

THE GOOD, THE BAD AND THE UGLY WITH ELECTRONIC CONTROL WEAPONS



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DLG
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ECW

The Good, the Bad, and the Ugly

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Nomenclature:

- Various writers refer to the instrument as a CED or CEW (Conducted Energy Device or Weapon), or an ECW or ECW (Electronic Control Device or Weapon), or an EMD weapon (Electro-Muscular Disruption), or an electroshock weapon or stun-gun. Like Xerox ® and Kleenex ®, T.A.S.E.R. ® (Thomas A. Swift Electric Rifle) is now the popular name for all hand-held, electric-discharging muscle immobilizers, even though a single manufacturer dominates the world market [Nasdaq: TASR].
- For simplicity, DLG refers to all conducted energy weapons as —Tasers®.



DISCUSSION TOPICS

- **GOOD**
 - Overview of ECW's and use by Law Enforcement.
 - Benefits Associated to the use of ECW
- **BAD**
 - Current Case Law
 - Misuse of the ECW by LE Officers
- **UGLY**
 - Analysis and Application



OBJECTIVES

- Knowledge is Power
- Goal is to understand the current and changing police practices as it is applicable to the following:
 - Policy
 - Training
 - Documentation
 - Current Use of Force Standards
 - Legal Trends

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Graham v. Connor



“Objective Reasonableness”

Use of Force must be objectively reasonable

Courts Consider Three Specific Factors:

- 1. How Serious was the offense that the officer suspected at the time that the officer used force. The more serious the offense, the greater the need for apprehension, thus, the greater level of force that may be used.
- 2. Did the suspect pose a threat to the officer or any other person present,
- 3. Was the suspect actively resisting or attempting to evade arrest by flight.

THE GOOD....

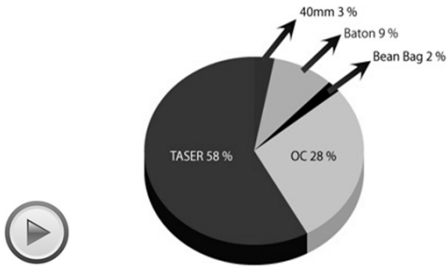
- “We explicitly ‘recognize[d] the important role controlled electric devices like the [TASER® X26™ ECW] can play in law enforcement” to “help protect police officers, bystanders, and suspects alike.”

**(Bryan, 9th Circuit, 11/30/10)*

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PoliceOne Feb, 2010 Poll

“The last time you deployed a less-lethal weapon, it was a...”



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Injury Rate

(National Institute of Justice TASER Study – June 2011)

- Injury rates for officers and suspects declined after they introduced CED.
- “90% less suspect injuries”
- “CED use is associated with a significantly lower risk of injury than physical force, so it should be considered as an alternative in situations that would otherwise result in the application of physical force.”

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Injury Rate

(PERF ECW STUDY – September 2009)

- Overall, the study showed that use of CEDs is associated with a 70-percent reduction in the chances of an officer being injured compared to agencies that do not use CEDs."
- "...the odds of a suspect being injured are reduced by more than 40 percent in CED agencies compared to non-CED agencies."
- "All in all, we found consistently strong effects for CEDs in increasing the safety of officers and suspects."

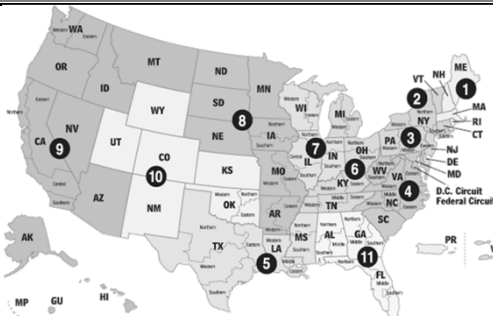
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THE BAD....

- The court recognized that while the advent of the Taser has undeniably provided law enforcement officers with a useful tool to subdue suspects with minimal risk of harm to the suspect or the officer, it is equally undeniable that being "tased" is a painful experience. (Beaver v. City of Federal Way.)

