

From: Michael Brave, LAAW International, LLC  
Date: October 28, 2011  
Case: *Mattos v. Agarano*, --- F.3d ----, 2011 WL 4908374 (C.A.9 (Hawai'i) 2011)  
Subject: Court's requirements for the use of a TASER® X26™ Electronic Control Device ("ECD") in drive-stun mode on a person who is "actively resisting" arrest solely to gain volitional compliance with Law Enforcement Officer's ("LEO's") commands.

Very short version of what I believe is important in the *Mattos* (including *Brooks*) case:

1. Each and every application of a force option by a LEO must be legally justified.
2. If a LEO is using an ECD in drive-stun mode solely to gain volitional compliance (person is not reasonably perceived to be an immediate threat or a flight risk) on a person who is "actively resisting" arrest, the LEO must give the person reasonable opportunity to volitionally comply with the LEO's directives prior to each ECD drive-stun application.
3. Before a LEO uses an ECD in drive-stun mode to attempt to gain volitional compliance to the LEO's lawful commands the LEO must give the person a reasonable opportunity to comply with LEO's directives prior to each ECD drive-stun application:
  - a. The LEO:
    - i. must not have a reasonable perception that the person is not capable of volitional compliance to LEO's commands.
    - ii. must reasonably perceive that the person is "actively resisting."
    - iii. must give a warning of the imminent application of force to gain compliance.
    - iv. must give the person time "to recover from the extreme pain" experienced,
    - v. must give the person a reasonable opportunity to "gather herself."
    - vi. must give the person a reasonable opportunity to "consider her refusal to comply" with LEO's commands before each ECD drive-stun application.
  - b. The duration of time between each ECD drive-stun application (according to this case) must be more than 36 seconds, to give the person reasonable:
    - i. time "to recover from the extreme pain she experienced,"
    - ii. to "gather herself," and
    - iii. to "consider her refusal to comply".
  - c. The LEO needs to include in his report that before each ECD drive-stun used to attempt to gain the person's volitional compliance he followed these guidelines.

A little more drill-down information:

On October 17, 2011, the United States Court of Appeals for the Ninth Circuit released the *En Banc Mattos v. Agarano*, --- F.3d ----, 2011 WL 4908374 (C.A.9 (Hawai'i) 2011) decision. This decision included both (WA) *Brooks v. Seattle* and (HI) *Mattos v. Agarano*.

You are strongly encouraged to read the case for yourself and draw your own conclusions. Here is a link: <http://www.ca9.uscourts.gov/datastore/opinions/2011/10/17/08-15567.pdf>

Here is what I believe is relevant new important guidance from the *Mattos* case:  
Short Version:

The *Mattos* (actually, *Brooks*) case does not prohibit the use of an X26 ECD in drive-stun mode to attempt to gain volitional compliance from a person who is “actively resisting” arrest. The Court does set out new guidance for use of force under such circumstances.

Here is one of the key paragraphs from the *Brooks*’ portion of the decision (not a quote):

The second overwhelmingly salient factor (in determining force was unreasonable) here is that:

- the LEO drive-stunned Brooks 3 times over less than 1 minute.
  - 27 seconds after the LEO warning sparked the ECD, he applied the ECD to Brooks.
  - 36 seconds later, the LEO used the ECD on Brooks for the second time.
  - 6 seconds after that, the LEO drive-stunned Brooks for the third (and last) time.
- Each time, Brooks cried out in pain.
- “Three [ECD drive stuns] in such rapid succession provided no time for Brooks to
  - recover from the extreme pain she experienced,
  - gather herself, and
  - reconsider her refusal to comply.”

According to the Court, in sum,

- Brooks’ alleged offenses were minor. (She refused to sign a speeding ticket.)
- She did not pose an immediate threat to the safety of the officers or others.
- She actively resisted arrest insofar as she
  - refused to get out of her car when instructed to do so and
  - stiffened her body and clutched her steering wheel to frustrate the officers’ efforts to remove her from her car.
- Brooks did not evade arrest by flight, and
- No other exigent circumstances existed at the time.
- She was seven months pregnant, which the officers knew (in this case), and
- The LEOs used an ECD in drive-stun mode on her three times within less than one minute, inflicting extreme pain on Brooks.