CIVIL RIGHTS LIABILITY AND JAIL LITIGATION

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OVERVIEW

- Anatomy of a Civil Rights Case
- Prisoner Litigation Reform Act
- Section 1983 Liability Standards and Case Law
Civil Rights Liability – Overview

- Civil Rights Litigation: 42 U.S.C. § 1983
  “Every person who, under color of any [law] . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .”
Civil Rights Liability – Overview (cont’d)

- Individual Capacity Liability


  civil rights liability against individual public employees or officials

  Personal involvement
Supervisory Liability

Subordinate’s misconduct must occur at supervisor’s direction or with the supervisor’s knowledge and consent.

Supervisor must know of subordinate’s misconduct and facilitate it, approve it, condone it, or turn a blind eye.

Some causal connection between action complained of and the supervisor being sued

Gentry v. Duckworth, 65 F.3d 555 (7th Cir. 1995)
Qualified Immunity for Individual Capacity Claims

Did the officer violate the clearly established constitutional rights of the plaintiff?

Question of law

Denial of immunity is immediately appealable
Civil Rights Liability – Overview (cont’d)

- **Official Capacity Liability**


Municipality = person under § 1983

municipal liability for unconstitutional policy, custom or practice, i.e. failure to train or discipline

Sheriff is a “person” under § 1983. *Mercado v. Dart*, 604 F.3d 360 (7th Cir. 2010)
Civil Rights Liability – Indemnification

- Compensatory Damages – Standard

- § 9–102 of Tort Immunity Act
  Local public entity is required to pay tort judgment or settlement for it or employee acting within scope of employment

- § 5/5–1022 of Counties Code
  County shall indemnify sheriff or employee, personally liable except willful misconduct but not to exceed $500,000
  Written notice to State’s Attorney – 10 days of service
Civil Rights Liability – Indemnification (cont’d)

- Punitive Damages – Legal Standard

- Liability – Who pays?
  Tort Immunity Act prohibits sheriff/county from paying individual’s punitive damage judgment
  Insurance

- Conflicts
  Assignment of counsel
Civil Rights Liability – Payment of Judgments/Settlements Against Sheriff’s Office

- **Conundrum – who pays judgments/settlements?**
  - Sheriff is independently elected constitutional officer responsible for acts and omissions of his office and employees
  - County controls Sheriff’s budget

- **Carver v. LaSalle County, 203 Ill.2d 127 (2003):**
  - Sheriff has authority to settle claims brought against his office
  - County must pay

- **Carver v. LaSalle County, 324 F.3d 947 (7th Cir. 2003):**
  - County is indispensable party in suits against Sheriff’s Office
Civil Rights Liability – Attorney’s Fees

- Civil Rights Attorney’s Fee Act of 1976
  42 U.S.C. § 1988
  Prevailing party may recover reasonable attorney’s fees as part of costs

- “Private Attorney General” Theory
  Congress wanted to incentivize attorneys to bring suits to enforce fundamental constitutional rights via civil system

- City of Riverside v. Rivera, 447 U.S. 562 (1986) ($245,000 fee award for $33,000 recovery)

- Not a two–way street: prevailing defendants generally cannot recover attorney’s fees.
Civil Rights Liability Overview – Final Thoughts

- Liability Insurance/Risk Pools

- Settlements
  Nuisance value v. cost of defense
  Rule 68 Offers of Judgment
PRISONER LITIGATION REFORM ACT
42 U.S.C. § 1997(e)
Vast majority of prisoner suits are pro se and frivolous

- 88.9% of § 1983 prisoner cases result in dismissals
- 7.6% result in settlement
- 3% proceed to trial, of which only 1/10 result in verdict favorable to the prisoner

Prisoner Litigation Reform Act – Inmate Required to Exhaust Grievance Procedure

- Inmates are required to exhaust internal administrative grievance procedures “as are available” before filing § 1983 lawsuit. 42 U.S.C. § 1997(e)(a)

