

Compliance Report

**Wisconsin's Electronic Control
Device training compared with
USDOJ recommendations made to
Orange County, FL**



**Wisconsin Department of Justice
Training and Standards Bureau
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INTRODUCTION

The Civil Rights Division of the U.S. Department of Justice has been conducting an investigation of the Orange County, Florida, Sheriff's Office use of "Conducted Energy Weapons" (Tasers™). On August 20, 2008, the USDOJ sent a letter¹ to the Orange County Sheriff's Office ("OCSO") containing "technical assistance recommendations" and urged OCSO to review and consider the information in revising its policies and procedures.

Upon learning of the letter, Training Officer Glenn Rehberg of the Wisconsin Department of Justice, Training & Standards Bureau, forwarded a copy of the letter to Bureau Director Ken Hammond. Hammond directed Rehberg to review the letter in detail and report Wisconsin's training curriculum compliance with the identified issues, state the basis for any non-compliance and/or draft any necessary revisions to Wisconsin's Electronic Control Device ("ECD") curriculum.

LIMITATIONS IN THIS REPORT

This compliance report evaluates Wisconsin's ECD training curriculum against recommendations made to a Florida sheriff's office. This results in the following complications:

- Although the USDOJ letter contains training recommendations, much of the letter consists of department-specific policy recommendations. Many of these recommendations are not suitable for inclusion in basic training. Wisconsin's basic training curriculum avoids making department policy recommendations.
- OCSO specifies six "Resistance Levels" which justify the "Response Levels" that may be used by Deputies. This model does not match Wisconsin's Intervention Options. Some of OCSO's Levels are undefined within the USDOJ letter.

¹ This letter is available at http://www.usdoj.gov/crt/split/documents/orangecty_ta_ltr.pdf and is also included in this report as an Appendix.

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POLICIES AND PROCEDURES

The Civil Rights Division of the USDOJ recommends that OCSO's policy contains additional information in three areas: pre-deployment, deployment, and post-deployment. USDOJ also recommends an annual review of the ECD policy, with an update as necessary.

PRE-DEPLOYMENT STAGE

USDOJ recommends providing information necessary to make appropriate deployment decisions, including "precise rules regarding circumstances under which the ECW deployment inappropriate."

Wisconsin's ECD manual provides guidance on what subject behavior may make use of an ECD appropriate, along with behavior that would generally prohibit ECD use. Wisconsin does not list "precise rules" under which ECD use is always inappropriate; instead, Wisconsin adopts the *Graham v. Connor* "reasonableness" standard.

USDOJ makes twelve specific Pre-Deployment recommendations, individually addressed below.

Reference to Applicable Constitutional Standards

USDOJ recommends that OCSO's policy include reference to the 4th Amendment, and its interpretation in *Graham v. Connor*—specifically:

- The severity of the alleged crime at issue
- Whether the suspect poses an imminent threat to the safety of officers and/or other
- Whether the suspect is actively resisting or attempting to evade arrest by flight

These factors are clearly described in Wisconsin's DAAT system and are also specifically enumerated on p. 6 of Wisconsin's ECD Manual.

Verbal Warnings Prior to ECD Deployment

USDOJ recommends that policy require a verbal warning prior to ECD deployment, unless exigent circumstances exist or the warning would place an individual at risk. The stated goal of this recommendation is to attempt to gain subject compliance and prepare other deputies to cuff under power.

Wisconsin's DAAT system is a "system of verbalization skills coupled with physical alternatives." It already recommends verbalization as preferable to

physical force and emphasizes the importance of verbalization to effectively communicate with the subject, any partner(s) present, and witnesses.

Flight as Justification for ECD Deployment

USDOJ states that a subject's flight should not be the sole justification for deploying an ECD.

The Wisconsin ECD Manual mirrors this information (p.6), stating that Control Devices are generally inappropriate for people who are merely running away, unless otherwise reasonably justified.

Prohibiting ECD Deployment Against “Passive” Subjects

Although OCSO's policy already classified ECD deployment as appropriate for “active physical resistance²,” USDOJ recommends that OCSO's policy expressly state that ECD “*deployment is appropriate only when encountering ‘level 4 or higher’ resistance and that [ECD] deployment is inappropriate when deputies encounter passive resistance as defined in Levels 1 through 3.*” USDOJ also recommends that policy define “*passive subjects to include those persons who question a deputy's commands in a non-violent and non-threatening manner and persons who are non-violently participating in public protest.*”

Wisconsin's ECD curriculum meets the general USDOJ recommendation that ECD use is generally appropriate for subjects exhibiting “active resistance or its threat” (p.5). Wisconsin's DAAT Student Manual expands upon this, stating:

“...in general, control devices would not be appropriate to use against verbal aggression, against people who are running away, against children and older persons, and against persons engaged in peaceful civil disobedience—unless reasonably justified by the circumstances covered in Approach Considerations.” (p. 41)

Furthermore, Wisconsin's ECD Manual points out preferred responses to passively-resisting subjects (p.7).

However, Wisconsin's DAAT and ECD curriculums teach officers to apply a reasonableness standard, taking into consideration officer-subject factors, circumstances surrounding the incident, etc. It does not specifically prohibit ECD deployment against passive subjects, regardless of other surrounding circumstances, and thus may not strictly adhere to USDOJ recommendations to OCSO.

² OCSO defines “active physical resistance”, level 4, as “Slight to moderate physical harm: a subject makes physically evasive movements to defeat a deputy's attempt at control. This may be in the form of bracing or tensing, attempts to push/pull away or not allowing the deputy to get close to him/her.” OCSO uses Levels 1-6, where Level 6 (“aggravated physical”) justifies deadly force.

However, the USDOJ recommendation prohibiting ECD use against passive subjects—in essence declaring ECD use against passive subjects unreasonable regardless of any other factors—does not allow officers to consider situation-specific information or other factors that determine whether such use of force is reasonable. Thus, although the USDOJ recommendation is *generally* appropriate, it implements a standard stricter than *Graham v. Connor*. The USDOJ recommendation is counter to the reasonableness standard taught throughout Wisconsin’s curriculum, and might expose officers to accusations of acting counter to training when the use of force was otherwise reasonable.

Wisconsin’s DAAT and ECD curriculums already state that passive resistance does not usually warrant use of an ECD. Officers are on notice that ECD use against passive subjects is usually unreasonable. However, Wisconsin’s curriculum gives officers an opportunity to demonstrate how use of an ECD was appropriate in their particular circumstance, and is best left unchanged.

ECD Use Against Handcuffed Subjects

USDOJ recommends prohibiting ECD use against handcuffed or otherwise restrained subjects unless the subject is exhibiting “Level 5 [*Aggressive Physical*] or higher” resistance. USDOJ makes this recommendation while stating “...*despite the reduced risk of danger posed to the deputy or other persons by a subject who is restrained by handcuffs or other means.*” USDOJ further recommends officers be trained in restraint of a subject’s ankles, when encountering a restrained subject engaged in active resistance.

Neither Wisconsin’s DAAT nor ECD curriculum specify the amount of force which may be used against a handcuffed subject. Instead, officers are again expected to apply a “reasonableness” standard.

The USDOJ recommendation attempts to quantify the danger presented by a handcuffed subject. This remote assessment of the danger presented by a handcuffed subject is inappropriate. The USDOJ’s statement that a handcuffed subject poses reduced risk to officers may not always be true. This is addressed in Wisconsin’s DAAT Student Manual (p. 28).

Although ECD use against a particular restrained subject may not be the most appropriate response, a bright line rule does not take into account other factors which may make ECD use reasonable, such as officer-subject factors, situation-specific circumstances, etc. Wisconsin’s reasonableness standard allows officers to take these factors into account.

Taken in its entirety, it appears this USDOJ recommendation is intended to prevent officers from Taser-ing a handcuffed but non-compliant subject into

submission. Instead, USDOJ prefers that officers use ankle restraints to prevent the subject from successfully attacking officers.

Wisconsin's DAAT curriculum does not train the use of the RIPP Restraint™ or other ankle restraints. The use of hobble restraints may be a reasonable and appropriate addition to Wisconsin's DAAT curriculum, as a method of retaining control during the "Transport" phase of Follow-Through Considerations.

