

## Electronic Control Devices- Where are we now?

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The utilization of Electronic Control Devices (“ECD”) has led to a windfall of litigation and court decisions which police departments must interpret to draft policies, conduct appropriate training, and implement the ECD into operation. A recent decision from the United States Court of Appeals for the Ninth Circuit, *Mattos v. Agarano*,<sup>1</sup> reinforced and clarified applicable standards regarding the permissible use of an ECD. While agencies located within the 9<sup>th</sup> Circuit are bound by this legal standard, the remainder of the country’s agencies would be wise to utilize the 9<sup>th</sup> Circuit court’s analysis and rulings as a gauge when examining its current police practices as they relate to its use of the ECD. The *Mattos* case involved the consolidation of two separate cases – *Mattos v. Agarano* and *Brooks v. City of Seattle* – in which questions arose as to whether the use of a (“ECD”) involved an excessive use of force, and whether the officers were entitled to qualified immunity.

In *Brooks v. City of Seattle*, the facts are as follows: On the morning of November 23, 2004, Malaika Brooks was driving her son to school. At that time, Brooks was seven months pregnant. The posted speed limit in the school zone was 20 miles per hour. When Brooks entered the school zone, she was driving 32 miles per hour. Seattle Police Officer Juan Ornelas pulled her over and asked for her license. Officer Ornelas informed Brooks that he was citing her for a speeding violation. Brooks informed him that she was not speeding and refused to sign the citation. Officer Donald Jones also approached Brooks asked her to sign the citation but she still refused to sign. Officer Jones informed her that is she did not sign the citation, he was “calling his sergeant and she would go to jail.”<sup>2</sup>

When Sergeant Steven Daman arrived at the scene, he instructed Brooks to sign the citation. When she refused, Daman told Ornelas and Jones to “book her.”<sup>3</sup> Ornelas instructed Brooks to get out of the car but she refused. Jones then pulled out his taser and asked Brooks if she knew what it was. At this point, Brooks informed both officers that she was pregnant and less than 60 days away from delivering the baby. After learning that Brooks was pregnant, Jones continued to display the taser and discuss how to proceed with Ornelas. One of the officers asked “well, where do you want to do it?” and the other replied “well, don’t do it in her stomach, do it in her thigh.”<sup>4</sup> Ornelas opened Brooks driver’s side door and twisted her arm behind her back but she stiffened her body and clutched to steering wheel to hinder the officers’ ability to remove her from the vehicle. At some point prior to the use of the taser, Ornelas removed Brooks’ keys from the ignition. With Ornelas still clutching her arm, Jones cycled the taser to show Brooks what it would do. Within twenty-seven

second of cycling the taser, and with Ornelas still holding her arm behind her back, Jones applied the taser to Brooks' left thigh in drive stun mode. Brooks cried out in pain and began honking the horn. Thirty-six seconds later, Jones tased Brooks' left arm and then, six seconds later, tased Brooks' neck. At this time, Brooks fell over in her car, the officers dragged her out and handcuffed her hands behind her back.

On December 6, 2004, the City of Seattle filed a misdemeanor criminal complaint against Brooks charging her with failure to sign an acknowledgment of a traffic citation, and resisting arrest. After a two-day trial, Brooks was convicted of failing to sign the speeding ticket but the jury could not reach a verdict on the resisting arrest charge, which was subsequently dismissed. Brooks delivered a healthy baby in January 2005. Brooks did not sustain any lasting injuries from the tasing, except for several permanent burn scars from the taser.

In *Mattos v. Agarano*, the facts are as follows: the police responded to a domestic dispute call between the plaintiff, Jayzel Mattos, and her husband, Troy. When responding officers approached the residence they found Troy sitting on the front stairs with open beer bottles lying near him. The officers observed Troy to be approximately six feet, three inches tall and approximately 200 pounds and found that he smelled of alcohol. Officer Stuart Kunioka questioned Troy and noted that he became agitated and rude. Officer Kunioka asked to speak with Jayzel Mattos to ensure that she was unharmed. When Troy went into the residence to retrieve Mattos, Officer Darren Agarano stepped inside the residence. When Troy saw that the officer had come into the residence, he became angry and yelled at the officer to get out. Officer Agarano asked Mattos to speak with her outside and she agreed. Before Mattos could comply, Officer Ryan Aikala stepped into the residence, stood in the middle of the living room, and told Troy that he was under arrest. At this time, Mattos was standing in front of Troy and did not immediately move aside. When Officer Aikala moved in to arrest Troy, he brushed against Mattos' chest, causing her to extend her arms to prevent her breasts from "being smashed against Aikala's body."<sup>5</sup> Officer Aikala responded to Mattos, "Are you touching an officer?"<sup>6</sup> At that same time, Mattos asked why Troy was being arrested and attempted to diffuse the situation by asking everyone to calm down and telling them there were children in the house. Suddenly, without any warning, Aikala shot his taser at Mattos in dart-mode. Mattos felt incredible pain, her joints and muscles locked up, and she fell hard to the floor. The officers handcuffed Troy and brought him and Mattos into custody. Mattos was charged with harassment and obstructing government operations, but all charges were ultimately dropped. Jayzel Mattos sued the officers for violations of her constitutional rights, including a Fourth Amendment claim of excessive force from the tasing.