- Purpose:
  - Reduces litigation and court dockets
  - Enables prisons and jails to correct an issue and manage its own affairs without court intervention and more economically than litigation
  - Keeps courts from interfering with jail/prison administration
Exhaustion is mandatory, even if inmate is seeking money damages only, or thinks the procedure would be futile. *Woodford v. Ngo*, 548 U.S. 81 (2006); *Booth v. Churner*, 121 S. Ct. 1819 (2001)

Prisoner Litigation Reform Act –
Inmate Required to Exhaust Grievance Procedure
(cont’d)

- **Take Your Grievance Process Seriously**
  
  Statute of limitations tolled while inmate completes grievance process. *Walker v. Sheahan*, 526 F.3d 973 (7th Cir. 2008)

  Failure to make the process available, i.e., failing to provide grievance forms to inmates, excuses exhaustion. *Dale v. Lappin*, 376 F.3d 652 (7th Cir. 2004)

  Timely respond – acknowledging a problem and taking steps to fix it may preclude liability under deliberate indifference standard. *Mays v. Springborn*, 575 F.3d 643 (7th Cir. 2009).

  Complete and accurate record-keeping
Prisoner Litigation Reform Act (cont’d)

- Court may dismiss § 1983 action if frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from defendant who is immune from liability

  Court may dismiss claim even if prisoner has not exhausted administrative remedies
Inmate may not file suit for mental or emotional injury without prior showing of physical injury.

Example: prisoner’s claim that he was exposed to disease, but he did not actually contract it, is not actionable. Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997).
Most § 1983 prisoner suits are filed in forma pauperis ("IFP")

Inmate may file suit without payment of filing fee (currently $350) if he submits affidavit attesting to lack of assets and certified copy of trust fund account statement for 6-month period preceding suit.

Inmate may not file IFP appeal if court certifies that it is not taken in good faith.

Court may order payment of partial filing fee.

Court may not prohibit filing if inmate has no assets and no means to pay filing fee.

Inmate may request appointed counsel.
“Three Strikes Rule”

Inmates are prohibited from filing IFP if inmate has, on three or more prior occasions, while incarcerated or detained in a facility, brought an action which had been previously dismissed on grounds that it is frivolous, malicious or fails to state a claim.

Exception: if prisoner is under imminent danger of serious physical injury.

- Untreated wound suffered in alleged excessive force incident. 
  
  *Fletcher v. Menard CC, (7th Cir. 2010)*
In Forma Pauperis
28 U.S.C. § 1915A

- Merit Review Screening
  Before case can be docketed or served on defendant, court screens the complaint to shift through cognizable claims and those claims that should be summarily dismissed as frivolous, malicious, or fails to state claim upon which relief may be granted, or against defendant who is immune.
In Forma Pauperis (cont’d)

- Examples of Suits Dismissed Pursuant to Federal Court Merit Review Screening
  - Personal Property Damages
  - Negligence (i.e., slip and fall in shower)
  - Pointing Taser at Inmate
  - Shackling an Inmate to bed in hospital room
  - Statute of Limitations
  - Immunity
Impact of PLRA

- 41,215 prisoner cases filed in 1996
- Upon enactment of PLRA in 1996, number of cases dropped to an average of 24,500 from 1999 to 2006
- Numbers have since leveled out, as 24,681 suits were filed in 2009
- 40% decrease in prisoner cases filed since 1996

SECTION 1983
CONSTITUTIONAL STANDARDS
AND CASE LAW
Constitutional Standards

There are three provisions of the Constitution which generally govern §1983 jail litigation:

- 4th Amendment – unreasonable searches and seizures
- 8th Amendment – cruel and unusual punishment
- 14th Amendment – deprivation of property or liberty without due process of law
Which standard applies depends on

- **4th Amendment**
  Applies at the time of arrest or stop, before judicial determination of probable cause

- **14th Amendment**
  Applies to pretrial detainees before conviction and sentencing

- **8th Amendment**
  Applies after a convicted person is sentenced
On the street vs. In jail

On the street
and seizure” most relevant

In jail
unusual
14th amendment process” provisions are most

4th amendment “search provision is

8th amendment “cruel and punishment” and “due relevant
Typical Jail Cases

- Conditions of Confinement
- Medical Care
- Jail Suicide
- Failure to Protect
- Strip Searches
- Use of Force – Tasers
CONDITIONS OF CONFINEMENT GENERALLY
Conditions of Confinement – Generally