ECD Deployments Resulting in Collateral Injury

USDOJ recommends against deployment in hazardous conditions, such as where flammable materials are present or when the subject is in an elevated position where a fall might cause substantial injury or death.

Wisconsin's ECD curriculum specifically warns against ECD use in flammable environments or when the suspect is in an elevated position. It also lists examples of elevated positions where ECD use could be inappropriate.

ECD Deployment Against Suspects Operating Vehicles

USDOJ recommends that policy specifically prohibit the deployment of an ECD against a subject in physical control of a vehicle in motion, absent exigent circumstances.

Wisconsin's ECD curriculum does not specifically prohibit ECD deployment against the driver of a vehicle in motion. There has been at least one case in Wisconsin where an officer used an ECD against the driver of a vehicle after the vehicle was boxed-in. There may also be situations where use of an ECD may be appropriate in these circumstances prior to the use of deadly force.

However, it may be appropriate to add a training point emphasizing that officers must consider the subject's resulting inability to control a vehicle should an ECD be deployed against them.

Disciplinary Action Resulting from Inappropriate ECD Use

OCSO's policy already prohibits ECD use for "extracting evidence or contraband" or in any type of "punitive or reckless manner." USDOJ recommends additional specific examples of inappropriate use, including:

- Needless display of the ECD
- Careless or haphazard muzzle control of the ECD
- Use or threat of use of ECD during an interrogation
- Use of an ECD to awaken a person
- Use of an ECD as a "prod"
- Use of the ECD on a helpless person or an individual with a severe disability

- Careless storage of the ECD
- Failing to report damage to the ECD
- Failing to log out an ECD or ECD cartridge in accordance with department policy

Wisconsin's DAAT and ECD texts do not exhaustively list prohibited situations in which use of force, including an ECD, would be inappropriate. Wisconsin's DAAT curriculum specifies when force may be used (p.1). It lists examples of when force is inappropriate, and states officers may face criminal charges for inappropriate use of force (pp. 1-3). This more general approach ends up being more inclusive and covers more situations than the USDOJ approach.

A training statement regarding safe storage of ECDs may be appropriate, similar to the guidance provided in Wisconsin's Firearms training. This may be considered by the Tactical Advisory Committee.

Children, Elderly, Pregnancy, and Physical Disabilities

OCSO policy requires deputies to "evaluate other options...and use caution before deploying an ECD in elementary schools, on young children, the elderly, females reasonably believed to be pregnant, and individuals with apparent physical disabilities impairing their mobility." USDOJ recommends that policy be amended to expressly state that ECD use on such subjects is "inappropriate absent exigent circumstances" and that such inappropriate uses may result in disciplinary action.

For children and the elderly, Wisconsin's ECD text instructs officers to compare the risk of injury when deploying an ECD against the risk of injury if officers used an alternative force method. This is an objective, reasonable approach to use of force against these vulnerable populations.

For pregnant women, Wisconsin's ECD text instructs avoiding ECD use on females known to be pregnant, when practicable.

Wisconsin's ECD text does not specifically address people with physical disabilities impairing their mobility. This would be addressed in the overall reasonableness standard in use of force by Wisconsin officers, though it could be added to the ECD manual.

Spark Tests

USDOJ recommends a policy requiring a "spark test" prior to each shift in the presence of a supervisor. It also recommends a policy that

- addresses what to do if the ECD fails to fire or fires slowly

- prohibits officers from testing the ECD a second time without supervisory approval
- requires deputies to report all accidental ECD discharges to a supervisor

Wisconsin's ECD curriculum does not require a spark test prior to each shift. This recommendation appears to be brand-specific. Taser™ recommends a spark test before each shift.

The rest of USDOJ's policy recommendations are not appropriate for basic training materials. Instead, they reflect an agency's comprehensive approach to supervision. For example, Wisconsin does not specify maintenance procedures for vehicles, firearms, or other law enforcement tools; whether officers can be trusted to perform required tests; or whether the department has a supervisor available or on-duty to witness something. Thus, USDOJ's recommendation is inappropriate for statewide adoption.

Warning Regarding ECD Use Under Extreme Heat

OCSO trains deputies that ECD cartridges exposed to extreme heat or cold may malfunction. USDOJ recommends that such warnings be included in policy, instructing deputies not to store the ECD or ECD cartridge in vehicles for extended periods of time.

Wisconsin's "Caring for ECD's" section does not address heat or cold. This may be manufacturer-specific (unknown). This recommendation may be brought to the Tactical Advisory Committee for review.

ECD Use and Excited Delirium

USDOJ's letter states, "Studies sponsored by the NIJ suggest that ECW deployment on subjects under the influence of drugs or presenting behaviors associated with [excited delirium] may lead to sudden death."³ USDOJ then recommends informing deputies of the findings of these studies, instruct deputies how to recognize the influence of drugs or excited delirium, and suggest ways to minimize the risks involved.

If the USDOJ statement regarding "sudden death," quoted above, was meant to imply causation, the statement may be exaggerated. [See "*Conclusions and Findings*", p. 19 of this report.] Wisconsin's ECD curriculum includes a lengthy section on "medically significant behavior," including excited delirium. This includes recognizing such behavior and suggested methods to decrease risks to the officer(s) and subject.

³ USDOJ Civil Rights Division letter, p. 9.

Notification of Emergency Medical Personnel

USDOJ recommends that deputies “notify” emergency medical personnel when ECD use is anticipated. USDOJ’s letter does not specify whether medical personnel would then respond to the scene, although such response is implied (or else why notify them?). The USDOJ recommendation appears to apply to all ECD deployments.

Although EMS should be notified as early as possible when officers observe medically significant behavior, routine EMS response is not indicated by any known NIJ research to date. Taken to its logical conclusion, this recommendation could require EMS response to every incident in which use of force is anticipated. This recommendation is inappropriate for statewide adoption in basic training curriculum.

DEPLOYMENT STAGE

Multiple Officers Deploying ECDs

The USDOJ letter states, “...a single cycle of a single ECD deployment should be sufficient to overcome a suspect’s resistance and allow the deputy...to effectuate an arrest.” USDOJ then recommends that, absent exigent circumstances, only one deputy at a time should deploy an ECD against a person.

Wisconsin’s ECD curriculum trains one officer to deploy an ECD while the others prepare to handcuff (p.16).⁴ Though this meets the USDOJ recommendation, it could be made more explicit.

The USDOJ statement regarding ECD effectiveness may not be supported by studies to date. For example, one NIJ study⁵ shows a mean of 1.6-1.8 ECD deployments per subject. The USDOJ statement regarding ECD effectiveness should not be made part of Wisconsin training curriculum.

Providing Cover and Arresting Under Force

USDOJ recommends that OCSO policy should include a “cover deputy” and an “arrest deputy” in addition to the deputy deploying the ECD. USDOJ recognizes

⁴ There may be situations where it would be tactically advantageous to have a second officer ready to deploy an ECD should the first ECD miss or fail to function.

⁵ <http://www.ojp.gov/nij/topics/technology/less-lethal/monitoring-ced-use.htm>

that 3 deputies may not always be available, but that the standard operating procedure “is to include a cover deputy to provide lethal cover to the ECW operator.” USDOJ states that a cover deputy is necessary to protect the ECD operator, who may not be in a position to respond effectively to escalating levels of resistance.

This recommendation may assume ECD is placed higher on the Disturbance Resolution chart. While cover officers with drawn firearms would be appropriate in some situations, they would be inappropriate in others. In fact, unnecessarily drawing firearms may escalate a situation, make weapon retention more difficult, and decrease officer safety. Officers with drawn firearms are also unavailable to assist in handcuffing under power. Thus, this recommendation is rejected.

USDOJ recommends that officers be trained to arrest the subject “under force.” This is addressed on p. 16 and p. 19 of Wisconsin’s ECD manual, although the technique could be made more explicit. It is a required Performance Assessment Task.

