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# TASER® Electronic Control Devices (ECDs)

## -- Legal Update

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Michael Brave, Esq., M.S., C.L.S.<sup>3</sup>, C.L.E.T., C.P.S., C.S.T.  
National Litigation Counsel, TASER International, Inc.  
President, LAAW International, Inc.

Email – [brave@laaw.com](mailto:brave@laaw.com)

Telephone – (651) 248-2809

E-fax – (480) 275-3291

ECD Legal Resources Website – [www.ecdlaw.info](http://www.ecdlaw.info)

ICD Resources – [www.incustodydeath.com](http://www.incustodydeath.com)

# Basics

- TASER International, Inc. (TASER) does not create, recommend, or endorse policy or set standards of care.
- Importance of keeping up to date:
  - Era of information and mis-information overload:
    - Importance of ignorance eradication
    - Learn the “*science*” and “*medicine*” not the “*myths*”
    - Need to understand the basics and foundations
    - Reference Sheets and Reference Packets
    - [www.ecdlaw.info](http://www.ecdlaw.info) (owned by LAAW International, Inc.)
    - [www.ipicd.com](http://www.ipicd.com) or [www.incustodydeath.com](http://www.incustodydeath.com)
- Understand actual legal standards (and bases)
- 2005 to present ECD hysteria not scientifically based

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# Numbers – Putting Things Into Perspective

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# Some TASER Numbers:

- Over 1,550,000 TASER ECD exposures
- Over 13,000 US LEAs w/ECDs (out of 18,400)
- Over 3,500 LEAs with full ECD deployment
- TASER ECDs in 43 countries
- TASER (manufacturer) litigation:
  - TASER has been sued approx. 118 times
    - Of those, TASER's record is 78:1
      - The one is being challenged and appealed
- Civilian – over 150,000 ECDs (no lawsuits)

# United States Today

## Putting the Numbers Into Perspective

- Since 01/01/2000: 750,000+ US Deaths From 4 Causes:
  - Drugs (30,711 in 2004) (19,128 in 1999)
  - Firearms (29,569 in 2004) (28,874 in 1999)
  - Suicide (32,439 in 2004) (28,485 in 2003)
  - Alcohol (21,081 in 2004) (19,469 in 1999)
- More “**2004**” Numbers (Law enforcement problems?):
  - 21,400,000 Serious Psychological Distress (9.9% of adults)
  - 19,100,000 Current Illicit Drug Users (7.9% of population)
  - 10,200,000 Operating Vehicles Under the Influence
  - 1,997,993 Drug Caused ER Visits

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# More Nos – 1999 through 2006

- 459,206+ LEOs Assaulted
  - 129,265 + LEOs Assaulted with Injuries
- 1,026 LEOs Killed
  - 431 LEOs Feloniously Killed
  - 595 LEOs Accidentally Killed

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# 2004 ME/C Numbers

(the Government's Numbers)

2,000 Medical Examiner/Coroner offices in U.S.:

- 7,320 ME/C full-time equivalent employees
- \$718,500,000.00 total annual budgets

2,398,000 human deaths:

- 956,000 deaths referred to ME/C offices
  - 487,000 deaths accepted for investigation
    - 677 Arrest Related Deaths (all causes)
      - 9 ARDs involving use of CEDs



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Do “NOT” confuse or substitute Constitutional force threshold standards with selected usually more restrictive judicial case extracted force considerations!!!!

- “Shall” versus “Should”



# Force Standards

(Do NOT confuse legal force thresholds with best practices suggestions)

- **Federal Constitutional Standards:**
  - Do not intentionally misuse government endowed authority (4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 14<sup>th</sup> Amendments, state law, etc.)
  
- **Restrictive force court case considerations:**
  - Minimum application of force to reasonably safely accomplish lawful objectives
  - Coupled with well written accurate descriptive force reporting and documentation  
(preferably video/audio from the LEO's perspective)

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# What is Your Force Management Objective?