- **Bell v. Wolfish**, 441 U.S. 520 (1979)
- Challenged conditions of confinement i.e., double bunking, restrictions on receiving personal packages, strip searches, etc.
- What right does a pretrial detainee have to be comfortable?
- Pretrial detainees are not yet convicted – cannot be punished
- Standard:
  - Do the conditions of confinement amount to punishment?
  - Or, is there a legitimate penological objective?
Conditions of Confinement – Generally

- Constitutional Duty:
  Minimal civilized measures of life’s necessities, i.e., adequate food, clothing, shelter, medical care and safety

- Violation of Duty:
  Is the condition sufficiently serious in objective sense?
  Does the condition reflect a subjective intent to punish?

- Mere negligence does not state a claim
MEDICAL CARE CLAIMS
Medical Care Claims Standard

- Duty to provide adequate medical care
- Violation: two 2 separate inquiries:

  (1) Objectively, is the medical condition sufficiently serious?
      -and-

  (2) Subjectively, was the officer deliberately indifferent to the inmate’s health or safety?

Medical Care in Jail – Is it Serious?

- Serious medical need:
  - Diagnosed by a doctor or other healthcare provider as mandating treatment
  - So obvious that a lay person would easily recognize need for medical attention
  - Medical condition that has a significant affect on inmate’s daily activities
  - Existence of chronic and substantial pain

_Gutierrez v. Peters, 111 F.3d 1364 (7th Cir. 1997)_
Medical Care in Jail – Deliberate Indifference

- Deliberate Indifference:
  Knowledge of the serious medical need
  Conscious disregard of that need so as to inflict punishment

- Reliance on medical professionals
  Exception: risk to inmate’s health is so obvious that jury may infer actual knowledge on part of officers

Estate of Gee v. Beeman, 2010 WL 528484 (7th Cir. 2010)
JAIL SUICIDE
Jail Suicide

- Treated by courts as a medical care claim
  - Is condition objectively serious?
  - Did officer have a culpable state of mind, i.e., deliberate indifference?

- Objective test: is the medical condition serious?
  - Satisfied by virtue of the suicide or attempted suicide itself. Collins v. Seeman, 462 F.3d 757 (7th Cir. 2006)
Jail Suicide

- Deliberate Indifference Standard Applies:

  Officer must have known about a substantial risk of suicide

  - Officer must be cognizant of a significant likelihood that an inmate may imminently seek to take his own life.

  Officer must have intentionally disregarded the known risk.

  - Officer must fail to take reasonable steps to prevent the inmate from attempting or committing suicide.
Jail Suicide Liability – Factors

- **Knowledge of Substantial Risk**
  - Past suicide attempts or threats
  - Mental health medications
  - Expression of suicidal ideations
  - Information from medical records or instructions
  - Information from other sources – cellmates, family, etc.

- **Reasonable Response to Known Risk**
  - Placement on suicide watch; 15 minute supervisory checks
  - Removal of items of self-harm
  - Suicide prevention clothing
  - Reliance on qualified medical judgment of suicide risk
  - Seeking clarification of medical instructions
Collins v. Seeman, 462 F.3d 757 (7th Cir. 2006) – inmate requested to see crisis counselor because he was “feeling suicidal.” Officer passed along the request and checked on inmate several times course of hour and was told by inmate that he felt ok and could wait.

Wells v. Bureau County, 2010 WL 2670892 (C.D. Ill. 2010) – failure to conduct cell checks every 30 minutes and failure to check past medical records.

Minix v. Canarecci, 597 F.3d 824 (7th Cir. 2010) – jail nurse’s lack of actual knowledge of inmate’s suicidal history or placement on suicide watch.

Estate of Novack v. County of Wood, 226 F.3d 525 (7th Cir. 2000) – mere knowledge that inmate was acting strangely.

