



## Memorandum of Law

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**To:** Distribution

**From:** Douglas E. Klint, Vice President and General Counsel

**Subject:** Legal Summary For TASER Conducted Energy Weapons

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The legal concerns usually raised regarding the TASER conducted energy weapon generally fall into two categories: 1. What are the legal restrictions on the use of a TASER conducted energy weapon; and 2. What is the impact of a TASER conducted energy weapon on legal liability in a use of force incident. The purpose of this Memorandum of Law is to address these issues in the context of U.S. Federal and State regulations and case law.

### **Legal Restrictions on Use of TASER Conducted Energy Weapons**

A TASER conducted energy weapon is not classified as firearm by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives since it uses compressed nitrogen gas as the propellant. Therefore, firearms-related regulations do not apply to the sale and distribution of the TASER conducted energy weapon within the United States. A distinction needs to be made with the old Tasertron conducted energy weapon that used black powder for the propellant and was classified as a firearm under U.S. Federal and state regulations. The Tasertron unit is no longer being manufactured.

Some states have enacted regulations restricting the sale and use of inexpensive, hand-held shock devices and these regulations also apply to TASER conducted energy weapons. In many cases, the law enforcement and corrections market is subject to different regulations than the consumer market. Based on a review of current regulations, the following states regulate the sale and use of the TASER conducted energy weapon:

<b>STATE</b>	<b>LAW ENFORCEMENT USE</b>	<b>CONSUMER USE</b>
Connecticut	Legal	Legal for home use, carrying prohibited

Florida	Legal	Legal, subject to restrictions
Hawaii	Legal	Prohibited
Illinois	Legal	Legal, subject to restrictions
Indiana	Legal	Legal, subject to restrictions
Massachusetts	Prohibited	Prohibited
Michigan	Legal	Prohibited
New Jersey	Prohibited	Prohibited
New York	Legal	Prohibited
North Carolina	Legal	Legal, subject to restrictions
North Dakota	Legal	Legal, subject to restrictions
Rhode Island	Legal	Prohibited
Washington	Legal	Legal, subject to restrictions
Wisconsin	Legal	Prohibited

The following cities and counties also regulate TASER conducted energy weapons:

<b>CITY OR COUNTY</b>	<b>LAW ENFORCEMENT USE</b>	<b>CONSUMER USE</b>
Annapolis	Legal	Prohibited
Baltimore	Legal	Prohibited
Chicago	Legal	Prohibited
Howard County, MD	Legal	Prohibited
Lynn County, OH	Legal	Legal, with restrictions
New York City	Legal	Prohibited
Philadelphia	Legal	Prohibited
Washington, D.C.	Legal	Prohibited

### **Impact of a TASER Conducted Energy Weapon on Legal Liability**

The body of case law concerning legal liability issues for use of a TASER conducted energy weapon generally involve liability claims brought by suspects or prisoners under Section 1983 of the Civil Rights Act (42 U.S.C.S. §1983) claiming excessive use of force. The use of excessive force by police officers gives rise to a Section 1983 action. The courts have routinely held that the use of a TASER conducted energy weapon is not a violation of clearly established Constitutional law governing excessive force. Following are summaries of the relevant case law:

#### **Russo v. Cincinnati, 953 F.2d 1036 (6th Cir. 1992)**

The court 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. The court concluded that the use of the non-lethal Taser to subdue a potentially homicidal individual did not constitute excessive force and did not transgress clearly established law. The court emphasized that the defendant police officer "deployed the Taser in an effort to obviate the need for lethal force."

**Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2003)**

The court affirmed the decision in **Russo v. Concinnati**, cited above, and held that the defendant police officer's use of Taser non-lethal force to subdue a potentially homicidal individual did not transgress clearly established law. The court further held that the use of Taser non-lethal force against an armed and volatile suspect does not constitute excessive force and concluded that the defendant police officers are entitled to qualified immunity on the Plaintiff's excessive use of force claim.

The court further held that in cases in which officers must choose among alternative use of force options, a plaintiff must show that the police "knowingly and unreasonably" opted for a course of conduct that entailed a substantially greater total risk than the available alternatives. Accordingly, the use of force option with the lowest risk of injury is the best alternative with the least likelihood of liability. Statistics from law enforcement agencies that have deployed TASER conducted energy weapons have established the TASER conducted energy weapon as having the lowest risk of injury of any alternative less-lethal weapon.