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Circuit Court Locations



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ECW Case Law

- **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.
- **Casey v. City of Federal Heights**, 509 F.3d 1278 (10th Cir.(Colo.) Dec. 10, 2007)
 - Convicted speeder bringing court file back into courthouse (settled for \$85,000)- Warning Necessary
- **Buckley v. Haddock**, 292 Fed.Appx. 791 (11th Cir.(Fla.) Sep 09, 2008) (Cert. denied 05/18/09)
 - Sobbing speeder failed to sign speeding ticket

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ECW Case Law

- **Beaver v. City of Federal Way**, 507 F.Supp.2d 1137 (W.D.Wash. 2007); (qualified immunity upheld by 301 Fed.Appx. 704 (C.A.9 (Wash.) Nov. 25, 2008)
 - Fleeing residential burglar (5 ECW uses, first 3 ok)
 - Active v. Passive resistance
- **Brown v. City of Golden Valley**, 534 F.Supp.2d 984 (D. Minn. 2008) (8th Cir, 2009) Affirmed, 2009 U.S. App. LEXIS 16071 (2009)
 - No Qualified Immunity
- **Parker v. Gerrish**, 547 F.3d 1 (1st Cir., 2008)
 - Cuffing could have been done without the need for a Taser and it was simply a question of timing.

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ECW Case Law

- **Heston v. City of Salinas**
 - City of Salinas police officers utilized multiple Tasers with 20 - 23 discharges against Robert Heston, Jr. in about 70 seconds.
- **Bryan v. McPherson**
 - 2009 U.S. App. Lexis 28413 (9th Circuit)
 - ECW deployment objectively UNREASONABLE
- **Mattos v. Agarano**
 - 2010 WL 92478 (9th Cir. (Hawaii) (En Banc Review 10-2011)
- **Brooks v. City of Seattle**, 599 F.3d 1018 (C.A.9 (Wash.), March 26, 2010) (En Banc Review 10-2011)

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Beaver v. Federal Way

- In Beaver, the issues clearly presented is at what point, if any, do multiple Taser applications against a suspect constitute excessive force.
- “Tased” five times during the course of an arrest for a residential burglary.
- In conducting its analysis, the Beaver court determined that the use of Taser did constitute a significant force.

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Beaver

TASER DISCHARGE REPORT

- Application 1: 13:24:32
- Application 2: 13:24:53
- Application 3: 13:25:00
- Application 4: 13:25:15
- Application 5: 13:25:42

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Beaver

- Conducted a Graham Analysis
 - Severity of the Crime
 - No violent burglary
 - Immediate Threat of Safety
 - No threats or visible weapons
 - Actively resisting or attempting to evade arrest
 - First two tasings justified- backup officer
 - Fourth and Fifth were not objectively reasonable

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Beaver

- **The court concluded by stating that as far as it was 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.

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Beaver

- The court found that this is particularly true when more than one officer is present to assist and control a situation.
- Fourth and finally, the court concluded that any decision to apply multiple applications of a Taser must take into consideration whether a suspect is capable of complying with the officers' commands.

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Parker v. Gerrish

- First Circuit Court of Appeals, November 2008
- A jury found in favor of plaintiff, Stephen Parker, on his claim that defendant, Officer Kevin Gerrish of the South Portland Police Department, violated his constitutional rights by using his Taser during the course of arresting Parker for operating a motor vehicle while under the influence of alcohol.
- The jury awarded \$ 111,000 to Parker, who complained that the use of the Taser and subsequent cuffing caused nerve damage to his arm and injured his shoulder.
- Gerrish disputes the finding of excessive force, argues that he is entitled to qualified immunity.

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Parker

- Gerrish failed the sobriety test and said "do what you have to do."
- Gerrish then attempted to physically uncross Parker's arms and place him under arrest. Gerrish readied his handcuffs while grabbing Parker's arm, which was still crossed in front of his chest. Gerrish tried to move Parker's arm, but Parker resisted.
- Gerrish then stepped back, drew his Taser, and ordered Parker to turn around and place his hands behind his back. Parker complied, turned around, and clasped his right wrist with his left hand.