Matos v. O’Sullivan, 335 F.3d 553 (7th Cir. 2003) – inmate denied present suicidal ideation and no present observations of depression or inappropriate mood or affect.
Jail Suicide – Liability

- **Carpenter v. Office of Lake County**, 2007 WL 1296998 (N.D. Ill. 2007) – inmate not placed on suicide watch at jail despite knowledge that inmate was placed on suicide watch in city lockup due to attempted overdose, was suicidal in the past, and combative when arrested.

- **Woodward v. CMS**, 368 F.3d 917 (7th Cir. 2004) – medical providers failed to place inmate on suicide watch pending psych evaluation knowing that he had expressed suicidal thoughts and had history of psychiatric treatment and suicide attempts.

- **Mombourquette v. Amundsen**, 469 F.Supp.2d 624 (W.D. Wisc. 2007) – jail nurse’s knowledge of inmate’s previous attempts to hang herself and hospital discharge instruction stated that inmate should be placed on suicide watch, and officers’ awareness of hospitalization for suicide attempt.
Jail Suicide – Sheriff’s Liability

  
  Failure to clearly delineate authority with respect to assessing and handling inmates with suicide risks
  Inadequate means of staff communications
  Failure to remedy jail inspection violations cited by DOC


  Sheriff’s policy that officers not conduct 30 minute supervisory checks during overnight shift
FAILURE TO PROTECT
Failure to Protect

- Duty to protect inmates from violence at the hands of other inmates. But, jail officer is liable only if:
  - He knew inmate faced substantial risk of serious harm, i.e.:
    - It is not enough for inmate to argue that a reasonable officer would have known or that the defendant officer should have known
    - Inmate has complained about specific threat to his safety
    - Jail officers were otherwise aware of an obvious, substantial risk of attack – precise identity of threat is not required
  - Disregarded the risk by failing to take reasonable measures to prevent it from happening
Failure to Protect

- **Santiago v. Walls**, 599 F.3d 749 (7th Cir. 2010)
  13 month gap between inmate complaint about threat and attack did not state claim. However, prisoner’s second complaint, which went ignored, and attack by cellmate 4 days later, stated claim.

- **Dale v. Poston**, 548 F.3d 563 (7th Cir. 2008)
  Mere fact that inmate faced inherent risks of danger by being a “snitch” did not mean prison officials violated his rights by failing to protect him from attack by other inmates

- **Harris v. Schapmire**, 2010 WL 26971 (C.D. Ill. 2010)
  No liability based on McLean County inmate’s complaint that he could not get along with another inmate and felt he was unsafe and may get into a fight – complaint too vague and lacked specific threat to safety

- **Sousa v. Sheahan**, 2007 WL 1805089 (N.D. Ill. 2007)
  No liability for beating of inmate at hands of other inmates at Cook County Jail; plaintiff did not know his attacker or express concern about his attacker to officers; and, officers acted
STRIP SEARCHES
New York Will Pay $50 Million In 50,000 Illegal Strip-Searches

By BENJAMIN WEISER
Published: January 10, 2001

The Giuliani administration has agreed to pay up to $50 million to settle a lawsuit filed on behalf of tens of thousands of people who were illegally strip-searched after being arrested for minor offenses, many of which fell under the city’s crackdown on quality of life violations.

The searches were conducted by jail guards in Manhattan and Queens during 10 months in 1996 and 1997. Many of the victims of the illegal searches were first-time offenders who were arrested for minor infractions like loitering, disorderly conduct or subway offenses.

The $50 million class action settlement could be paid out to more than 50,000 people who were arrested during the 10 months. The lawsuit recounts several cases of men and women with no arrest record who said they felt humiliated as they were ordered to disrobe, lift their breasts or genitals for visual inspections, and to squat and cough.

The minimum award will be $250, the maximum $22,500, though individual plaintiffs can appeal if they think they deserve a higher award based on their emotional suffering. A plaintiff who spent thousands of dollars on psychiatric care in the aftermath of a strip-search could seek additional damages to cover the fees, for example.
Payout to end strip search lawsuit

By Joe Mozingo and Maeve Reston
September 25, 2007 in print edition B-1

San Bernardino County officials have agreed to pay $25.5 million to settle a class-action lawsuit that said jailers conducted illegal strip searches, sometimes in front of inmates and deputies of the opposite sex.