Multiple ECD Deployment Cycles

USDOJ recommends policy expressly state an ECD should be deployed for no more than one standard cycle before stopping to evaluate the situation and give commands to the subject. Furthermore, policy should state that the standard five seconds is “often unnecessary” to achieve compliance, which “can often be achieved two to three seconds into the deployment cycle...” USDOJ recommends that the ECD operator reduce the length of the cycle if an arrest team can secure the subject under force. If two cycles have no effect on the subject’s aggressive behavior, the deputy should consider whether the person is suffering excited delirium, whether the ECD is functioning properly, and whether other force options may be appropriate.

Wisconsin’s DAAT curriculum teaches that if a technique is ineffective, officers should disengage and/or escalate. It does not explicitly mention “two cycles.” Officers are expected to assess whether what they are doing is working, and to “assess whether to disengage and/or escalate each time you deliver an additional cycle.”⁶

Wisconsin’s ECD curriculum does not specifically address shortening standard cycles. Wisconsin’s DAAT curriculum demands that ECD use must be reasonable. Attempting to shorten ECD deployments to the “minimum” amount of time required, rather than a “reasonable” period of time, would require the officer to omnisciently know how long the subject needs. If the officer underestimated the length of time required, a second deployment might be required. This would increase the number of ECD exposures against the subject

⁶ *Electronic Control Devices Student Manual, WisDOJ LESB, p. 16.*

and could potentially allow the situation to change and/or escalate to where an ECD might be ineffective.

Proper Use of “Probe Mode” and “Drive Stun Mode”

USDOJ recommends that “drive stun” mode be only used as a secondary option, as it is only a pain compliance method.

Wisconsin’s ECD manual does not specify this. It mentions that ECDs are more effective when the distance between probes is greater. Wisconsin’s ECD curriculum could include that “drive stun” is only a pain compliance method.

POST-DEPLOYMENT STAGE

Proper Restraint Techniques

USDOJ states restraint techniques that impair breathing should not be used.

Neither Wisconsin’s ECD nor DAAT system prohibit “hog-tying.” Page 25 of the ECD manual mentions hog-tying is often prohibited by department policy, as a possible contributing factor to in-custody deaths.⁷

This recommendation could be reviewed by Wisconsin’s Tactical Advisory Committee, perhaps in combination with ankle restraints (as mentioned in “*ECD Use Against Handcuffed Subjects*” in this report).

Medical Evaluation and Monitoring

USDOJ recommends mandatory “post-deployment medical evaluation and monitoring of the subject” as officers usually have no knowledge of the suspect’s health or medical history. This recommendation is “to avoid serious bodily injury or death to the subject” as ECD deployment “...will rarely result in death or serious bodily injury...”. OCSO’s policy only specified medical attention for removal of probes from the face, groin, or breast.

Wisconsin’s ECD manual states medical assistance must be obtained when:

- the subject requests it
- If a person has an adverse reaction to an ECD application
- If the officer observes any other problem or feels that medical assistance is warranted
- projectile embedded in sensitive tissue areas, (neck, face, groin, breast)

⁷ Whether a cause/effect relationship exists between “hog-tying” and in-custody deaths may be disputed.

Wisconsin advises officers to monitor for signs of medically significant behavior, including “excited delirium.” Wisconsin’s DAAT system also teaches officers to “Monitor/Debrief” the subject after any use of force (p.82 of the DAAT Manual), which includes a medical assessment and reassessment for medically significant behavior. Absent the subject’s request or findings by the officer, mandatory medical evaluation by EMS or hospital personnel is not required.

USDOJ’s recommendation to have every ECD deployment subject be medically evaluated by EMS or hospital personnel is unsupported by NIJ studies (see “*Conclusions and Findings*”, p.19 in this report) and is inappropriate for statewide adoption. Individual departments may adopt stricter standards if they choose.

Supervisor Response to ECD Incidents

USDOJ recommends a supervisor be required to respond to all ECD deployments as soon as practicable.

This is a department-specific requirement and inappropriate for statewide adoption. Many departments do not have a supervisor available for immediate response.

Supervisor’s Initial Review of ECD Deployment

USDOJ recommends that the on-scene supervisor:

- interview the deputy, subject, and other witnesses
- complete a use-of-force report
- photograph all evidence (including impact points of projectiles before they are removed from the subject)
- collect the AFID confetti

Furthermore, the supervisor would also

- ensure the ECD cartridge and probes are submitted into evidence
- secure and review in-car video
- download the ECD deployment data

Requiring a supervisor to perform these tasks is a department-specific requirement and inappropriate for general adoption in Wisconsin, as not all departments will have a supervisor available for response.

The recommendations regarding interview of subjects and witnesses, completion of a use-of-force report, and gathering of evidence are appropriate but may be beyond the scope of basic training curriculum. These skills could be evaluated for possible addition to the DAAT curriculum as they may be appropriate for all uses of force.

Supervisor ECD Training

USDOJ recommends that supervisors receive ECD training in order to conduct their ECD deployment review, described above.

“Use of Force Supervisor” is a training class available in Wisconsin that addresses supervisory issues. Although such training may be valuable, it is not appropriate for basic training curriculum.

TRAINING

GENERAL TRAINING COURSE RECOMMENDATIONS

Develop Agency ECD Training

USDOJ recommends OCSO supplement the manufacturer's training materials with agency-specific materials, including scenario-based deployment and arrest drills. Materials should be distributed to deputies during training.

Wisconsin has developed such training material through its ECD curriculum.

Seriousness and Professionalism

USDOJ recommends that ECD training be conducted in a serious and professional manner.

Wisconsin supports such an approach to training.

Inclusion of Agency ECD Policy

USDOJ recommends that ECD training include all areas of the agency's ECD policy.

Wisconsin's ECD manual includes most of the material suggested by USDOJ, as described herein. Wisconsin's statewide materials do not include agency-specific policy.

SPECIFIC OCSO TRAINING COURSE RECOMMENDATIONS

Enhanced Pre-Deployment Training

USDOJ recommends that ECD training includes pre-deployment decision-making, including specific examples of appropriate and inappropriate ECD deployment.

Pre-deployment decision-making is a key component of Wisconsin's DAAT and ECD curriculum. Wisconsin's ECD curriculum contains specific examples of factors to consider when evaluating whether ECD deployment is appropriate and provides examples of appropriate and inappropriate ECD deployment.

Scenario-Based Training Exercises

USDOJ recommends incorporating scenario-based training, specifically including the following skills:

- give verbal warning to subject & other officers
- work with other officers as a team
- provide cover and how to arrest under power
- deploy a standard cycle and assess the situation
- recognize symptoms of mental illness and medically significant behavior
- stage EMS when ECD deployment is predictable

Wisconsin's ECD training includes scenarios that address these topics. Each listed skill, except "stage EMS", is addressed in at least one of these Performance Assessment Tasks: #5 (*Deploy an ECD*), #6 (*Loading/Reloading Cartridges*), #7 (*Use of Force*), #8 (*ECDs and Emotionally Disturbed Persons*), and #9 (*Cuffing Under Power*). "Stage EMS" is not evaluated, although it may be an appropriate evaluation point in Performance Assessment Task #8.

Supervisor Review of ECD Use

USDOJ recommends a supervisor respond to all ECD deployments. This recommendation states training dedicated to supervisor response and incident review should be developed.

Wisconsin does not mandate supervisor response; thus this training material is not developed. Training as a "use-of-force supervisor" is available through technical colleges in the state.

Risks of Deploying ECD Against a Subject

USDOJ recommends that instructors explain the risks involved in deploying an ECD, specifically against subjects under the influence of drugs or exhibiting medically significant behavior. USDOJ implies that use of an ECD may increase the risk of injury and/or death in these incidents.

USDOJ also recommends against instructors minimizing ECD risks, as it develops a “misunderstanding of the potential dangers involved in ECD deployment...”

These recommendations seem to be founded in the belief that ECD deployments may increase the risk of suspect injury. The reverse has been found in some studies, such as that conducted by the Madison Police Department, among others.

Wisconsin’s ECD curriculum includes risk assessment, such as evaluation for medically significant behavior, to address subjects under the influence of drugs or exhibiting medically significant behavior. See also p. 19, “*Conclusion & Findings*” in this report.