In *Mattos*, the Appellate Court began its analysis with a general discussion of qualified immunity and excessive force. It noted that the United States Supreme Court has previously stated that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known.”<sup>7</sup> Qualified immunity will shield a police officer from liability even if his or her actions resulted from “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”<sup>8</sup>

Courts use a two-part test to determine whether officers are entitled to qualified immunity. First, the court determines whether the officer violated an individual’s constitutional rights. Second, if the court determines that the officer violated those rights, it determines whether the constitutional rights are “clearly established in light of the specific context of the case” at that time.<sup>9</sup>

When determining the first step of the qualified immunity analysis – whether the officer violated a constitutional right – the court looks to *Graham v. Connor*<sup>10</sup> for guidance with excessive use of force claims. In *Graham*, the court stated that “[d]etermining whether the force used to affect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment rights against the countervailing governmental interests at stake.”<sup>11</sup>

To determine the governmental interests at stake, courts look at “(1) how severe the crime at issue is, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.”<sup>12</sup> Of these three factors, courts consider to be the most important factor whether the suspect posed an “immediate threat to the safety of the officers or others.”<sup>13</sup> In *Mattos*, the court stated that it may also consider factors other than the three listed above “when additional facts are necessary to account for the totality of circumstances in a given case.”<sup>14</sup>

When determining the second step of the qualified immunity analysis – whether the constitutional right was clearly established at the time of the conduct – courts establish whether it was sufficiently clear that every reasonable officer would understand that his actions violate that right.<sup>15</sup> When deciding this issue, courts are mindful of the fact that officers are often forced to make “split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.”<sup>16</sup>

In *Mattos*, the Court then applied the three-part test listed above to the facts and circumstances in *Brooks v. City of Seattle* matter to determine the reasonableness of Officer Jones actions. As to step one, the court found, while they did not diminish the dangers associated with speeding, failing to sign a traffic citation, and driving 32-miles-per-hour in a 20-mile-per-hour zone were not serious offenses.<sup>17</sup>

As to the second part of the test, the court decided that Brooks did not pose a serious threat to the officers. The court noted that while Brooks did become upset, agitated, and uncooperative as the incident progressed, she never verbally threaten the officers, she was unarmed, behind the wheel of

the vehicle, and not physically threatening. Therefore, at the time Jones used the taser, the court found that Brooks no longer posed even a potential threat to the officers.

As to the third part of the test – whether Brooks was actively resisting arrest or attempting to evade arrest by flight – the court found that Brooks did engage in some resistance to arrest, although the court noted that her resistance did not involve any violent actions towards the officers.<sup>18</sup>

Finally, the court looked at the totality of the circumstances and recognized that Brooks was responsible for some of the escalation of the incident, but found two additional factors played a greater role in determining the totality of circumstances: (1) Brooks notified the officers that she was pregnant, and the officers considered this information when deciding where to apply the taser; and (2) the officers tased Brooks three times over the course of less than one minute. The Court stated that tasing Brooks in such a rapid succession allowed no time for her to recover from the pain and reconsider her refusal to comply with the officers requests.

After taking all these facts under consideration, the Court concluded that the officers' use of force was unreasonable and therefore constitutionally excessive.<sup>19</sup> As stated above, once the court determines that the officers violated a suspect's constitutional rights, it must next consider whether, despite the violation, the officers are entitled to qualified immunity. To do so, the court must consider whether, at the time the officer tased Brooks, the constitutional violation was "sufficiently clear" that every "reasonable official would have understood" that his actions violated that right.<sup>20</sup>

