 386 (1989), law enforcement officers are often called upon to make "split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving . . . ." Id. at 397."

“Hood was confronted with a tough judgment call. Even when viewed in the light most favorable to Plaintiff, the result of Hood's decision may have been regrettable, but his rationale was objectively reasonable. That is all the law requires to entitle him to qualified immunity, which protects him from liability for "bad guesses in grey areas." *Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992).* Plaintiff's evidence fails to demonstrate a Fourth Amendment violation. The defendant is therefore entitled to qualified immunity, and his Motion for Summary Judgment will be granted ”

16. Multiple discharges of TASER on juvenile arrested for tagging was not objectively reasonable.

Michaels v. City of Vermillion, 2008 U.S. Dist. LEXIS 13288, 29-32 (D.Ohio)

Plaintiff, a juveinile claims that he was tased over 25 times including strikes to his testicles while police arrested him for “tagging”. Police stated they only used the TASER “several” times while he was resisting.

“The Graham factors--severity of the crime at issue, safety threat, and resistance--will prove useful in addressing the objective reasonableness inquiry here.
First, the crimes for which Michaels was arrested--resisting arrest, disorderly conduct, and criminal mischief--are not particularly severe.”

“Second, the evidence does not establish that Michaels posed a significant threat to the Officers, and there is no evidence [*30] that he posed a threat to anyone else. Although Officer Grassnig's police report indicates that "in his effort to resist [Michaels] turned, put his head down, and came at me," at that time Michaels was in handcuffs and Officer Reinheimer was present to assist Officer Grassnig. (Doc. 24-2.) In addition, this exchange occurred before Officer Grassnig tased Michaels for the first time. Chronology is important here, because the Plaintiffs' excessive force claim relates specifically to whether Officer Grassnig used the taser gratuitously. (Doc. 1 at P 18.) In the excessive force context, segmenting the incident at issue is appropriate in order to isolate the particular use of force that is allegedly excessive. See Dickerson v. McClellan, 101 F.3d 1151, 1161 (6th Cir. 1996); see also, e.g., Russo v. City of Cincinnati, 953 F.2d 1036, 1044-45 (6th Cir. 1992). **Thus, the question in this case is whether Michaels was a threat to officer safety after Officer Grassnig tased him once and he was at the threshold of the door of the squad car. The Plaintiffs' attest that, although Michaels kicked Officer Grassnig at that time, he did so reflexively as a result of being tased.”**

"The same segmenting concept is applicable under the third factor -- whether Michaels was resisting arrest or attempting to evade arrest. It is undisputed that Michaels resisted arrest when he refused to get in the squad car. This does not establish, however, that he was resisting arrest after that point in time -- i.e., when according to Plaintiffs, the Officers used the allegedly excessive force. n9 Indeed, the Plaintiffs say that Michaels stopped resisting arrest when Officer Grassnig tased him the first time, and that any 'resistance' thereafter was a reflexive reaction to being tased."

"Focusing on the tasing--the specific conduct alleged to constitute excessive force--the Graham factors favor finding that, taking the facts as alleged by the Plaintiffs, a jury could find that a constitutional violation occurred. In other words, the discrepancy between the parties' accounts of the tasing constitutes a material issue of fact and, under the first prong of the Saucier test, the Plaintiffs' version of the facts rises to the level of a constitutional violation."

17. The use of a TASER on a 14 year old girl was not reasonable as a matter of law where girl physically placed herself in between officers and her brother who was under arrest.