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Parker

- Gerrish testified that once the first cuff was on he saw a struggle between the cuffing officer and Parker. Gerrish did admit that he couldn't really see what was happening because his view was partially blocked.
- Cuffing officer testified that Parker tried to pull his hands free after the first cuff was applied, but he never let go of Parker's hand and felt that he could have finished the cuffing without the Taser being employed. Important

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Parker

- The first Circuit court said that a reasonable jury could have believed that the cuffing could have been done without the need for a Taser and it was simply a question of timing, that Gerrish should have waited a few seconds before using the Taser and if he had Parker would have been arrested without injury.

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Bryan v. McPherson

Ninth Cir. 2009

- Officer Brian McPherson deployed his taser against Carl Bryan during a traffic stop for a seatbelt infraction.
- Appellate Court Affirmed DC holding that Officer McPherson's use of the taser was unconstitutionally excessive and a violation of Bryan's clearly established rights.
- Bryan Sunday was off to a bad start...

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Bryan

- We, along with our sister circuits, have held that tasers and stun guns fall into the category of non-lethal force.
- We therefore conclude that tasers like the X26 constitute an "intermediate or medium, though not insignificant, quantum of force,"
- We hold only that the X26 and similar devices constitute an intermediate, significant level of force that must be justified by "a strong government interest [that] *compels* the employment of such force."

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Bryan

- Even if Bryan had taken a single step toward Officer McPherson, this would not have rendered him an immediate threat justifying an intermediate level of force, as he still would have been roughly nineteen to twenty-four feet away from Officer McPherson, by the officer's own estimate.
- We thus conclude that the intermediate level of force employed by Officer McPherson against Bryan was excessive in light of the governmental interests at stake. Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle.

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Bryan

- Officer McPherson was standing approximately twenty feet away observing Bryan's stationary, bizarre tantrum with his X26 drawn and charged. Consequently, the objective facts reveal a tense, but static, situation with Officer McPherson ready to respond to any developments while awaiting back-up. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply "no immediate need to subdue [Bryan]" before Officer McPherson's fellow officers arrived or less-invasive means were attempted.

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Crowell v. Kirkpatrick

- Second Cir. 2010
- Upheld that the use of a Taser on protesters who refused to unchain themselves from a barrel was not unreasonable under the Fourth Amendment.
- Court focused on the fact that the officers warned the plaintiff's before applying the Taser.

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Mattos v. Agarano and Brooks v. City of Seattle

- 9th Cir. En Banc Review October 17, 2011
- The Ninth Circuit Court consolidated two separate cases – *Mattos v. Agarano* and *Brooks v. City of Seattle* – in which questions arose as to whether the use of a taser weapon involved an excessive use of force, and whether the officers were entitled to qualified immunity.

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Brooks v. City of Seattle

- Drive stun application on a female who is seven months pregnant.
- Speeding in a school zone
- Refused to sign the infraction.
- Refused to get out of the car and told officers that she was pregnant.
- Officers discussed options and demonstrated Taser use.
- Three applications – left thigh, left arm and neck.

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Brooks v. City of Seattle

- Speeding – was not a serious offense
- Did not pose a serious threat to the officers
- Did engage in some resistance but that her resistance did not pose a potential threat to the officers.
- What factors did the court consider in determining the force was unconstitutional?

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Brooks v. City of Seattle

- 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.

Brooks v. City of Seattle

- 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.

Brooks / Mattos

- Each and every application of an ECW must be legally justified.
- When using an ECW 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 ECW application


Brooks / Mattos

- Must perceive that the suspect is “actively resisting.”
- Must be certain that the suspect is capable of compliance with the officer’s commands.
- Must give a warning prior to each application of the ECW.
- Must give the suspect time to recover from the “extreme pain” experienced during the ECW application.

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Brooks / Mattos

- Must give the suspect a reasonable amount of time to “gather herself.”
- Must give the suspect a reasonable opportunity to consider the consequences of her refusal to comply with commands before each ECW application.
- 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 ECW.




Where are we now?




THE UGLY....