ACCOUNTABILITY

RECOMMENDATIONS FOR OCSO PSD⁸ RELATED TO ECD USE

Orange County's "Professional Standards Division" ("PSD") utilizes an "Early Identification System" ("EIS") to track instances of use of force.

Incorporation of ECD Data Into EIS

USDOJ recommends ECD use be tracked within EIS to generate alerts for unusually high rates of deployments, similar to what is done for other uses of force.

This is an agency-specific recommendation and unsuitable for statewide adoption.

Use-of-Force Form for ECD Use

USDOJ recommends that OCSO revise its use-of-force form to include information specific to ECD deployments.

Wisconsin does not mandate a use-of-force form. Agencies are free to use whatever form they wish, if any.

Automatic PSD Review of Certain ECD Cases

USDOJ recommends that PSD automatically investigate any ECD case where the subject dies or suffers serious bodily injury, or in cases where the subject experiences prolonged or excessive cycling of the ECD, the ECD appears to have been used in a punitive or abusive manner, or there is substantial deviation from OCSO policy.

This is an agency-specific recommendation and inappropriate for Wisconsin statewide adoption.

⁸ "Professional Standards Division", i.e. Internal Affairs

Download of ECD Data Following Deployment

USDOJ recommends a download of the ECD data following each deployment.

This is an agency-specific recommendation and inappropriate for Wisconsin statewide adoption. Furthermore, not all ECD weapons can record or download such data.

Random Audits of ECD Deployment Data Downloads

USDOJ recommends random audits comparing download data to use-of-force reports, with investigation of any discrepancies.

This is an agency-specific recommendation and inappropriate for Wisconsin statewide adoption.

Statistical Information Regarding ECD Deployments

USDOJ recommends that PSD collect statistical data including date, time and location of incident; subject compliance with or without deployment and number of cycles; descriptive information about subject, witnesses, and deputy; type and brand of ECD; level of resistance displayed; whether weapon was possessed; type of crime involved; whether deadly force would have been justified; type of clothing worn; point of impact; distance from deputy; whether cover deputy present; whether cuffed under power; whether drive stun employed; environmental conditions during incident; injuries to deputy or subject; medical care provided; and whether subject under influence of drugs or medically significant behavior.

Although this information may be valuable, collection of this information is up to the individual agency and is not governed by Wisconsin training curriculum.

Civilian Complaints Regarding ECD Deployment

USDOJ recommends that all civilian complaints regarding ECD use be investigated appropriately, regardless of the method by which they are received. Furthermore, OCSO should consider printing a “tear-off postcard” with the address of PSD. Additionally, officers should be notified in writing when the complaint is received and resolved, and the complainant should be regularly updated regarding the status of the complaint.

The internal affairs procedures of a department are beyond the training scope of ECD curriculum. Though law enforcement agencies are required to have citizen complaint procedures under state statute 66.0511(3), the content of such procedures is not dictated.

CONCLUSION & FINDINGS

CIVIL RIGHTS DIVISION INTERPRETATION OF USDOJ STUDIES

The USDOJ Civil Rights Division's letter to Orange County refers to National Institute of Justice studies evaluating the risk of ECD use. The most current, in-depth study⁹ by the USDOJ's NIJ finds:

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.

The purported safety margins of CED deployment on normal healthy adults may not be applicable in small children, those with diseased hearts, the elderly, those who are pregnant and other at-risk individuals. The use of a CEDs against these populations (when recognized) should be avoided, but may be necessary if the situation excludes other reasonable options.

Preliminary review of deaths following CED exposure indicates that many are associated with continuous or repeated discharge of the CED. There may be circumstances in which repeated or continuous exposure is required, but law enforcement officers should be aware that the associated risks are unknown. Therefore, caution is urged in using multiple activations of CEDs as a means to accomplish subdual.

Another NIJ study¹⁰ found the following:

While most (99.7 percent) people who are exposed to CEDs suffer no injuries or mild injuries only, a small number do suffer significant and potentially lethal injuries. Police officers and agencies should be aware of these potential injuries and address them when they do occur.

In this study, three subjects—0.3% of the 962 subjects studied—were admitted to the hospital for moderate or severe injuries. Two of these injuries were only indirectly related to ECD use; one moderately severe injury had an “uncertain” relationship to ECD use. Two in-custody deaths occurred subsequent—not

⁹ <http://www.ojp.gov/nij/topics/technology/less-lethal/incustody-deaths.htm>

¹⁰ <http://www.ojp.gov/nij/topics/technology/less-lethal/monitoring-ced-use.htm>

immediately following—ECD use; both were determined to be unrelated to ECD use.

These NIJ studies should be monitored for their further findings, but they do not seem to support a belief that ECD use has a significant risk of death or serious injury. Other studies, such as that of Madison PD, demonstrate Taser™ use has reduced suspect and officer injuries.

WISCONSIN CURRICULUM FINDINGS

Wisconsin is compliant with most of the recommendations made by the USDOJ. USDOJ recommendations that require stricter standards than that dictated by *Graham v. Connor* are not currently in place, nor are they recommended for adoption by Wisconsin.

ACTION PLAN

It may be appropriate to review Wisconsin training curriculum in the areas shown below. Such review will include consideration and review of the recommendations by the Tactical Advisory Committee. (Page numbers shown below refer to the page of this report.)

- Whether the use of ankle or hobble restraints should be incorporated into Wisconsin's DAAT curriculum ("*ECD Use Against Handcuffed Subjects*," p.5)
- Whether ECD use against the driver of a vehicle in motion should be explicitly cautioned ("*ECD Deployment Against Suspects Operating Vehicles*," p.6)
- Whether training materials regarding safe storage of ECDs should be adopted ("*Disciplinary Action Resulting from Inappropriate ECD Use*," pp.6-7)
- Whether ECD use against persons with limited mobility deserves specific mention in the ECD Manual ("*Children, Elderly, Pregnancy, and Physical Disabilities*," p.7)
- Whether ECDs are subject to malfunction in extreme heat or cold ("*Warning Regarding ECD Use Under Extreme Heat*," p.8)
- Should multiple-officer deployment be made more specific? ("*Multiple Officers Deploying ECDs*," p.9)
- Should the "Cuff Under Power" section of Wisconsin's curriculum be made more explicit? ("*Providing Cover and Arresting Under Force*," pp.9-10)
- Whether Wisconsin's ECD Manual should mention that "drive stuns" are merely a pain compliance method ("*Proper Use of "Probe Mode" and "Drive Stun Mode*," p.11)

- Whether hog-tying should be flatly prohibited in Wisconsin's DAAT curriculum ("*Proper Restraint Techniques*," p.11)
- Whether investigation of use-of-force incidents should be addressed in the basic training curriculum ("*Supervisor's Initial Review of ECD Deployment*," p.12)
- Whether staging EMS should be added as an evaluation criterion in Performance Assessment Task #8 ("*Scenario-Based Training Exercises*," p. 15)

USDOJ CIVIL RIGHTS DIV. LETTER



U.S. Department of Justice
Civil Rights Division

SYC:DHW:GG:WEN
DJ 207-17M-4

*Special Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530*

August 20, 2008

Via FedEx and U.S. Mail

Sheriff Kevin Beary
Orange County Sheriff's Office
2500 West Colonial Drive
Orlando, FL 32804

Re: United States Department of Justice Investigation of
the Orange County Sheriff's Office Use of Conducted
Energy Devices

Dear Sheriff Beary:

As you know, the Civil Rights Division of the Department of Justice has been conducting an investigation of the Orange County Sheriff's Office ("OCSO"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. We would like to take this opportunity to express our appreciation for the cooperation we have received thus far from the OCSO.

At the beginning of our investigation, we committed to provide the OCSO with technical assistance, where appropriate, to improve OCSO practices and procedures and ensure compliance with constitutional rights. In this letter, we convey our recommendations regarding OCSO's written policies, training, and accountability processes pertaining to the use of conducted energy devices ("CEDs").¹ We view the technical assistance provided below as recommendations and not mandates. These recommendations were developed in close consultation with our police practices consultants and follow the productive dialogue we had with deputies under your command. We strongly urge the OCSO to closely review and consider these technical assistance recommendations in revising its policies and procedures. We hope this letter will assist in our mutual goal of ensuring that OCSO

¹ We note that OSCO policies use the term electronic control weapons ("ECWs") to describes CEDs.

provides the best possible law enforcement services to the people of Orange County. We look forward to continued cooperation toward this goal.