Mattos v. Agarano, 2008 U.S. Dist. LEXIS 13201, 33-34 (D. Haw. 2008)

"Here, because both the intrusion on Jayzel and the government's need for the intrusion can be construed as significant, it is unclear which way the balance of equities tips on the issue of force. It is undisputed that Jayzel's actions were inappropriate and dangerous. It is also possible, however, that Officer Aikala's use of the Taser was disproportional to the gravity of the threat. The Officers outnumbered Plaintiffs two-to-one and Jayzel, after initially trying to diffuse the situation with entreaties to discuss the matter outside, was not actively threatening the Officers. It is also unclear to this Court, based on the differing accounts given by Officer Aikala and Jayzel, the nature and scope of the warning provided by Officer Aikala before the Taser was employed. **While the Court recognizes that police officers face a panoply of difficult choices, often requiring immediate resolution, when faced with the question of whether the use of force is warranted and, if so, to what degree, the Court cannot say as a matter of law that Officer Aikala's use of the Taser was reasonable under the circumstances.** Rather, the Court finds that questions of fact exist regarding whether the use of the Taser on Jayzel was constitutionally reasonable. Defendants' MSJ on the issue of excessive force is therefore DENIED."

18. Instruction on the "use of force continuum" sufficient to overcome cause of action for deliberate indifference to training.

Goldsmith v. Snohomish County, 2008 U.S. Dist. LEXIS 11630, 27-29 (D. Wash. 2008)

While at a friend's house, subject advises that he is feeling strange and states he is having a panic attack and might be having a heart attack due to a reaction to his anti-anxiety medicine. Medic is summoned and upon their arrival subject is highly agitated and physically confrontational. Police are summoned and after a scuffle where police employed a variety of pain compliance holds (including a two handed hair hold??) and a TASER which was deployed by a discharge and the drive stun method. While in custody, he suffered a heart attack but was revived. Plaintiff sued both for excessive force and inadequate training. In reference to inadequate training the Court held:

"In *Board of County Comm'rs of Bryan County, Okl. v. Brown,* the Supreme Court discussed three ways in which a county may be liable for inadequate training. 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). The first is a deficient training program "intended to apply over time to multiple employees." (citation omitted). The continued adherence by policymakers "to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action--the 'deliberate indifference'--necessary to trigger municipal liability." *Id.* (citation omitted). Second, a municipality may be liable if there is "the existence of a pattern of tortious conduct by inadequately trained employees" that is the "'moving force' behind plaintiff's injury." *Id.* at 407-08 (citation omitted). However, plaintiff must show more than simply "a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident." *Id.* at 408. Third, a plaintiff may prove a failure-to-train claim without showing a pattern of constitutional violations where "a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Id.* at 409.

"Plaintiff has not demonstrated a genuine issue of material fact as to whether the County acted with deliberate indifference. See *Monell*, 436 U.S. at 694. **First, the County trains all of its deputies to use a "force continuum," to ensure that only reasonable and proportional force is used.** The County also trains its deputies of the risk of positional asphyxia and excited delirium. These policies do not demonstrate inadequacy rising to the level of deliberate

indifference. Second, Plaintiff has not produced facts suggesting that a pattern of tortious conduct by County deputies exists. See Brown, 520 U.S. at 407-08. Plaintiff's expert states, without supporting information, that the County "was directly involved in one of the first recorded excited delirium and restraint asphyxia deaths nationwide--Scarsella in 1986." (Dkt. 37-8, Van Blaricom Decl. at 8) This is insufficient to create a genuine issue of material fact that a pattern of tortious conduct by County deputies exists that can amount to deliberate indifference. Moreover, the County cannot be held liable "solely because it employs a tortfeasor." Monell, 436 U.S. at 691. Lastly, there is no evidence that officers encountered a highly predictable situation without proper training. See Brown, 520 U.S. at 407-09. Although the officers had varying levels of information regarding excited delirium and positional asphyxia, there are no facts in the record showing that this was "a highly predictable" or "recurring situation[]." See id. at 409 (suggesting that the need for more training must be "obvious")."

19. It was not objectively reasonable to discharge TASER without a warning where woman refused to get off the phone.

Brown v. City of Golden Valley, 2008 U.S. Dist. LEXIS 11300, 20-21 (D. Minn. 2008)

Subject was a passenger in a vehicle that had been stopped for suspicion of drunk driving. Driver was secured in patrol car after being forcibly removed from the car. Passenger was on her cell phone with a 911 operator when according to an officer discharged his TASER. Passenger claimed injuries including psychological trauma that manifests itself as anxiety and a rash when she sees a uniformed officer.