Consider encouraging/training full knowledge possible minimum injury force practices? (Not to be confused with, or substituted for, Constitutional force standards or threshold(s).)

These legal case based practices considerations likely do not reflect the federal Constitutional force standards or thresholds in numerous jurisdictions.

Meaning, these considerations are (in many circumstances) considerably more restrictive than applicable federal Constitutional rights force standards threshold(s).

And, be cautious to NOT create elevated force standards above the Constitutional force standards thresholds.

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# Dominos Falling Enhancers

- Department's policies and training standards
  - Setting inappropriately escalated force standards
- He said/she said (recording incident from officer's perspective)
- Death case - medical examiner errors
- ECD experts – sufficiently knowledgeable experts?
  - “TASER Instructor” ≠ “Knowledgeable Expert”
- Court's Mis-Understandings:
  - (OH) Michaels – “drive stun” ≠ “NMI”
  - (FL) Buckley (dissent) -- “drive stun” ≠ “NMI”
  - (MI) Keiser (6<sup>th</sup> Circuit (10/21/08)) – “DS ≠ “NMI”
  - “50,000 Volts!!!!!!” (Oh My God!!!!!!)

# Dominos Falling Enhancers

- P.D.P.C.T. (fallacy) (outcome vs. process)
- Incident:
  - Officer misperceives threat level
  - Officer uses more than least intrusive force
  - Officer does not consider alternatives
  - Officer does not have sufficient tolerance/respect
  - Officer “Tases to Submission”
  - ***Lawful but awful*** force
  - Bad reporting (Crayon® reports or absence of change audit trail)
  - Incomplete investigation

# Basic Force Considerations

- What is your force management objective?
- What is starting, or significantly enhancing, the dominos falling?
- Which force standard to comply with? Where the courts are (sometimes) headed?
  - Intentional misuse of govt endowed authority?
  - Tolerance for non-intentionally-violent offenders?
  - The “**force avoidance**” standard?
  - The “**thou shalt be nice**” (or at least “*respect*”) standard?
  - Expeditious medical care? (when in doubt summon)

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## (Usually) Not a Problem ...

If a LEO is justified in using force and the person is an immediate threat to LEOs or others or the person is trying to flee (and the LEO would be justified in tackling the person), then reasonably limited ECD is almost always legally justified.

The question is: how to make the best force decisions coupled with excellent reporting?

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## A few ECD cases to consider:

- *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir.(Colo.) Dec. 10, 2007)
  - Convicted speeder bringing court file back into courthouse
- (UR) *Buckley v. Haddock*, 2008 WL 4140297 (11th Cir.(Fla.) Sep 09, 2008)
  - Sobbing speeder failed to sign speeding ticket
- *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137 (W.D.Wash. 2007)
  - Fleeing residential burglar (5 ECD uses, first 3 ok)

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## A few ECD cases to consider:

- *Brooks v. City of Seattle*, 2008 WL 2433717 (W.D. Wash. 2008)
  - Pregnant speeder who refused to sign ticket or get out of the car.
- *Bryan v. McPherson*, 2008 WL 904906 (S.D. Cal. 2008, April 03, 2008)
  - Traffic ticket, failed to comply, clenched fists, profanities at officer.



## A few ECD cases to consider:

- *Brown v. City of Golden Valley*, 534 F.Supp. 2d 984 (D.Minn. Feb 14, 2008)
  - Female car passenger, beer tankards at feet, husband (driver) arrested for OMVWI.
  
- (UR) *Releford v. City of Tukwila*, CASE NO. C07-2009-RSM (W.D.Wash. 2008)
  - 6'5", 280 pounds, simultaneous ECD discharge, and simultaneous ECD discharge while on ground. Arrested on warrant, not on recently committed crime.

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## A few ECD cases to consider:

- *Parker v. Gerrish*, --- F.3d ----, 2008 WL 4793434 (1<sup>st</sup> Cir.(Me.) Nov. 5, 2008)

# *Buckley v. Haddock,*

2008 WL 4140297 (11<sup>th</sup> Cir.(Fla.) Sep 09, 2008)

Officers are supposed to know if force is ok?