To date, we have reviewed relevant OCSO policies, audited OCSO training classes, participated in ride-alongs, and conducted interviews with a cross-section of OCSO command staff, supervisors, and deputies. We also spoke with a local community representative and the chairman of the Orange County Citizens' Review Board.

Important aspects of our fact-gathering process remain outstanding, most notably reviewing documents related to specific use of force incidents. This process is ongoing and we hope to conclude our review shortly. Therefore, this letter is not meant to be exhaustive, but rather focuses on recommendations we can provide at this stage of our investigation.

I. Constitutional Standard of Review

Pursuant to 42 U.S.C. § 14141, the United States is authorized to initiate a civil investigation into allegations regarding systemic violations of the Constitution by law enforcement agencies. As stated above, the investigation of OCSO is focused solely on an alleged pattern or practice of excessive force in OCSO's ECW use.

In Graham v. Connor, 490 U.S. 386, 394-95 (1989), the Supreme Court held that claims of excessive force are to be judged by Fourth Amendment standards.² See also Kesinger v. Herrington, 381 F.3d 1243, 1248 (11th Cir. 2004); Garrett v. Athens-Clarke County, 378 F.3d 1274, 1279

² The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

(11th Cir. 2004); McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1244 (11th Cir. 2003); Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002); Lee v. Ferraro, 284 F.3d 1188, 1197 (11th Cir. 2002). Applying Fourth Amendment standards to claims of excessive force requires a court to determine whether the force employed to effect a particular seizure was "reasonable." Graham, 490 U.S. at 396.

In determining whether the use of force was reasonable, a court must carefully balance the nature and quality of the intrusion on the suspect's Fourth Amendment guarantees against that of the countervailing governmental interests at stake. Id.; Kesinger, 381 F.3d at 1248 n.3; Vinyard, 311 F.3d at 1347; Lee, 284 F.3d at 1197. The Graham Court specified three factors for a court to consider when balancing these competing interests: (1) "the severity of the crime at issue;" (2) "whether the suspect poses an immediate threat to the safety of the officers or others;" and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396; see also Kesinger, 381 F.3d at 1248 n.3; Garrett, 378 F.3d at 1279; Vinyard, 311 F.3d at 1347; Lee, 284 F.3d at 1197-98.

The Court in Graham noted that the reasonableness of a seizure "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396; see also Kesinger, 381 F.3d at 1248; Garrett, 378 F.3d 1279; McCormick, 333 F.3d at 1244. Moreover, the "reasonableness" analysis is an objective one. The inquiry is whether the officers acted objectively reasonable "in light of the facts and circumstances confronting them, without regard to their underlying intent or motive." Graham, 490 U.S. at 397; see also Kesinger, 381 F.3d at 1248; Garrett, 378 F.3d 1279; Vinyard, 311 F.3d at 1347; Lee, 284 F.3d at 1198 n.7. That is to say, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Graham, 490 U.S. at 397; Lee, 284 F.3d at 1198 n.7 (quoting Graham).

Additionally, a claimant in the Eleventh Circuit is required to prove that the officer employed greater than de minimis force in effecting the seizure. "The application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." Nolin v. Isbell, 207 F.3d 1253, 1257-58 (11th Cir. 2000) ("[A] minimal amount of force and injury. . . will not defeat an officer's qualified immunity in an excessive force case."). At a minimum, this will require a

showing of greater force and injury than should be expected in a typical arrest. Nolin, 207 F.3d at 1258 n.4.

II. Policies and Procedures

Written policies are the primary means by which law enforcement agencies communicate their standards and expectations to their officers. Accordingly, it is essential that the OCSO's policies be comprehensive, up-to-date, and consistent with relevant legal standards and contemporary law enforcement practices. While OCSO's current ECW policies³ contain accurate information, we recommend that OCSO provide additional guidance on three stages of ECW use: pre-deployment; deployment; and post-deployment. We also recommend that OCSO review its ECW policy annually, and update the policy as necessary.

A. Pre-Deployment Stage

In the pre-deployment stage, a sound ECW policy should provide deputies with the information necessary to make appropriate decisions regarding ECW deployment. Such information should include clearly stated factors to aid the deputy in determining whether the circumstances are appropriate for ECW deployment, as well as precise rules regarding circumstances under which the ECW deployment is inappropriate. The following twelve ECW policy recommendations will assist in providing OCSO deputies with the information necessary to make appropriate decisions regarding the deployment of the ECW:

1. Reference to Applicable Constitutional Standards

While both OCSO's ECW and use-of-force policies currently state that "personnel only use that level of force objectively reasonable to perform their official duties," see OCSO G.O. 8.1.6 (2); 8.1.8 (2), the policies do not refer to, nor explain, constitutional standards regarding uses of force under the Fourth Amendment. We recommend that the OCSO include reference to the Fourth Amendment, which mandates that ECW deployment be reasonable in light of the facts and circumstances surrounding the deployment. Such a determination requires a balancing of the physical force exerted upon the subject through the deployment of

³ It is our understanding that OCSO's policy regarding ECW comprises two OCSO General Orders: General Order 8.1.6 (OCSO's general use-of-force policy) effective date February 8, 2008, and General Order 8.1.8 (OCSO's specific policy on the use of ECWs) effective date March 4, 2008.

the ECW against such factors as the severity of the crime, the immediate threat to the safety of the deputy and others posed by the subject, and the level of resistance demonstrated by the subject. See Graham v. Connor, 490 U.S. 386, 394-96 (1989); Appendix C.

2. Verbal Warnings Prior to ECW Deployment

We recommend that OCSO policy require a verbal warning prior to ECW deployment, unless exigent circumstances exist or the verbal warning would place an individual at risk. Such warnings, recommended by our expert consultants and in accordance with recognized best available practices in this emerging field, will alert surrounding deputies of the impending ECW deployment and may achieve suspect compliance, eliminating the need to deploy the ECW. This procedure will allow the deputies to take proper safety precautions to "secure [the subject] under power"⁴ or upon conclusion of the ECW cycle.

3. Flight as Justification for ECW Deployment

While a subject's flight may be considered "active physical resistance" leading an deputy to deploy an ECW, we recommend that OCSO clarify its policies to make clear that a subject's flight should not be the sole justification for deploying the ECW.

Prior to deploying the ECW against a fleeing subject, the deputy should consider such factors as:

- (a) the severity of the offense;
- (b) any immediate threat to the safety of the deputy or others posed by the subject; and,
- (c) the ability of the deputy to safely effectuate the arrest without ECW deployment.

While OCSO's current ECW policy⁵ contains "subject factors" to be considered by the deputy in making the decision to deploy the ECW such as "seriousness of crime committed by subject," and "whether the subject can be recaptured at a later time," it does not,

⁴ OCSO policy defines "secure under power" as "a technique used to secure a subject during the activation cycle." OCSO G.O. 8.1.8 (3) (D).

⁵ See OCSO G.O. 8.1.8 (4) (C) (1) (a) (2) (a.1) and (a.8).

however, expressly instruct deputies that a subject's flight should not be the sole justification for ECW deployment.

Although the deployment of the ECW against a fleeing subject may be reasonable under certain circumstances, the mere act of fleeing the presence of law enforcement, without more, does not create circumstances under which a deputy's deployment of the ECW would be considered a reasonable use of force. We recommend that in accordance with the recognized best available practices and the recommendations of our expert consultants, OCSO revise its policies to clarify this distinction to prevent potential unlawful ECW use.