"Taking the evidence in the light most favorable to Plaintiff, Zarrett did not warn her before tasering her. *Cf.* *Schumacher v. Halverson,* 467 F. Supp. 2d 939, 944, 951 (D. Minn. 2006) (upholding single use taser on intoxicated motorist after police warned him three times that he would use taser if plaintiff failed to comply). Plaintiff was not holding dangerous weapons or threatening Zarrett. *Cf.* *Russo v. City of Cincinnati,* 953 F.2d 1036, 1044-45 (6th Cir. 1992) (upholding use of taser when officers faced patient who was potentially homicidal and suicidal, had made threatening statements, refused to return to psychiatric institute, and was armed with knives)."

"Here, viewing the facts in the light most favorable to Plaintiff, Plaintiff gave no indication of violence and made no attempt to flee; Zarrett did not warn her that he would use the taser or attempt to use any other type of force; and Zarrett was one of ***four*** officers on the scene and Plaintiff's husband was already

safely in the squad car. The only crime Zarrett suspected Plaintiff of committing was a violation of the open container statute - a minor crime, particularly since Plaintiff was the passenger in the car. Although there were tumblers at Plaintiff's feet, any object could be used as a weapon and there is no allegation that Plaintiff made any indication to reach for the tumblers, dispose of the tumblers, or use them as a weapon."

"Zarrett did not order Plaintiff to get out of the car or remove her seatbelt. He only told Plaintiff to hang up the telephone. Accepting Plaintiff's version of the facts, Zarrett knew that she was on the telephone with a 9-1-1 operator and was frightened, yet after the second time she failed to heed his command to get off of the telephone, without warning, he tasered her. *Cf.* *Parker v. City of S. Portland No. 06-129-P-S, 2007 U.S. Dist. LEXIS 37015, 2007 WL 1468658, at *21-*23 (D. Me. May 18, 2007,)* (unpublished) (gathering cases in which district courts held use of taser was not entitled to qualified immunity and holding that use of taser on unarmed, intoxicated motorist, who did not physically threaten officers or attempt to flee and who was surrounded by three officers, was not entitled to qualified immunity), *aff'd* 2007 U.S. Dist. LEXIS 52468, 2007 WL 2071815 (D. Me. Jul 18, 2007) (unpublished)."

20. Court granted summary judgment for officer who deployed his TASER against a shoplifter even though other alternatives to force were available.

McDonald v. Pon, 2007 U.S. Dist. LEXIS 92356, 11-12 (D. Wash. 2007)

A police officer deployed TASER two times after shoplifter failed to follow verbal commands and punched a loss prevention officer in the face. Shoplifter sued and argued that officer should have considered other options before using his TASER.

"A court may also consider the availability of alternative methods of capturing or subduing a suspect in determining reasonableness. See *City of Hemet, 394 F.3d at 701.* Verbal commands alone had proven ineffective against Mr. McDonald, so some level of force was required. See Pon Decl. PP 4-5. By using his Taser, Officer Pon was able to obtain compliance while remaining a safe distance from Mr. McDonald. By comparison, close proximity would have been necessary for impact or body force, and those options would have presented a greater risk of lasting injury to both Mr. McDonald and Officer Pon. See Myers Decl., Ex. A (Expert Report at 4-5). In addition, chemical agents

would have carried a risk of self-contamination, and their use would have required a lengthy decontamination period. Id. at 5. A reasonable officer on the scene could have believed that the Taser was the safest and most effective force option available."

"Applying the Graham reasonableness factors to the facts in the light most favorable to Mr. McDonald, the court concludes that Mr. McDonald has not made out a Fourth Amendment violation for excessive force. Officer Pon is, therefore, entitled to summary judgment in his favor.