- Over-reliance on the ECW to avoid soft hands compliance.
- Failure to document objective basis for using force
- Failure for foresee risk or injury or secondary injury
- Failure to maintain proper policies to guide use of the ECW; and
- Failure to supervise, discipline and training on the proper use when deficiency is identified.
- Use of the weapon in Drive Stun Mode



Policy Application

- Model Policies Available
 - IACP Guidelines
 - PERF Guidelines
- DOJ- Civil Rights Division
 - Orange County Sheriff's (Use of CED)
 - Findings Letters/ Consent Decree
 - Puerto Rico PD (09/07/11)
 - New Orleans PD (03/17/11)
- External Sources- Case Law/ Studies

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Start with the Policy....



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Policy Development

- | | |
|---|-------------------------|
| ▪ Constitutional Standards- 4 th Amendment | ▪ High Risk Application |
| ▪ Verbal Warning | ▪ Environment |
| ▪ De-escalation Requirements | ▪ Elderly/ young child |
| ▪ Deployment | ▪ Pregnant |
| ▪ Fleeing Subjects | ▪ Disabled |
| ▪ Passive Subject | ▪ Vehicle/ Bicycle |
| ▪ Restrained Subject | ▪ Prohibited Use |
| | ▪ Passive |
| | ▪ Horseplay |
| | ▪ torture |

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Policy Development

- Definitions- Clear
- Multiple ECW's
- Multiple Cycles
- Drive Stun use
- Medical Attention
 - Removal of the Probes
 - Care and Treatment
- Supervision
 - Respond to scene
 - Evaluate Deployment
- Ensure documentation
- Evidence Collection
 - Photographs of injuries
 - Spent cartridge
- Data Download
- Training
 - Certification
 - Excited Delirium
 - Reporting
 - Supervision

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NO Consent Decree

- Officers shall use ECWs only when such force is necessary to protect the officer, the subject, or another party from physical harm, and other less intrusive means would be ineffective.
- Officers shall be authorized to use ECWs to control a violent suspect when attempts to subdue the suspect by other tactics have been, or will likely be, ineffective and there is a reasonable expectation that it will be unsafe for officers to approach the suspect within contact range.

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NO Consent Decree

- Unless doing so would place any person at risk, officers shall issue a verbal warning to the subject that the ECW will be used prior to its use. Where feasible, the officer will defer ECW application for a reasonable time to allow the subject to comply with the warning.
- ECWs will not be used where such deployment may cause serious injury or death from situational hazards, including falling, drowning, losing control of a moving vehicle, or igniting a potentially explosive or flammable material or substance, except where lethal force would be permitted.

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NO Consent Decree

- After one standard ECW cycle (5 seconds), the officer shall reevaluate the situation to determine if subsequent cycles are necessary. Officers shall be trained in the risks of prolonged or repeated ECW exposure, including that exposure to the ECW for longer than 15 seconds, whether due to multiple applications or continuous cycling, may increase the risk of death or serious injury. Officers shall independently justify each cycle used against a subject in written Force Statements.

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NO Consent Decree

- Officers shall not intentionally activate more than one ECW at a time against a subject.
- ECWs shall not be used in drive-stun mode as a pain compliance technique. ECWs shall be used in drive-stun mode only to supplement the probe mode to complete the incapacitation circuit, or as a countermeasure to gain separation between officers and the subject, so that officers can consider another force option.

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NO Consent Decree

- ECWs shall not be used against visibly pregnant women, elderly persons, young children, or visibly frail persons, except where lethal force would be permitted, or where the officer has reasonable cause to believe there is an imminent risk of serious physical injury. Officers shall determine the reasonableness of ECW use based upon all circumstances, including the subject's age, size, physical condition, and the feasibility of lesser force options. Officers shall be trained in the increased risks that ECWs may present to the above-listed vulnerable populations.

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NO Consent Decree

- ECWs may not be applied to a subject's head, neck, or genitalia, except where lethal force would be permitted, or where the officer has reasonable cause to believe there is an imminent risk of serious physical injury.
- ECWs shall not be used on handcuffed subjects, unless doing so is necessary to prevent them from causing serious physical injury to themselves or others, and if lesser attempts of control have been ineffective.