4. Prohibiting ECW Deployment Against "Passive" Subjects

While the OCSO's use-of-force matrix appropriately classifies ECW deployment at Level 4, requiring "active physical resistance,"⁶ OCSO policy should expressly state that ECW deployment is appropriate only when encountering Level 4 or higher resistance and that ECW deployment is inappropriate when deputies encounter passive resistance as defined in Levels 1 through 3. We also recommend that OCSO policy define "passive subjects" to include those persons who question a deputy's commands in a non-violent and non-threatening manner and persons who are non-violently participating in public protest.

5. ECW use against handcuffed subjects

OCSO policy allows ECW deployment "on handcuffed, or otherwise secured subjects who present a Level 4 active physical resistance." OCSO G.O. 8.1.8 (4) (C) (5). This policy authorizes identical force responses against both restrained and unrestrained individuals despite the reduced risk of danger posed to the deputy or other persons by a subject who is restrained by handcuffs or other means. Therefore, we recommend that OCSO revise its ECW policy to prohibit ECW deployment against handcuffed or otherwise restrained subjects unless the subject is exhibiting Level 5 or higher resistance.⁷

⁶ See Appendix A.

⁷ In addition, OCSO should train deputies to consider use of force options other than the ECW, such as a ripp restraint (a strong velcro cloth) that can be used to secure a subject's ankles, when encountering a restrained subject engaging in Level 4 resistance or higher.

6. ECW Deployments Resulting in Collateral Injury

Current OCSO ECW policy states that the ECW should not be deployed "in any environment where potentially flammable, volatile, or explosive material (gasoline, natural gas, propane, flammable chemical sprays, etc.) are present." OCSO G.O. 8.1.8 (4)(C)(6). In addition, OCSO ECW policy should generally prohibit deployment of the ECW in an environment where the subject's fall may cause substantial injury or death. The policy should list several examples of such environments (e.g., an elevated location such as rooftop or building ledge; standing in or near water or other drowning hazards; or climbing a fence or wall).

7. ECW Deployment Against Suspects Operating Vehicles

We recommend that OCSO ECW policy specifically prohibit the deployment of the ECW against a subject in physical control of a vehicle in motion, absent exigent circumstances. In such situations, successful ECW deployment would incapacitate the driver, making it impossible for him to maintain control of a vehicle and increasing the likelihood of injury to the deputy, subject, or other persons.

8. Disciplinary Action Resulting from Inappropriate ECW Use

While current OCSO ECW policy prohibits its use for "extracting evidence or contraband" or in any type of "punitive or reckless manner," OCSO G.O. 8.1.8 (4)(C)(3) and (4), we recommend that OCSO supplement these prohibitions with several other specific examples, including but not limited to:

- (a) needless display of the ECW;
- (b) careless or haphazard muzzle control⁸ of the ECW;
- (c) using the ECW or threatening to use the ECW during an interrogation;
- (d) using the ECW to awaken a person;
- (e) using the ECW as a "prod";

⁸ The term "muzzle" refers to the portion of the ECW where the air cartridge connects to the weapon's barrel.

(f) using the ECW on a helpless person or an individual with a severe disability;

(g) careless storage of the ECW;

(h) failing to report damage of the ECW; and,

(i) failing to log out an ECW or ECW cartridge in accordance with OCSO policy.

We note that the current OCSO ECW policy states: "Deputies shall evaluate other options (e.g., verbal commands, hands on techniques, OC spray) and use caution before deploying an ECW in elementary schools, on young children, the elderly, females reasonably believed to be pregnant, and individuals with apparent physical disabilities impairing their mobility." OCSO G.O. 8.1.8 (4)(C)(1)(a.1). We recommend that OCSO amend its ECW policy to state expressly that the use of the ECW on such subjects is inappropriate absent exigent circumstances. We further recommend that OCSO ECW policy expressly warn deputies that such inappropriate uses of the ECW may result in disciplinary action.

9. Spark Tests

Testing ECWs allows deputies to identify malfunctions prior to deployment in the field, allows supervisors to observe the deputies' control over the weapon and provide instruction as necessary, and provides an additional measure of accountability over a department-issued weapon. While OCSO deputies are trained to test their ECWs before each shift, the OCSO ECW policy does not currently require such testing. We recommend that OCSO ECW policy require deputies to conduct a pre-operation check (or "spark test") of the ECW prior to each shift and in the presence of a supervisor (at the conclusion of shift briefing, for example).⁹

In addition, OCSO policy should: (1) set forth procedures for addressing ECWs that fail to fire or fire slowly; (2) prohibit deputies from testing the ECW a second time without a supervisor's approval; (3) require deputies to report all

⁹ Spark Tests should include removing the cartridge of the ECW; pointing the ECW in a safe direction; and running a full five-second cycle.

accidental ECW discharges to a supervisor (to ensure accurate auditing of the ECW downloaded data).¹⁰

10. Warning Regarding ECW Use Under Extreme Heat

During training, the OCSO warns deputies that exposure of ECW cartridges to extreme heat or cold may cause malfunctions. We recommend that the OCSO include such warnings in its ECW policies, instructing deputies not to store the ECW or ECW cartridges in vehicles for extended periods of time.

11. ECW Use and "Excited Delirium"

Studies sponsored by the National Institute of Justice¹¹ suggest that ECW deployment on subjects under the influence of drugs or presenting behaviors associated with the condition of "excited delirium"¹² may lead to sudden death. As we learn more about the effects of ECW deployment on the human body, risks of such deployment may be eliminated, refined, or supplemented. Nevertheless, we recommend that OCSO's policy inform deputies of the findings of these studies, instruct deputies how to identify behaviors associated with the influence of drugs or the condition of "excited delirium," and suggest precautions to be taken to minimize the risks involved.¹³

¹⁰ We address ECW data downloading in Section III. A. 4 of this letter.

¹¹ See Appendix B for a listing of ECW studies.

¹² A subject said to be in a state of "excited delirium" will exhibit extreme agitation, bizarre and/or violent behavior, imperviousness to pain, exceptional strength and endurance, inappropriate nudity, extreme paranoia, and/or incoherent shouting.

¹³ Some precautions that may minimize risk are: (1) deploying an arrest team with a larger number of deputies; (2) staging medical personnel to respond to the scene prior to the deployment of the ECW when practicable; or (3) ceasing ECW deployment and moving to a different means of force if it becomes clear that several ECW cycles have not effected the subject's aggressive behavior.

12. Notification of Emergency Medical Personnel

While the deployment of the ECW rarely results in death or serious bodily injury, because such incidents can and do occur OCSO should take proper medical precautions whenever practicable. Therefore, we recommend that OCSO's ECW policy instruct deputies to notify emergency medical personnel when it is anticipated that the deputy will deploy the ECW against a subject.

While we recognize that many law enforcement encounters involving the ECW occur rapidly and unexpectedly, in some cases ECW deployment is predictable. Notification of emergency medical personnel is particularly important when ECW use is anticipated involving a subject: (1) under the influence of drugs; (2) exhibiting behaviors associated with "excited delirium;" (3) apparently suffering from a mental illness; or (4) posing a threat to him or herself, but not to others, as in some cases of attempted suicide.

B. Deployment Stage

In the deployment stage, OCSO policy should provide deputies with the technical instruction necessary for successful ECW deployment and apprehension of the subject with minimal risk to both the deputy and subject. The following four recommendations will assist in providing OCSO deputies with the technical instruction necessary for such deployments:

1. Multiple Deputies Deploying ECWs

When properly deployed, a single cycle of a single ECW deployment should be sufficient to overcome a suspect's resistance and allow the deputy and accompanying deputies to safely effectuate an arrest. Absent exigent circumstances, simultaneous ECW deployment by multiple deputies increases the risk of excessive force against the subject. Moreover, it is more effective to have one deputy deploy the ECW and have the other deputies arrest the subject, than to have multiple deputies deploying the ECWs against the subject. Therefore, we recommend that OCSO policy state that, absent exigent circumstances, no more than one deputy at a time should deploy an ECW against a person.

2. Providing Cover and Arresting Under Force¹⁴

While many arrests are often made by a single deputy, when practicable, each ECW deployment should include a "cover deputy" and an "arrest deputy" (or "arrest deputies") to secure the subject under force. While circumstances do not always allow for multiple deputies on the scene, OCSO ECW policy should nevertheless instruct that the standard operating ECW procedure is to include a cover deputy to provide lethal cover to the ECW operator. Cover deputies should be armed with OCSO-approved firearms appropriate for the situation. A cover deputy is necessary to protect the ECW operator who may not be in a position to respond effectively to escalating levels of resistance.