21. Police use TASER to force man to submit to catheterization.

Wheeler v. City of Orlando, 2007 U.S. Dist. LEXIS 88140, 1-2 (D. Fla. 2007)

Plaintiff Antonio Wheeler is suing the City of Orlando (the "City") and Orlando Police Department officer Peter Linnenkamp, for claims arising from his arrest. Wheeler alleges that he was strapped to a gurney and, in an attempt to force Wheeler to submit to catheterization, was repeatedly tasered. Wheeler motion to quash subpoena for his medical records was overruled

22. TASER sued in in-custody death case.

Oliver v. City of Orlando, 2007 U.S. Dist. LEXIS 80552, 2-3 (D. Fla. 2007)

Plaintiff Amy Shirley Oliver filed a civil rights suit against the City of Orlando, two Orlando Police Department officers, and Taser International Inc. ("Taser") for claims arising out of the alleged excessive force used during the arrest and leading to the death of her son, Anthony Carl Oliver, Sr. ("the Decedent"). In the Second Amended Complaint, Plaintiff (as the personal representative of the estate of Decedent), alleges claims for product liability against Taser relating to the design, manufacture and marketing of the Taser product ("Advanced Taser M26") used on the Decedent during the arrest. Doc. No. 30. Plaintiff alleges the defective condition of Taser's product caused Decedent's death and lists claims for negligent failure to warn (Count V); negligent design, manufacture, assembly or distribution (Count VI); strict liability -- design defect (Count VII) and manufacturing defect (Count VIII).

23. Officers' motion to dismiss denied where TASER allegedly deployed to remove non-resisting suspect from car.

Jackson v. City of Schertz, 2007 U.S. Dist. LEXIS 87238, 6-7 (D. Tex. 2007)

According to the Plaintiff he drove up on a crime scene and was confronted by several officers who initially pointed guns at him. He was told to get out of the car, but before he could comply he was hit with multiple TASER discharges.

"Here, lithe facts as Plaintiff pled them are true, no reasonable officer could conclude it would be lawful to taser an unresisting person multiple times, in addition to shooting pepper spray in his face and kicking and punching him. Where an individual is belligerent, struggling with police, or attempting to flee, a reasonable officer's reliance on a heightened showing of force becomes more justifiable. But where, as Plaintiff alleges is the case here, none of these factors are present."

"Therefore, given the deferential approach due Plaintiff's allegations at this stage of litigation, the Court finds Plaintiff has met the requisite burden to overcome Defendants' Motions to Dismiss. Accordingly, these motions are denied."

24. Officers denied qualified immunity for deploying TASER multiple times on subject that was resisting arrest.

Crihfield v. City of Danville Police Dep't, 2007 U.S. Dist. LEXIS 79182, 7-9 (D. Va. 2007)

"Only after we find that there was a violation of a constitutional right should we go to the next sequential step in the qualified immunity analysis: Determining whether that right was clearly established. Id. at 1774. Officers can only be personally accountable in § 1983 actions if their acts violate clearly established constitutional rights of which a reasonable official would have known. In each case, the right must be defined at a "high level of particularity." *Edwards v. City of Goldsboro, 178 F.3d 231, 250 (4th Cir. 1999)*. We know that there is a general right to be free from excessive force, but this is too broad. The Defendants wish the right to be characterized as that of intoxicated and threatening individuals who are actively resisting arrest not to be tased in order to subdue them. Obviously, defined as thus, such a right is not clearly established. **However, because we must take the situation in the light most favorable to Plaintiffs, the question should be "is it a clearly established right not to be**

tased up to 20 times after you have been handcuffed and placed under arrest and are no longer forcibly resisting." The answer is probably not. However, this is clearly based on a factual issue. If the facts later demonstrate that Plaintiffs were actively struggling and resisting arrest, then the officers may be entitled to a qualified immunity defense. Therefore, I will DENY the Motion to Dismiss with regards to the § 1983 claim against the police officers."

25. Excited Delirium caused death not TASER.

Smith v. La. State Police, 2007 U.S. Dist. LEXIS 73689 (D. La. 2007)

Subject became ill at a restaurant and medic was summoned. When officers arrived he was in an agitated state and was waving a knife. He was subdued by a TASER. Subject collapsed a few moments later and died. His estates sued TASER for product liability and TASER moved for summary judgment.