As many as 160,000 inmates may have been subjected to the searches over three years, attorneys for the plaintiffs said, and each could get several hundred dollars, depending on how many apply for the award. The settlement is one of the largest in the nation to resolve the issue balancing jail security concerns and inmates’ privacy rights.

Between May 2003 and December 2006, sheriff’s deputies strip-searched many inmates they processed into the two central jails, even if there was no reason to suspect them of smuggling contraband, the plaintiffs’ attorneys said at a news conference in Los Angeles.

Inmates were forced to bend over and spread their buttocks so deputies could see their body cavities, and some had their genitals inspected, according to the lawsuit. “These are pretty humiliating things for people who were arrested for all sorts of things, including very minor offenses,” said attorney Barry Litt.

San Bernardino County spokesman David Wert said the county denies wrongdoing and disputes the allegations in the suit.

County Supervisor Brad Mitzelfelt said San Bernardino County agreed to settle the suit to avoid the risks of litigation and noted that insurance would pay for most of the settlement. The department changed its policy last year after the lawsuit was filed so that the only people being strip-searched are those suspected of carrying contraband, Wert said.
Will County has agreed to pay $2.15 million to settle a federal class action suit involving thousands of former jail inmates whose strip searches were ruled unconstitutional, officials said Friday.

As part of the settlement, the county would drop its appeal of a December 2005 federal court ruling that found Will County Jail officials violated the constitutional rights of defendants arrested for minor offenses by strip searching them upon incarceration and release.

After attorneys’ fees, each eligible inmate could receive more than $400, attorneys said.

U.S. District Court Judge Virginia Kendall on Wednesday gave preliminary approval to the settlement, pending a Nov. 17 "fairness hearing," said Kenneth Flaxman, the attorney who filed the suit.

It's unlikely the settlement will not hold, said Kevin Clancy, the attorney who represented the county. If approved, coun insurers would pick up more than two-thirds of the $2.15 million tab, he added.

Four months after the suit was filed in May 2003, jail officials started giving inmates released by a judge the option of not returning to jail from court, thus avoiding a strip search when they return to their cells to retrieve belongings.

After the federal court ruling, the county stopped routinely strip-searching inmates brought in on warrants for failure to appear in court after being charged with traffic and misdemeanor offenses.

So far, 5,117 former inmates eligible to share in the settlement have been identified and located, Clancy said. More
Bell v. Wolfish, 441 U.S. 520 (1979)

- Class action lawsuit challenging strip searches of pretrial detainees at the Metropolitan Correctional Center in New York
- Court acknowledged that strip searches invade the personal privacy of inmates
- Court balanced the significant and legitimate security interests of the institution against the privacy interests of the inmates
- Held that strip searches, including visual body cavity searches, can be conducted on less than probable cause
A strip search shall be performed in an area that ensures privacy and dignity of the individual. The individual shall not be exposed to the view of others who are not specifically involved in the process.

Strip searches shall be conducted by a person of the same sex.

All personal clothing shall be carefully searched for contraband.

The probing of body cavities may not be done except where there is reasonable suspicion of contraband. Intrusive searches may only be conducted:

- By a medically trained person who is not a detainee, for example, a physician, a physician’s assistant, registered nurse, licensed practical nurse, or paramedic; and
- In a private location under sanitary conditions.
Case Law: Strip Searches

- **Tinetti v. Wittke**, 620 F.2d 160 (7th Cir. 1980) – enjoined Racine County policy of strip searching persons arrested for non-misdemeanor traffic offenses absent probable cause to believe that person concealed weapons or contraband.

- **Mary Beth G. v. City of Chicago**, 723 F.2d 1263 (7th Cir. 1984) – held unconstitutional suspicionless strip searches of women arrested for misdemeanor offenses.