Furthermore, OCSO ECW policy should instruct deputies on arresting the subject under force. We recommend that OCSO ECW policy specifically instruct deputies to effectuate the arrest on the command of the ECW operator and that the arresting deputies follow standard procedures for effectuating an arrest, which include securing their weapons in their holsters prior to approaching the subject.

3. Multiple ECW Deployment Cycles

Currently, OCSO ECW policy states: "Deputies shall attempt to secure the subject under power as soon as practical, when submission/ compliance cannot be achieved through a minimal number of activation cycles." OCSO G.O. (4)(C)(8). We recommend the following revisions to this portion of the ECW policy.

First, the policy should expressly state that deputies should deploy the ECW for no more than one standard cycle before stopping to evaluate the situation. During the assessment period, deputies should clearly give commands to the subject to achieve compliance. As subjects are often unable to hear or respond to commands during the cycling of the ECW, it is ineffective to give commands while deploying the ECW, as deputies may mistakenly interpret the subject's failure to respond to commands as active physical resistance.

¹⁴ The term, "under force" means to control or secure the subject and to effectuate an arrest of the subject upon deployment of the ECW, which does not necessarily conclude with the termination of the ECW cycle.

Second, the policy should also clearly state that one standard cycle (a full five seconds) is often unnecessary to achieve compliance. Compliance can often be achieved two to three seconds into the deployment cycle, especially with an arrest team prepared to secure the subject under force. In the same manner, if (after assessing the situation) the deputy determines that a second cycle is necessary, the deputy should restrict the duration of the second cycle to only the time necessary for the subject to comply and be safely placed under arrest. If a second cycle has no effect on the subject's aggressive behavior, the deputy should consider whether the ECW is functioning properly, whether the subject is exhibiting behaviors associated with "excited delirium," and whether other use-of-force options may be appropriate.

4. Proper Use of "Probe Mode" and "Drive Stun Mode"

Current OCSO policy currently allows ECW use in a "touch stun" or "drive stun mode" in which, the deputy removes the cartridge and presses the unit against the subject's body. OCSO G.O. 8.1.8 (4)(C)(9). Unlike the ECW's "probe mode" or "dart mode," which force compliance through an involuntary contraction of muscles disrupting neuro-motor control, "drive-stun mode" forces the subject to comply solely through infliction of pain. As different subjects exhibit varying levels of pain tolerance, the "drive stun mode" is not as effective in controlling the subject as the "probe mode." Because the "drive stun mode" is more likely to lead to excessive force than the "probe mode," we recommend, in accordance with recognized best practices and the recommendations of our expert consultants, that deputies be instructed to use the "drive stun mode" only as a secondary option.

C. Post-Deployment Stage

In the post-deployment stage, OCSO policy should provide deputies with a set of steps to be taken after ECW deployment to enhance the safety of the deputy and subject, and to ensure accountability of proper ECW deployment. The following five recommendations will assist in providing OCSO deputies with such options:

1. Proper Restraint Techniques

Absent exigent circumstances, a deputy should not employ restraint techniques that will impair a subject's respiration. We recommend that OCSO incorporate such a provision into its post-deployment ECW policies because, while the effects of the

ECW on the human respiratory system are not fully and conclusively understood at this time, some studies have suggested that ECW use leads to death of individuals restrained in such a manner.¹⁵

2. Medical Evaluation and Monitoring

While ECW deployment will rarely result in death or serious bodily injury, such risks do exist both immediately following deployment and some time after deployment. During most ECW deployment incidents, the deputy has no knowledge of the subject's health or medical history, therefore, to avoid serious bodily injury or death to the subject, we recommend that OCSO revise its ECW policy to require post-deployment medical evaluation and monitoring of the subject. The procedure for the medical evaluation and custodial monitoring should be set forth in OCSO's ECW policy, which is currently silent on medical attention to the subject but for the removal of ECW probes that have struck the subject's face, groin, or breasts.

3. Supervisor Response to ECW Incidents

The presence of a supervisor at the scene following an ECW deployment ensures accountability regarding pre- and post-deployment procedures. The supervisor on the scene can also assist in the arrest-related events at the scene by conducting a first-hand review of the use-of-force. OCSO does not currently require supervisors to respond to all incident scenes as soon as practicable where a deputy deploys an ECW. We recommend that the OCSO revise its policies to include such a requirement.

4. Supervisor's Initial Review of ECW Deployment

We recommend that OCSO ECW policy instruct supervisors to conduct an initial review of any ECW deployment by a deputy. This initial review should include, but not be limited to:

- (a) the supervisor interviewing the deputy, the subject, and other witnesses;
- (b) completing a use-of-force report;
- (c) photographing all relevant evidence, including impact points of the ECW probes before and after removal from the subject; and,

¹⁵ See studies listed in Appendix B.

(d) collecting a sample of the AFID confetti¹⁶ from the ECW cartridge.

Furthermore, the supervisor should ensure that the deputy place the spent ECW cartridge and probes into evidence control; secure and review any in-car video if so equipped; and download the ECW deployment data to assess the time of the deployment, the number of deployments, and the duration of each deployment. If upon the supervisor's review, a violation of law or policy is suspected, the supervisor's use-of-force report should be immediately forwarded to OCSO's Professional Standards Division for investigation.

5. Supervisor ECW Training

An ECW policy that requires that supervisors respond to all incident scenes where a deputy deploys an ECW, and conduct an initial review of the deployment, must also require that supervisors undertake ECW training. We recommend that OCSO ECW policy expressly state this requirement.

III. Training

Effective leadership of a law enforcement agency must prioritize training as a critical component for effective and constitutional ECW use. Generally, we find that OCSO's ECW training course contains accurate information, but does not provide complete and adequate ECW training. Through proper training, deputies will learn to make appropriate decisions, and develop the skills necessary, to effectively deploy the ECW during the course of their law enforcement duties. Accordingly, we recommend that OCSO consider the following recommendations:

A. General Training Course Recommendations

1. Develop OCSO ECW Training

OCSO conducts its ECW training course almost exclusively from the training materials provided by the ECW manufacturer. While it may be appropriate to employ these materials when discussing the basic functions and operation mechanics of the

¹⁶ AFID ("Anti-Felon Identification Device") confetti is expelled from the ECW cartridge when the ECW is deployed. An alpha-numeric identifier unique to the ECW cartridge is printed on each piece of confetti. See OCSO G.O. 8.1.8 (3)(B).

ECW, the materials are inadequate for other aspects of ECW training. OCSO should create its own training materials; scenario-based deployment and arrest drills; and testing procedures to best develop the ECW knowledge and skills of its deputies as tailored for the needs of OCSO. Training materials should be distributed to the deputies during the training course, and deputies should be encouraged to take notes in the materials during the course.

2. Seriousness and Professionalism

The ECW is a weapon capable of inflicting great pain, and in rare instances, contributing to death or serious bodily injury. Accordingly, OCSO deputies should be trained to respect the ECW as a weapon, and such training begins with the discipline instilled in the deputies during the ECW training course. We recommend that, unlike the ECW training we observed in November 2007, future ECW training courses be conducted with the same level of seriousness and professionalism as that of a firearms training course.

3. Inclusion of OCSO ECW policy

OCSO training briefly addresses ECW policy, specifically highlighting appropriate environments for ECW use and subjects upon whom ECWs should not be deployed. OCSO ECW training instructors also briefly address the subject and deputy factors to be considered prior to ECW deployment. While the emphasis on such factors is important, OCSO ECW training instructors should review every aspect of the OCSO ECW policy during the ECW training course. This recommendation includes ECW training instructors reviewing the policy issues discussed throughout this letter. For example, OCSO ECW training instructors should review such policy aspects as: prohibiting ECW deployment against passive subjects; deployment of the ECW against handcuffed or otherwise restrained subjects only when the subject is employing Level 5 resistance; the risks associated with ECW deployment, specifically against subjects under the influence of drugs or exhibiting behaviors associated with "excited delirium;" and the role of supervisors in reviewing ECW deployments. Such training may be conducted adequately through a lecture format that allows deputies to ask questions and discuss policy details.