"In the case at bar, Taser asserts that it is only liable for "damage[s] caused by their product" under Louisiana's Products Liability Act. (La. R.S. § 9:2800.52). Here, Taser argues that Plaintiffs' claims against Taser cannot be supported because Plaintiffs cannot prove that the TASER stun administered by Trooper Dewey caused or contributed to Smith's death. Taser also claims that no medical study has ever proven that a TASER touch stun is capable of causing ventricular fibrillation. Finally, Taser presents the affidavit of Dr. Samantha Huber, the pathologist who performed Smith's autopsy. Dr. Huber's affidavit plainly states, "the TASER X26 used by the Louisiana State Police did not cause or contribute to Mr. Darvel Smith's death." (Rec. Doc. 23, Exhibit A, Affidavit of Dr. Samantha Huber, p. 2). Accordingly, Taser argues that Plaintiffs are precluded from seeking any claims against them for the death of Darvel Smith."

26. Court overrules Plaintiff's motion to exclude expert opinion that drug overdose caused death rather than the TASER

Mann v. Taser Int'l, In.c, 2007 U.S. Dist. LEXIS 96169, 17-18 (D. Ga. 2007)

"Plaintiffs request that the Court exclude the opinion of William Oliver, M.D., a medical examiner with the Georgia Bureau of Investigation ("GBI") who completed the autopsy report of Plaintiffs' decedent, Melinda Neal Fairbanks. Plaintiffs challenge Dr. Oliver's conclusion that Ms. Fairbanks died from "[s]ympathomimetic poisoning syndrome (malignant hyperthermia)", due to

"[m]ethamphetamine toxicity." (Docket Entry No. 349 at 8.) The opinion portion of Dr.

“Oliver's autopsy report stated: Autopsy examination and review of medical records of this unfortunate victim revealed the classic findings of amphetamine-related hyperthermia syndrome. The level of methamphetamine in this decedent is lethal. The behaviors reported during subdual [sic] are those of classic so-called "excited delirium." While the contusions present on the body are dramatic, interpretation of them is somewhat problematic due to the coagulopathy associated with malignant hyperthermia (which sometimes results in disseminated intravascular coagulation) and the liver necrosis noted on histology.”

. . . . Hypertherma complicates or is primarily responsible for many of the clinical findings present in patients suffering from amphetamine or cocaine toxicity. Mental status changes, such as agitation, confusion, panic, and hallucinations, are common in sympathomimetic poisoning and may progress to coma or status epilepticus, contributing to a poor neurologic outcome in many of these. . . .”

“Exertional hyperthermia in the agitated and often restrained patient may be accompanied by rhabdomyolysis, DIC, hyperkalemia, hypoxia, myocardial dysfunction, and the rapid onset of cardiovascular collapse and death shortly after arrival at the hospital or while still in the custody or police or paramedical personnel. For those who are admitted to the hospital, the expected complications of hyperthermia and rhabdomyolysis are commonly encountered, including renal failure, acidosis, DIC, and hepatic necrosis. . .The application of TASER device did not contribute to death[.]”

“The Court has reviewed Dr. Oliver's opinions, Dr. Oliver's deposition, Dr. Oliver's autopsy report, Dr. Oliver's affidavit, Dr. Gowitt's affidavit, Dr. Gowitt's deposition, and the briefs and other materials submitted by the parties. Based on the Court's review of the record, the Court finds as follows.”

“First, Dr., Oliver is qualified to express the opinions contained in his autopsy report. Although Plaintiffs appear to contend that Dr. Gowitt has more experience as a medical examiner than Dr. Oliver, and appear to argue that Dr. Oliver's experience as a medical examiner is limited, Dr. Oliver's qualifications and experience certainly are adequate to allow him to express the opinions contained in his autopsy report.”

“Further, the Court rejects Plaintiffs' contentions that Dr. Oliver's

methodology is unreliable. Certainly, Dr. Gowitt's opinions may have differed from Dr. Oliver's opinions if Dr. Gowitt had issued the autopsy report. The Court, however, cannot find that excluding Dr. Oliver's opinion is appropriate based on the criticisms voiced by Dr. Gowitt and by Plaintiffs. n2 The Court therefore cannot find that Dr. Oliver's opinion is so unreliable that the Court may exclude it under Daubert."