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NO Consent Decree

- Officers shall keep ECWs in a weak-side holster to reduce the chances of accidentally drawing and/or firing a firearm.
- Officers shall receive annual ECW certifications, which should consist of physical competency; weapon retention; NOPD policy, including any policy changes; technology changes; and scenario-based training.

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NO Consent Decree

- Officers shall be trained in and follow protocols developed by NOPD, in conjunction with medical professionals, on their responsibilities following ECW use, including:
 - the removal of ECW probes, including requiring medical or specially trained NOPD personnel to remove probes that are embedded in a subject's skin, except for probes that are embedded in a subject's head, throat, groin, or other sensitive area, which should be removed by medical personnel only;
 - the risk of positional asphyxia, and training officers to use a restraint technique that does not impair the subject's respiration following an ECW application;

NO Consent Decree

- the transportation to a hospital for evaluation of all subjects who: have been exposed to prolonged application (more than 15 seconds); are a member of one of the vulnerable populations listed above; or had an ECW used against them in circumstances presenting a heightened risk of harm, such as subjects under the influence of drugs and/or exhibiting symptoms associated with excited delirium; or were kept in prone restraint after ECW use; and
- the monitoring of all subjects who have received ECW application while in police custody.

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NO Consent Decree

- Officers shall report all ECW discharges (except for training discharges), laser painting, and/or arcing of weapons to their supervisor and the communications command center as soon as possible.
- NOPD agrees to develop and implement integrity safeguards on the use of ECWs to ensure compliance with NOPD policy, including conducting random and directed audits of ECW deployment data. The audits should compare the downloaded data to the officer's Force Statement. Discrepancies within the audit should be addressed and appropriately investigated.

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NO Consent Decree

- NOPD agrees to include the number of ECWs in operation, and the number of ECW uses, as elements of the EWS. Analysis of this data shall include a determination of whether ECWs result in an increase in the use of force, and whether officer and subject injuries are affected by the rate of ECW use. In addition, the analysis shall include laser painting and arcing of weapons to measure the prevention/deterrence effectiveness associated with the use of ECWs. ECW data and analysis shall be included in NOPD's Use of Force Annual Report.

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ACLU June 2011

Recommendations

- Implement Strong Accountability mechanisms for Taser Use, Including Data Collection.
- Revisit Tasers' Place on the Use-of-Force Continuum and Update Agency Policies.
- Mandate Regular Training That Meaningfully Incorporates Agency Rules and Philosophies Regarding Taser Use.
- Establish a Statewide Body to Review Taser Use and Develop Policy Recommendations and Training Resources for Agencies.

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Training Focus

- Use no more force than necessary to accomplish lawful objective
- Use lowest possible number of applications
- Use probe rather than drive-stun
 - DS not necessarily less force than probe.
 - Avoid DS (less probability of effectiveness)

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Cuffing Under Power

- Officers can go hands on with the subject during the 5-second cycle.
- Officers should move in and control the subject while the ECW is cycling and the subject is incapacitated.
- If cuffing occurs while subject is incapacitated the need for multiple cycles may be avoided.

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Secondary Impact

- Use of the ECW causes incapacitation which often causes people to fall.
- Consider the environment – such as elevated areas and even ground level falls can cause serious injuries.

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Drive Stun Mode

- Department must determine their position on the use of Drive Stun Mode
- Identify in policy the department standard
- Strong recommendation to limit Drive Stun Mode application
- Training must discuss options regarding Dart Mode and Drive Stun Mode.



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ECW Against Handcuffed or Restrained Persons

- Increase in litigation over the use of ECW against handcuffed or restrained persons.
- Graham Standards:
 - Harm to officer, themselves or third party
 - Attempt to flee or escape
 - Destruction of property
- Using significant force in the form of a Taser against a suspect who is neither resisting nor fleeing arrest, and who may be seriously injured serves no legitimate government interest and is excessive.

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Force Reporting

- Departments should use a reporting form which is designed for the officer to document their use of force including ECW use.
- Departments should use this form to track ECW usage for Risk Management purposes.
- Forms also must be reviewed to determine policy or training deficiencies.

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Where Do We Go From Here?



The End....

Thank You

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