First, to determine whether the constitutional violation was clearly established, courts look to the most analogous case law that existed at that time. In *Mattos*, the court found only three relevant opinions from other circuits. These cases, however, were distinguishable for several reasons. In one, the officers were dealing with a paranoid schizophrenic suspect who made homicidal and suicidal threats to the officers.<sup>21</sup> In the second case the suspect shoved, kicked, and bit the officer, and not merely stiffen her body and clutch the steering wheel like Brooks.<sup>22</sup> The third case involved a suspect, who – when asked to provide documentation during a traffic stop – acted in a confrontational and agitated manner, paced back and forth, and repeatedly yelled at the officer. After the officers fifth request for the suspect to produce the documents and he failed to do so, the officer tased him. The court in that case found that the use of the taser gun under these circumstances was reasonable, given the difficult, tense and uncertain situation that the officer faced in the traffic stop, and did not constitute excessive force.<sup>23</sup>

As these three cases were not applicable, the *Mattos* court looked to the decision in *Bryan v. MacPherson*<sup>24</sup> to reach its conclusion. In *Bryan*, the court determined that while the officer's use of the taser amounted to excessive force, the officer was entitled to qualified immunity. The *Bryan* court reasoned that, at the time of the incident in 2005, there was no "Supreme Court decision or decision of [the district court] addressing the use of a taser in dart mode."<sup>25</sup> Therefore, since no

guidance from the courts existed, a reasonable officer could have made a reasonable mistake of law regarding the constitutionality of the taser use.<sup>26</sup>

In *Mattos*, the Court then focused on the case involved Jayzel Mattos, and likewise applied the three-part test. As to the first part of the test – the severity of the crime – the court determined that Jayzel’s actions did not rise to the level of obstruction, and therefore, the severity of the crime, if any, was minimal.<sup>27</sup>

As to second part of the test – whether the suspect posed an immediate threat – the court found that Jayzel did not pose a threat to the officers because she was not armed, did not verbally threaten the officers, and her only physical contact with the officer was a defensive move to stop her breasts from being pressed against the officer.<sup>28</sup>

As to the third part of the test – whether Jayzel was actively resisting arrest or attempting to evade arrest – the court stated that the most that can be said of Jayzel’s actions was that she “minimally resisted Troy’s arrest.”<sup>29</sup> Furthermore, the court noted that Jayzel was attempting to comply with Officer Agarano’s request to speak with her outside when she got caught in the middle between Aikala and Troy. Therefore, this part of the test also weighed in Jayzel’s favor.

Finally, the court looked at the totality of the circumstances by considering the additional relevant, specific factors. Specifically, the court took into consideration the dangerous nature of the situation. Troy was agitated, hostile, intoxicated, over six feet tall, and 200 pounds. Furthermore, the court noted that the volatile nature of domestic situations makes them particularly dangerous. Therefore, the court recognized that a reasonable officer arriving at the scene would be concerned about his or her safety. The court found, however, that tasing the innocent wife of a large, drunk, angry man when there is no threat that either spouse has a weapon was not reasonable.<sup>30</sup> Finally, the court noted that the officer failed to warn Jayzel before using the taser and that an officer’s failure to warn, when he is able to do so, weighs in favor of finding a constitutional violation.<sup>31</sup> The court concluded that the officer’s use of force on Jayzel was constitutional excessive in violation of the Fourth Amendment.

The court then examined the second part of the qualified immunity analysis – whether the constitutional violation was “sufficiently clear that every reasonable official” would understand that his actions violated that right. The court once again compared the three analogous cases from surrounding circuits and found that they were also distinguishable from the facts and circumstances in the *Mattos* case. Therefore, the court also found that the violation in the *Mattos* case was not clearly established law, and the officers were entitled to qualified immunity.

The court makes several points in the *Mattos* decision that are important to law enforcement officers and the use of electronic control devices. First, the court makes it clear that it does not prohibit the

use of electronic control devices to gain compliance from a suspect who is “actively resisting” arrest. Rather, the Court sets forth certain guidelines for the use of such weapons in the field.

Second, the court also made it clear that it will look at the totality of the circumstances, not just those factors provided in the three-part test above, when deciding the applicability of qualified immunity as provided in *Graham*. Courts will consider other relevant factors surrounding the incident when deciding whether an officer has used excessive force. As we saw in *Mattos*, the court took into consideration that Brooks had notified the officers that she was pregnant and that the officer’s tased her three times in less than a one minute interval. With regard to Jayzel Mattos, the court took into consideration that this was a domestic disturbance - which in itself creates a volatile situation – but that when the officers arrived at the scene it appeared that the dispute had ended, and – most importantly – that the officer failed to warn Jayzel prior to tasing her. All of these additional factors played a key role in the court’s conclusion that the officers utilized excessive force when dealing with Brooks and Mattos.