"Further, although Plaintiffs hint that Dr. Oliver's opinion may have been biased in favor. of Defendant TASER, Plaintiffs have offered nothing but speculation to support this theory. In any event, this perceived issue of bias is a question for the jury, and does not render Dr. Oliver's opinion inadmissible under Daubert."

"In sum, the Court concludes that Dr. Oliver is qualified to offer the opinions contained in his autopsy report of Ms. Fairbanks. The Court further concludes that Dr. Oliver's opinions are sufficiently reliable to pass muster under Daubert. The Court therefore denies Plaintiffs' Motion to Exclude Opinions, in Part, of William Oliver, M.D."

27. The use of a TASER against a mentally ill subject who was handcuffed but continued to struggle was objectively reasonable.

Goebel v. Taser Int'l, 2007 U.S. Dist. LEXIS 68560, 20-22 (D. Ohio 2007)

Mentally ill subject died after receiving multiple discharges from a TASER. Prior to his death he had cut his wrist and had thrown objects. After being handcuffed he continued to struggle and was tased again.

"This Court finds one Sixth Circuit case addressing officers' use of a Taser gun. Russo v. City of Cincinnati, 953 F. 2d 1036 (6th Cir. 1992). In Russo, the Sixth Circuit held that an officer was entitled to qualified immunity despite using his Taser gun multiple times on knife-wielding suspect who was laying at the bottom of a stairwell and no longer an immediate threat. Russo, 953 F. 2d at 1045. The Court noted that the officer's "actions were intended to avoid having to resort to lethal force." 953 F.2d at 1044-45. Specifically, the court found that, although the officer may have used excessive force during initial tasering, plaintiffs had failed to show that clearly established law rendered the officer's actions unconstitutional in circumstances in which the officer confronted the suspect who was armed with knives, had made a number of threatening statements to the officers and was considered potentially homicidal and suicidal, and the officer was attempting to obviate need for lethal force. Id."

"The Court also finds the Eleventh's Circuit's opinion in *Draper v.*

Reynolds, 369 F.3d 1270 (2004), particularly instructive in determining the reasonableness of the officers' use of the Taser gun under the circumstances of this case. In *Draper*, officers stopped the plaintiff's truck for improper illumination of the vehicle's tag light. *369 F.3d at 1272*. The plaintiff immediately became belligerent with the officers, denied that he had done anything wrong, and ignored the officers' requests for documentation. *Id. at 1272-73*. After the plaintiff ignored the officers' multiple requests for documentation, one of the officers discharged his Taser gun at the plaintiff's chest. *Id. at 1273*. The plaintiff then sued the officers, alleging that the officers used excessive force in violation of federal and state law. *Id. at 1274."*

"The Eleventh Circuit then concluded that the officer's use of the Taser gun to effectuate the plaintiff's arrest was reasonable under the circumstances. Id. The court found the following circumstances relevant in its evaluation of the plaintiffs claim: From the time Draper [the plaintiff] met Reynolds [the officer] .. .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. Id. The court concluded that the officer's use of the taser gun "was reasonably proportionate to the difficult, tense and uncertain situation that [the officer] faced in this traffic stop, and did not constitute excessive force." Id.

"In this Court's view, Hyde was more hostile, belligerent, and uncooperative than the plaintiffs in both Russo and Draper. Immediately upon the officers' entry into the basement, Hyde was found hiding behind the furnace. Although the officers identified themselves, Hyde refused to show his hands, claimed he had a gun, and threatened to kill the officers. Hyde repeatedly ignored the officer's request to come out from behind the furnace with his hands up and threatened the officers with a glass vase. Even after he was tasered, Hyde threw objects at the officers. During the entire sequence, Hyde was covered in blood and projectile vomiting at the officers. Hyde continuously threatened that he would kill the officers, and the officers could not use their numbers to advantage due to the cramped and debris-filled basement. The Court, therefore, concludes that the officers initial use of the Taser, before Hyde was handcuffed, was a reasonable use of force under the circumstances."