- **Kraushaar v. Flanagan**, 45 F.3d 1040 (7th Cir. 1995) – held that the County jailer conducting strip search could rely on information received from the arresting officer that he observed arrestee make furtive hand movements around the waist of his pants at the roadside stop.
Case Law: Strip Searches


- **Mays v. Springborn**, 575 F.3d 643 (7th Cir. 2009) – held that daily group strip searches, done in cold room, where guards failed to change latex gloves and made demeaning comments, if true, were reflected intent to humiliate and cause psychological pain.
Kane County: Strip searches of intakes permitted if (a) arrestee charged or previously convicted for escape, drug or weapon possession, crimes of violence, or any other felony; (b) current or historical institutional behaviors of contraband possession or refusal to be searched; (c) to have been in a public area known to be used to buy, sell or ingest drugs.

No person arrested for ordinance violation, traffic, and/or misdemeanor shall be strip searched absent cases involving drugs or weapons, or reasonable suspicion of contraband.

Requires documentation of name, reason, date and time, and officer conducting strip search.

All body cavity searches by medical personnel upon supervisor approval.
USE OF FORCE – TASERS
Use of Tasers

- 11,500 law enforcement agencies have acquired approximately 260,000 devices in operational settings
  
  Source: National Institute of Justice Interim Report on Deaths Following Electro–Muscular Disruption, June 2008

- In 2008, estimated 1070 human exposures daily worldwide. More than 780,000 training exposures and 630,000 field uses (total over 1.4 million)

Use of Tasers (cont’d)

- Survey of 288 Sheriffs’ Departments nationwide:
  - 65% have some type of CED
    - Over 90% use projectile mode CED
    - 77% projectile mode is primary option
  - 31% don’t authorize CEDs
  - 5% have discontinued CEDs
  - 60% used arcing as a warning – effective deterrent
  - 78% point dot as a warning – effective deterrent

Conducted Energy Devices: Use in a Custodial Setting, A Collaborative Study [www.sheriffs.org](http://www.sheriffs.org)
Pros and Cons

- According to Taser International, its product has reduced injuries by nearly 80% and saved 9,000 lives and residual cost savings in civil liability cases.
- Taser has high track record of defeating product liability claims.
- Taser won recent case overturning coroner’s findings.

Pros and Cons (cont’d)

- National Sheriffs’ Association
  “[D]ecisions about the use of CEDs (conducted energy devices) should be left to individual sheriffs’ offices, but . . . any use of such devices or other less-lethal alternatives should be ‘supported by research, adequate policies, continuous training and appropriate and prompt follow-up.’”

Pros and cons (cont’d)

- International Association of Chiefs of Police

  “Based on the research completed to date, there is not a basis to establish that EMDT (Electro–Muscular Disruption Technology) poses unacceptable health risks when used appropriately on healthy persons. Independent data does not yet exist concerning in-custody deaths, the safety of EMDT when applied to drug or alcohol–compromised individuals, or other critical issues.”

IACP, Electro–Muscular Disruption Technology, A Nine–Step
Pros and Cons (cont’d)

- Amnesty International has called for a moratorium on Taser use, citing more than 334 deaths of persons between 2001 and 2008.
  
  Source: http://www.amnestyusa.org/print.php

- In-custody death rate increases six-fold in first year after adoption of conducted energy devices in police agencies and sheriff departments.

Man Drives Distance With Taser Dart in His Back

Revealed: The shocking truth about Tasers

A commuter in a diabetic coma, an 89-year-old man and children as young as 12 - just some of the targets of British police armed with skin-piercing 50,000-volt Taser guns. As the Home Office investigates reports on the slow creep of arms onto our streets.

U.S. study raises more questions about stun gun safety

Deputy's Three Taser Jolts to Handcuffed Motorist Not Excessive, Says Split 11th Circuit

R. Robin McDonald
09-15-2008

Tasers under scrutiny after claims of death and injury

Man dies after Midlothian cops use Taser on him

A Riverdale man died early this morning after being subdued by police with a Taser following a traffic stop, authorities said.

Jacob Ingles, 31, of the 14500 block of South Normal Avenue, was pronounced dead at MetroSouth Hospital in Blue Island at 12:31 a.m., according to the Cook County medical examiner's office. An autopsy today was inconclusive, pending further investigation.