Third, the court has made it clear that because there existed limited applicable and similar case law regarding the use of taser devices to serve as guidance to officers, the officers could avail themselves to qualified immunity protections. As we saw in *Mattos*, since there were only three analogous cases for court to look to, and none of them were applicable to the facts and circumstances set forth in *Mattos*, the officers were protected by qualified immunity because the suspect’s constitutional rights were not clearly established.

This point is extremely important to officers and departments because as more excessive force cases involving the use of tasers are decided in the judicial system, and the law becomes more clearly defined, the ability of officers to utilize qualified immunity will shrink. If courts are able to point to analogous cases – with facts that are relevant and similar to the excessive force case before it – they will conclude that the officers should have known that their actions would result in a violation of the suspect’s constitutional rights and decline to apply the qualified immunity doctrine.

This leads us to another very important point, officers and departments must keep current with developing case law to understand which actions and uses of an electronic control device will be deemed excessive and, in turn, whether they should have known these actions would violate the subject’s Fourth Amendment constitutional rights and land them outside the protection of qualified immunity.

A department can protect itself and its officers by staying vigilant in its goal to keep current with the ever-developing body of case law in the area of electronic control devices and excessive use of force claims. As this case law develops, departments should provide regular bulletin updates and training session for its officers to provide guidance for the use of electronic control devices. It is imperative for a department to continually update its Use of Force and Electronic Control Device

policies. When a department reviews its current policies, it should make certain that these policies include the following guidelines that were highlighted in the *Mattos case*:

1. Each and every application of an ECD must be legally justified.
2. When using an ECD in “drive-stun” mode to gain compliance from a suspect who is “actively resisting” arrest, the officer must give the suspect reasonable opportunity to comply with the officer’s commands prior to each ECD application. Specifically, as discussed in *Mattos*, the officer:
  - a. Must perceive that the suspect is “actively resisting.”
  - b. Must be certain that the suspect is capable of compliance with the officer’s commands.
  - c. Must give a warning prior to each application of the ECD.
  - d. Must give the suspect time to recover from the “extreme pain” experienced during the ECD application.
  - e. Must give the suspect a reasonable amount of time to “gather herself.”
  - f. Must give the suspect a reasonable opportunity to consider the consequences of her refusal to comply with commands before each ECD application.

Tasing a suspect three times in less than a one-minute interval does not meet these requirements.

3. Officers may not use an electronic control device on a visibly pregnant woman (or one who informs the officer of her pregnancy) unless deadly force is the only other option. These same restrictions would apply to children and the elderly.
4. The reporting requirements contained in the policy must provide that an officer is required to include in his report specific information indicating that all of these guidelines were followed prior to the application of an ECD.

In conclusion, to answer the question of “where are we now?” it is apparent now more than ever that police departments and officers must continue to review, interpret, and understand the clearly established law passed down by the courts. That clearly established law identifies the legal standards which must be included in policies, training, and application to protect departments and officers from excessive force claims arising out of the use of an electronic control device.

<sup>1</sup> *Mattos v. Agarano*, --- F. 3d ---, 2011 WL 4908374 (9<sup>th</sup> Cir. October 17, 2011.)

<sup>2</sup> *Id.* at \*2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*4

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at \*5 (citing *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 490 U.S. 386 (1989.)

<sup>11</sup> *Id.* at 396.

<sup>12</sup> *Mattos*, 2011 WL 4908374 at \*6 (citing *Deorle v. Rutherford*, 272 F. 3d 1272, 1280 (9<sup>th</sup> Cir. 2001).)

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*7 (citing *Graham*, 490 U.S. at 396-97.)

<sup>17</sup> *Id.* at \*8

<sup>18</sup> *Id.* at \*9.

<sup>19</sup> *Id.* at \*10.

<sup>20</sup> *Id.*

<sup>21</sup> *Russo v. City of Cincinnati*, 953 F.2d 1036 (6<sup>th</sup> Cir. 1992).

<sup>22</sup> *Hinton v. City of Elwood*, 997 F.2d 774 (10<sup>th</sup> Cir. 1993)

<sup>23</sup> *Draper v. Reynolds*, 369 F. 3d 1270 (11<sup>th</sup> Cir. 2004)

<sup>24</sup> 630 F.3d 805 (9<sup>th</sup> Cir. 2010)

<sup>25</sup> *Id.* at 833.

<sup>26</sup> *Id.*

<sup>27</sup> *Mattos*, 2011 WL 4908374 at \*13

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at \*14.

<sup>31</sup> *Id.* at \*15.