- District Court – not objectively reasonable, no officer would, no qualified immunity (QI)
  
- Circuit Court:
  - Chief Judge: Objectively reasonable (OR) plus QI
  - Appellate Judge – 2 uses OR, 3<sup>rd</sup> use not OR, QI
  - District Judge – not OR, no officer would, no QI

# Basic 4<sup>th</sup> Amendment Force

(Key *Graham* Factors)

- the severity of the crime at issue
- whether the suspect poses an immediate threat to the safety of the officers or others
- whether suspect is actively resisting arrest or attempting to evade arrest by flight
- split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about amount of force necessary in particular situation

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# *Graham Factors as Ranked by Chew*

Order of Importance – Potential for Injury Risk Importance

- Immediate threat to safety of officers/others
- Actively resisting
- Circumstances tense, uncertain, rapidly evolving (“*pace*” of events)
- Severity of the crime at issue
- Attempting to evade seizure by flight

# Additional Force Factors

- Court may also consider "the availability of alternative methods of capturing or subduing a suspect." (*Smith v. City of Hemet*, 394 F.3d 689, 701 (9<sup>th</sup> Cir.2005))
- Court may also consider what officers knew about the suspect's health, mental condition, or other relevant frailties. (*Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9<sup>th</sup> Cir. 2001); *Franklin v. Foxworth*, 31 F.3d 873, 876 (9<sup>th</sup> Cir.1994))

# Clarifying the *Graham* Factors:

(Immediate threat to safety of officers or others)

*Graham's "immediate" vs. "possible" threat:*

- “[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.” (*Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9<sup>th</sup> Cir. 2001))
- *Beaver* – “possibly” had a weapon under him
- *Brooks* – could have fled in car
- *Brown* – beer “tankards” used as weapons

# Clarifying the *Graham* Factors:

(Immediate threat to safety of officers or others)

## *Graham's "immediate" vs. "possible" threat*

- “*Releford* – 2 friends, confusing commands, questioned arrest (delaying tactic? – no evidence)
  - weighed against the minimal need for force, the simultaneous double-tasing of plaintiff was clearly excessive. Once plaintiff fell to the ground and rolled onto his stomach, the need for force diminished even more and hence, the second double-tasing was also clearly excessive.



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# Clarifying the *Graham* Factors: (Actively Resisting)

## *Releford*:

- Fact that Releford stopped and raised his hands over his head, asked legitimate questions about why he was being arrested, and was likely confused by the officers' conflicting commands to turn around – the Court cannot term plaintiff's behavior "active resistance." Indeed, his behavior suggests at least a partial willingness to comply.

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# Clarifying the *Graham* Factors:

(Seriousness of the Offense)

- *Buckley* – failed to sign speeding ticket
  - *Brooks* – failed to sign speeding ticket
  - *Bryan* – traffic ticket
  - *Brown* – open intoxicant M/V passenger
  - *Casey* – took court file to parking lot
  - *Releford* – not suspected of having just committed a crime (warrant arrest)
  - *Beaver* – fleeing residential burglar
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# Clarifying the *Graham* Factors:

(Pacing – Tense, Uncertain, Rapidly Evolving)

- *Brooks* – slow pacing
- *Brown* – 4 officers present, husband in handcuffs in back of patrol car
- *Buckley* (dissent) – should have waited for backup

# Less Intrusive Alternative Methods?

- *Releford*:
  - ❑ Officers did not explain why options less intrusive than ECDs could not have been used.
  - ❑ Officers did not state that they even considered less intrusive options.
- *Brooks*:
  - ❑ Alternative methods (to get her out of car)
- *Buckley* (dissent):
  - ❑ Alternative methods (waiting for backup)

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# ECD Force Must be Justified

*Beaver:*

- ECD use involves the application of force.
- each ECD application involves an additional use of force.