This case is also very significant in that the court noted that a state official's decision to initiate a rescue with sub-optimal equipment "sounds in negligence". The implication of this dicta is that municipalities must provide their police officers with optimal equipment to avoid a charge of negligence and potential liability. The TASER is being recognized by law enforcement agencies as the optimal equipment for many rescue situations due to its high rate of effectiveness and safety record, and the failure of a municipality to provide TASER conducted energy weapons may well be negligent. See also **New England Coal & Coke Co. v. Northern Barge Corporation (S.D. New York, 1931)** where the court found tug boat & barge companies liable for not equipping them with readily available and widely used radio technology.

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

In this case the plaintiff argued in his reply brief that the City of Bridgeport could also be liable because it failed to issue "widely accepted and non-lethal means [by] which to apprehend Thomas," such as "Tasers" to the officers. The court took note of this argument, but could not consider it due to a legal technicality since it was raised for the first time in plaintiff's reply brief. However, as noted in the **Ewolski v. City of Brunswick** decision cited above, courts are beginning to find liability for failure to provide "optimal equipment" to its police officers.

**Lifton v. City of Vacaville, 2003 U.S. App. LEXIS 16286 (9th Cir. 2003)**

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

**Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988)**

The appellate court held that the use of Taser guns was not cruel and unusual punishment and a policy of allowing use of Taser guns on an inmate who refuses to submit to a strip search does not constitute cruel and unusual punishment. The court noted that Nevada's

Department of Prison authorities believe the Taser is the preferred method for controlling prisoners because it is the "least confrontational" when compared to the use of physical restraint, billy clubs, mace, or stun guns. By disabling the inmate, it prevents further violence. The court held that the Taser gun is not per se unconstitutional.

**Jolivet v. Cook, 1995 U.S. App. LEXIS 3950 (10th Cir. 1995)**

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

**Walker v. Sumner, 1993 U.S. App. LEXIS 26517 (9th Cir 1993)**

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

**Caldwell v. Moore, 968 F.2d 595 (6th Cir. 1992)**

The court affirmed the lower court's judgment and held that defendant correction officers' use of a taser did not violate the Eighth Amendment to the U.S. Constitution, and thus were entitled to qualified immunity, because the force was applied in a good faith effort to maintain or restore discipline, and not maliciously and sadistically to cause harm. The lack of a policy regulating the use of stun guns did not render stun guns use per se unconstitutional; and as the use of a taser was held permissible, it was not unreasonable for defendants to have concluded that the use of the stun gun was necessary to avoid using even greater force. Further there was no deliberate indifference as plaintiff did not suffer a serious deprivation because his injuries were not serious enough to require immediate medical attention, and he produced no evidence that defendants acted with a culpable state of mind.

**Hernandez v. Terhume, 2000 U.S. Dist. LEXIS 18080 (ND Cal. 2000)**

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

**Hinton v. City of Elwood ('93, KS)**

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

**Drummer v. Luttrell, 75 F. Supp. 2d 796 (WD Tenn. 1999)**

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

**Bennett v. Cambra, 1997 U.S. Dist. LEXIS 1584 (N.D. Cal 1997)**

The court held that it is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved than a hand to hand confrontation. See also *Dennis v. Thurman*, 959 F. Supp. 1253 (C.D. Cal. 1997); *Munoz v. California Dep't of Corrections*, 1996 U.S. Dist. LEXIS 17759 (C.D. Cal 1996); *Jackson v. Carl*, 1991 U.S. Dist. LEXIS 11617 (N.D. Cal. 1991); and *Caldwell v. Moore*, 968 F. 2nd 595 (6th Cif. 1992)

**Alford v. Osei-Kwasi, 203 Ga. App. 716, 721, 418 S.E.2d 79 (1992), cert. denied, 1992 Ga. LEXIS 494 (June 10, 1992).**

The court held that a sheriff's deputy was acting within his discretionary authority when he used a Taser stun-gun on an unruly prison inmate. The deputy stated he used the TASER to minimize possible injuries to all concerned, including Alford and her unborn child.

**Nicholson v. Kent County Sheriff's Dep't, 839 F. Supp. 508 (W.D Mich. 1993)**

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

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

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