Officers used a Taser on Ingles in an attempt to subdue him, Midlothian police said.
ASSOCIATION v. CAUSATION

- Problem with media attention:
  Links temporal association with causation
  Implies that injury/death means unreasonable or excessive force was used

- **Cyrus v. Town of Mukwonago**, 2010 WL 4483713 (7th Cir. 11/10/10)
  Court held that close proximity of multiple taser applications to arrestee’s death presented fact question on issue of causation
Independent Study of Taser Use

- NIJ In-Custody Death Study: The Impact of Use of Conducted Energy Devices

While exposure to conducted energy devices (CEDs) is not risk free, there is no conclusive medical evidence that indicates a high risk of serious injury or death from the direct effects of CEDs. Field experience with CED use indicates that exposure is safe in the vast majority of cases. Therefore, law enforcement agencies need not refrain from deploying CEDs, provided the devices are used in accordance with accepted national guidelines.

U.S. Dept. Justice, National Institute of Justice Special Interim Report on Deaths Following Electro Muscular Disruption (June 2008)
Use of Force Standard


Recognized that prison officials in face of disturbances, fights, etc., have to balance real threats with ensuring safety of staff and inmates.

Decisions about the use of force often made in haste, under pressure and frequently without the luxury of a second chance.

Standard: Is the force used in a good faith effort to restore order or maintain discipline, or maliciously and sadistically to cause harm or solely to inflict pain on an inmate?
Factors:
- The need for application of force,
- The amount of force used,
- The threat reasonably perceived,
- Efforts made to temper the severity of the force used, and
- The extent of injury to the inmate.

Whitley factor #1:
The need for force

- **Inmate Resistance (cont.)**
  - **Physical resistance**
    - Inmate is biting and spitting at officers, tasing warranted.
      Bailey v. County of Kittson (D. Minn. 2009)
    - Inmate kicking cell door and screaming for seven hours, tasing warranted.
  - **Confrontational demeanor**
    - Inmate threatened and lunged at guard.
      Jasper v. Thalacker (8th Cir. 1993)
Whitley factor #1: The need for force (cont.)

Inmate Resistance (cont.)

Risk of inmate harming himself or others may warrant tasing

- Inmate stuffed paper, plastic into body orifices.
  Bowers v. Pollard (7th Cir. 2009)
- Inmate banging head against cell wall.
  Dye v. Lomen (7th Cir. 2002)
- Inmate stuffed wrong medicine into mouth.
- Inmate wrapped trash bag around his head and swung at officers.
  Wallace v. Thomas (D.S.C. 2007)
- Inmate cutting himself with razor.
  Jefferson v. Cruse (9th Cir. 2009)
Whitley factor #1: The need for force (cont.)

Erratic or irrational inmate behavior

- Tasing may be warranted where officers cannot reason with an inmate.
- Hallucinating, paranoid inmate who is resisting. Spears v. Cooper (E.D. Tenn. 2009) (inmate refused to cooperate because he believed dogs were in his cell and were “after him”)
Whitley factor #1:
The need for force (cont.)

- **Inmate who is merely disobeying an order**
  This is a highly fact-intensive inquiry:
  - What was the order?
  - Was the order security-related?
  - How long has the inmate been refusing to comply?
  - How many warnings was the inmate given?
  - What is the inmate’s disciplinary history?
Whitley factor #1: The need for force (cont.)

Inmate disobeying an order (cont.)

Some courts have held that an inmate may be tased for refusing to comply with security-related orders (i.e. cell extraction, searches, etc.), even in the absence of aggression.

- Where inmate refused to submit to a strip search tasing warranted.
  Michenfelder v. Sumner (9th Cir. 1989).
- Where inmate refused multiple orders to lockdown.
  Cintora v. Downey (C.D. Ill. 2010)
Inmate disobeying an order (cont.)

In the absence of physical resistance and security risk, tasing is not permitted where an inmate refuses to:

- Sweep his cell. Hickey v. Reeder (8th Cir. 1993)
- Pick up food from the floor. Preston v. Pavlushkin (D. Colo. 2006).
- Don jail garb. Stephens v. City of Butler (11th Cir. 2008).
Whitley factor #1: The need for force (cont.)