# ECD Force that Must be Justified

## (Multiple ECD Applications)

### Multiple ECD Applications:

- Is suspect an immediate threat?
- Is suspect about to flee?
- Suspect fails to comply with command?
  - Multiple ECD applications cannot be justified solely on the grounds suspect fails to comply with command, absent other indications: about to flee or poses immediate threat to officer
    - particularly true when more than one officer present to assist in controlling situation.

# ECD Force that Must be Justified

## (Multiple ECD Applications)

### Multiple ECD Applications:

- Is the suspect capable of complying with command?
  - any decision to apply multiple ECD applications must consider whether suspect is capable of complying with commands.
    - Physically? (*Beaver*)
    - Mentally (intoxication, schizophrenic, etc.)?
    - Emotionally? (*Buckley, Brown*)
    - Conflicting commands? (*Beaver, Releford*)

# Officer's Force Decision & Report?

(especially where person is not active threat or attempting to flee)

- *Graham* factors – as modified by *Chew*
- Justification(s) for each use of force
  - Beware “*possible*” vs. “*immediate*” threat
  - Each application of force justified
- Presence or absence of other officer(s)
- Any factor used to justify escalated force must be explained
  - *Releford* – 2 persons (not explained why threat concern)



# Officer's Force Decision & Report?

(especially where person is not active threat or attempting to flee)

- Consideration of suspect's ability to comply with commands
  - Conflicting commands
  - Ability to comprehend commands
  - Physically able to comply with commands
  - Emotionally able to comply with commands
  - Mentally able to comply with commands
  - Inability to comply due to trauma
- Absence of conflicting commands

# Officer's Force Decision & Report?

(especially where person is not active threat or attempting to flee)

- Availability of alternative methods of capturing or subduing suspect.
  - Consideration of alternatives
  
- What officers knew about the suspect's:
  - Health,
  - mental condition, or
  - other relevant frailties.

# Officer's Force Decision & Report?

(especially where person is not active threat or attempting to flee)

- Warning of force to gain compliance
  - Giving warning(s) before force is used
  - Consider whether warning will be comprehended
- If pain is going to be used to gain compliance
  - consideration whether person will perceive the pain and be able to comply with command(s)
- Time between force applications to give time for voluntary compliance (tolerance factors)
  - Concern of too short a time between applications

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# Where Some Courts Are Going:

## *Releford*:

- *Brooks* and *Bryan* suggest that where, as here (in *Releford*), where there is no immediate threat to anyone's safety, clearly-established law prohibits the use of an ECD to gain compliance.

This is contrary to numerous other court cases – including some ECD use while restrained cases.

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# ICD - Where the Courts are Going

1. **Known risk factors** (*Richman v. Sheaham*, 512 F.3d 876 (7<sup>th</sup> Cir.(IL) Jan. 7, 2008) - 489 lb man – “a reasonably trained police officer would know that compressing the lungs of a morbidly obese person can kill the person”
2. **Necessity of haste** – (*Id.*) So the deputies had to use care in removing him from the courtroom, unless there was some compelling need for haste. But there was not. Court was over for the day. From the effort of the first 2 deputies to seize Richman to his death, only 7 minutes elapsed.

*There was no reason to endanger his life in order to remove him with such haste. A reasonable jury could find that the deputies used excessive force.*

# Electronic Control Devices Are Not Risk Free.



## **WARNING**

### **Electronic Control Device**

- Can temporarily incapacitate target.
- Can cause injury.
- Obey warnings, instructions and all laws.
- Comply with current training materials and requirements.
- See [www.TASER.com](http://www.TASER.com).

# Watch For

- Two new books – electrical, physiological, legal aspects of ECDs (January 2009)
- TASER ECD Involved Litigation Program (continuing legal education program)
  - Tentatively – (FL) Orlando – May 2009
- Check information websites often
  - [www.ecdlaw.info](http://www.ecdlaw.info)
  - [www.ipicd.com](http://www.ipicd.com)