"The Court further notes that one of the main purposes of nonlethal, temporarily incapacitating devices such as the Taser to give police effective options short of lethal force that can be used to take custody of an armed suspect who refuses to be lawfully arrested or detained. *Ewolski v. City of Brunswick, 287 F.3d 492, 508 (6th Cir. 2002).* As a general matter, the Sixth Circuit has expressed doubt "that the use of non-lethal force against an armed and volatile suspect constitutes excessive force." Id. Hyde's case falls in this category as the evidence is undisputed that he stated that he was armed with a

gun and his aggressive behavior toward the officers by refusing to submit to arrest, projectile vomiting at the officers, threatening to kill the officers, and throwing heavy objects."

B. Subsequent use of the Taser

"Plaintiff also claims that the officers' use of the Taser gun after Hyde was handcuffed constitutes gratuitous use of force in violation of the Fourth Amendment. It is well established in the Sixth Circuit that the gratuitous use of force on a suspect who has already been subdued and placed in handcuffs is unconstitutional*. McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir. 1988).* The Sixth Circuit has found that the use of nonlethal, temporarily incapacitating devices on a suspect who is already handcuffed and no longer poses a threat to the safety of the officers or others constitutes excessive force. *Champion v. Outlook Nashville, Inc., 380 F.3d 893, 901 (6th Cir. 2004), cert. denied, 161 L. Ed. 2d 725, 125 S. Ct. 1837, 544 U.S. 975 (2005)."*

"Plaintiff cites Champion, along with other Sixth Circuit cases involving the use of pepper spray and chemical spray, for the proposition that tasing [*20] Hyde after he was handcuffed constitutes excessive force. *See Greene v. Barber, 310 F.3d 889, 898 (6th Cir. 2002)* (holding that it may be excessive force to use pepper spray on suspect who was resisting arrest but "not threatening anyone's safety or attempting to evade arrest by flight"); *Vaughn v. City of Lebanon, 18 Fed. Appx. 252, 2001 WL 966279, at * 12-13 (6th Cir. 2001)* (holding that the use of a chemical spray may be unconstitutional when there is no immediate threat to the safety of the officers or others); *Adams v. Metiva, 31 F.3d 375, 386 (6th Cir. 1994)* (holding that the use of mace on a compliant suspect is constitutionally unreasonable). In Champion, the suspect was handcuffed on the ground, but continued to squirm and kick his feet in the air. *Champion, 380 F. 3d at 901.* Even after the officers attached a hobbling device to his ankles, they continued to use pepper spray on him. The Court stated that it was constitutionally unreasonable for police officers to continue to spray a suspect, "who had stopped resisting arrest and posed no flight risk," and who "was immobilized by handcuffs and a hobbling device." Id.

"The Court finds that, contrary to Champion and similar case law prohibiting the use of force after a suspect has been subdued, Hyde still posed a threat to the officers after he was handcuffed. When the officers attempted to handcuff one of Hyde's wrists, Hyde continued to fight, kick his legs and roll side to side. Even after the officers handcuffed Hyde, he continued to violently kick his legs at the officers and EMTs treating his wrist injury. The EMTs attempted to bandage a laceration on Hyde's arm that he sustained when breaking through the building. Hyde, however, continued to kick and resist the EMTs' attempts to treat him and prevent further blood loss. Horvath then used his Taser in drive-stun mode in order to gain control of Hyde's legs, but Hyde continued to kick and the drive stun appeared to have no effect. (Horvath Depo., Exh. B, pp. 20-21).

Finally, the officers were able to restrain Hyde's legs by the use of shackles. In light of the fact that Hyde posed a danger to himself and the officers even after he was handcuffed, the Court finds the officers' use of the Taser reasonable under the circumstances. Therefore, with the facts and all reasonable inferences are viewed in a light most favorable to the Plaintiff, the Court finds that Plaintiff has failed to demonstrate a constitutional violation."