- Cannot use taser merely to harass, humiliate, or retaliate against an inmate. Cannot tase an inmate just “to teach him a lesson.”

  Cannot tase for past misbehavior where inmate is no longer resisting.
  Morrison v. Stephenson (S.D. Ohio 2008)

  Cannot tase inmate just because inmate complained.
  Willis v. Atkinson (W.D. Ark. 2009)

  Courts are especially concerned about retaliatory tasing or tasing as torture because tasers leave minimal or no marks on inmates.
  Hickey v. Reeder (8th Cir. 1993)
Whitley factor #2:  
The Amount of Force Used

- **Number of times Taser is deployed:**  
  Was inmate tased more times than necessary?

  - **Cyrus v. Town of Mukwongo, 2010 WL 4483713 (7th Cir. 11/10/10)** – officer testified that he activated taser 6 times but taser internal computer recorded 12 times.
Whitley factor #3: Threat reasonably perceived

- **Inmate’s physical size**
  Tasing may be warranted by resisting inmate’s large physical size and strength.
  Cotton v. Danner (N.D. Cal. 2007)

- **Inmate’s violent history**
  Recent physical altercation with guards.
  Hunter v. Young (10th Cir. 1997)
  Long history of disciplinary problems and disruptive behavior including threats to jail staff and other inmates warranted tasing.
  Honorable v. Osborne (W.D. Ky. 2005)
  Inmate had bitten officer during prior incident.
  Burkett v. Alachua County (11th Cir. 2007)
Whitley factor #3: Threat reasonably perceived (cont.)

- Uniquely dangerous characteristics of inmate may justify tasing
  Resisting inmate had hepatitis C and threatened to infect officers.
  Bailey v. County of Kittson (D. Minn. 2009)

- Presence of other inmates and danger of a riot situation may justify tasing
  Fight between officer and detainee attracted crowd of inmates who refused to lock down.
  Davis v. Lancaster County (D. Neb. 2007)
  Prisoner and two other inmates refused multiple orders to return to their cell during incident.
  Boone v. Hannah (M.D. Ga. 2007)
Whitley factor #4: Efforts to Temper Force

- Verbal taser warnings should be given
  Patterson v. Abney (D.S.C. 2009)
  Price v. Austin (W.D. Tex. 2007)

- Inmate should be given a sufficient opportunity to comply after the verbal warning
  Lewis v. Downey (7th Cir. 2009)
  Forrest v. Prine (C.D. Ill. 2009)
Whitley factor #5: Injury to the Inmate

- Pain, not injury, is the measure of an excessive force claim.
  Wilkins v. Gaddy, 130 S.Ct. 1175 (2010); Lewis v. Downey (7th Cir. 2009).

- Lack of any injury from the tasing weighs in favor of a finding that tasing was justified.
  Patterson v. Abney (D.S.C. 2009)

- A taser injury that requires medical treatment weighs against a finding that tasing was justified.
  Council v. Sutton (11th Cir. 2010):
Biographies

- **Michael W. Condon** is a 1986 graduate of the John Marshall Law School, where he was the Executive Lead Articles Editor of the Law Review. For the past twenty-four years, Michael has represented public officials and various units of local government across the State of Illinois at both the trial and appellate levels. Michael has successfully tried numerous jury cases in federal court on behalf of police officers and their employers. In addition to his federal trial practice, Michael also has substantial experience in litigating administrative matters involving units of local government. He has successfully represented police chiefs and other officers in disciplinary proceedings before local Fire and Police Commissions.

- **Michael D. Bersani** received an undergraduate degree from the University of Illinois in 1985 and a law degree from The John Marshall Law School in 1988. Upon completing law school, Mike served as a judicial clerk to a Florida state appellate court judge. He entered private practice in 1990 and has concentrated in representing local governments and public officials in civil rights litigation. His practice areas include police misconduct, jail litigation, wrongful termination and employment discrimination.

- Mr. Condon and Mr. Bersani would like to thank HC&B associate Matthew Hafeli for his invaluable assistance in helping to research and prepare this presentation.