B. Specific OCSO ECW Training Course Recommendations

1. Enhanced Pre-Deployment Training

We recommend that the OCSO enhance its ECW training regarding pre-deployment decision-making. First, OCSO should incorporate a brief legal training into the ECW training course. Training instructors should review and discuss Fourth Amendment standards and application of such standards when effectuating an arrest and using force against a subject. Second, we recommend that training instructors discuss the pre-deployment aspects of the OCSO ECW policy, as well as the policy recommendations already suggested in this letter.¹⁷

2. Scenario-Based Training Exercises

While we note that OCSO ECW training provides appropriate training on the functional deployment of the ECW (i.e. "aim and fire"), we recommend incorporating training exercises on other steps in the ECW deployment stage. In addition to enhancing instruction on proper pre-deployment decisions, OCSO should incorporate practical scenario-based training exercises to drill deputies on ECW deployment skills. For example, deputies should be instructed, drilled, and tested on how to:

- (a) give a verbal warning to the subject and other deputies;
- (b) work together with other deputies as a team;
- (c) provide cover, and how to arrest under force;
- (d) deploy a standard cycle and assess the situation;

¹⁷ For example, OCSO ECW training instructors should discuss what type of subject action constitutes Level 4 resistance, and what type of actions by a restrained subject will constitute Level 5 resistance. Moreover, we note that while OCSO ECW training instructors currently discuss some inappropriate uses of the ECW, OCSO should expand such discussions to include additional specific examples of inappropriate uses of the ECW, such as deploying the ECW against a subject in control of a vehicle, or fleeing from a consensual encounter. Training instructors should also provide actual examples of appropriate (as well as inappropriate) uses of the ECW provided by OCSO deputies that have properly (or improperly) deployed the ECW to effectuate an arrest.

(e) recognize symptoms of mental illness and "excited delirium"; and,

(f) stage emergency medical services in cases where ECW deployment is predictable.

3. Supervisor Review of ECW Use

We recommended above that OCSO ECW policy require a supervisor to respond as soon as practicable to the scene and conduct an incident review when a deputy deploys an ECW. We further recommend that OCSO not only incorporate that recommendation into its policy, but also develop training dedicated to supervisor response and incident review. The course material should cover such aspects of supervisor response and incident review as:

(a) conducting interviews with the deputy, the subject, and other witnesses;

(b) completing a use-of-force report;

(c) photographing all relevant evidence, including impact points of the ECW probes before and after removal from the subject; and,

(d) collecting a sample of the AFID confetti from the ECW cartridge.

4. Risks of Deploying ECW Against a Subject

We recommend that OCSO ECW training instructors explain the risks involved in deploying the ECW, specifically against subjects under the influence of drugs or exhibiting behaviors associated with "excited delirium." We encourage OCSO ECW training instructors to discuss recent studies regarding the ECW's effect on the human body. Currently, the OCSO ECW training course does not address such risks, but rather, instructors emphasize the relatively low rates of serious injuries caused by ECW use.

Moreover, OCSO ECW instructors spend an inordinate amount of time offering explanations for ECW-related deaths. During an OCSO ECW training, we observed instructors state, "the ECW can't hurt you, it won't hurt you," and "such a small amount of electricity has no effect on the body," and "the ECW absolutely will not hurt someone with a pacemaker." Such statements provide deputies with a misunderstanding of the potential dangers

involved in ECW deployment, and as a result, can increase the potential for injury and excessive force against a subject. Training instructors should provide examples from actual cases in which subjects received serious injuries as a direct or indirect result of an ECW deployment.

IV. Accountability

Accountability of proper ECW use is critical to maintain a high level of professionalism within a law enforcement agency and to ensure the trust and respect of the community. OCSO's Professional Standards Division ("PSD") is well-equipped to handle the accountability issues related to ECW use, and we recommend that OCSO utilize the PSD to track and address such accountability. OCSO's PSD currently employs an Early Identification System¹⁸ ("EIS") to track instances of uses of force. Essentially, the EIS is a computer database designed to identify those deputies with a higher than normal record of using force in the course of their law enforcement duties. OCSO's EIS is a capable and effective tool for the PSD to manage the accountability of OCSO's ECW use. Accordingly, we propose the following recommendations related to accountability of ECW use:

A. Recommendations For OCSO PSD Related to ECW Use

1. Incorporation of ECW Data into the EIS

While OCSO PSD currently records ECW-use incidents in its EIS database, it does not track the data through EIS alert functions and, therefore, does not identify deputies with an unusually high rate of ECW deployments. As OCSO uses the EIS alert functions for all other uses-of-force, it should include ECW use in its alerts. We strongly urge OCSO to implement this recommendation to identify deputies with a high rate of ECW deployments, and take necessary actions (e.g. training, counseling, discipline) to appropriately address the conduct. Implementation of such practices will improve OCSO's ECW accountability, as well as increase the community's confidence in OCSO's professionalism.

¹⁸ The EIS is defined by OCSO as "a proactive, non-disciplinary system intended to enhance awareness by employees, supervisors and managers of potential employee problems before serious events occur." See OCSO G.O. 285 (3) (A).

2. Use-of-Force Form For ECW Use

Following each ECW deployment, OCSO deputies are required complete the Use of Defensive Tactics/K-9 Form, and copies of the form must be forwarded to the PSD. See OCSO G.O. 8.1.8 (4)(E). This form was not specifically designed to address ECW deployments. A use-of-force form designed specifically for ECW use will allow OCSO to record ECW data and statistics. OCSO can then review and analyze the ECW data collected through the use-of-force forms and make informed decisions regarding ECW policy, training, and accountability.

We recommend that OCSO create an ECW use-of-force form that records information such as, but not limited to:

- (a) the serial number of the ECW and ECW cartridge;
- (b) information regarding the deployment (e.g. unholstered only, unholstered and deployed and hit or missed target);
- (c) distance from subject; environment, physical and weather conditions of the location;
- (d) number of cycles deployed;
- (e) whether a drive-stun was employed;
- (f) a description of the resistance demonstrated by the subject;
- (g) statements from the subject;
- (h) injuries; and,
- (i) names of witnesses.

3. Automatic PSD Review of Certain ECW Cases

While a supervisor should conduct an incident review of every ECW deployment, certain serious circumstances should automatically trigger an independent PSD investigation. For example, in cases where the subject dies or suffers serious bodily injury after deployment of the ECW, or in cases where: a subject experiences prolonged or excessive cycling of the ECW; the ECW appears to have been used in a punitive or abusive manner; or there appears to be a substantial deviation from OCSO ECW policy.

4. Download of ECW Data Following Deployment

All OCSO ECWs are equipped to record the date and time of each deployment, as well as the duration of each deployment cycle. This data can be downloaded from the ECW into a computer for examination and analysis. Despite the existence of this technology, OCSO only downloads this valuable information once a year during the deputy's annual inventory at OCSO Material Control/Supply. Moreover, OCSO makes no use of the data it does download. We recommend that OCSO PSD download the data from an ECW after every ECW deployment. By downloading and analyzing the data after each deployment, OCSO will produce a more accurate record of the ECW incident. Moreover, supervisors and PSD can use the downloaded data to compare against the deputy's use-of-force and arrest reports to ensure accuracy and identify errors, unreporting, or false reporting. Additionally, downloading data following each deployment will clear the ECW's memory storage and prevent loss of data that is currently being erased when the ECW computer memory records over itself upon reaching its data storage capacity limit.

5. Random Audits of ECW Deployment Data Downloads

We recommend that PSD conduct random audits of the ECW deployment data. The audits should compare the downloaded data to the deputy's use-of-force reports (or a use-of-force report completed by the supervisor). Discrepancies within the audit should be addressed and appropriately investigated.

6. Statistical Information Regarding ECW Deployments

Analysis of statistical information will allow OCSO to identify trends regarding ECW use. Identification of the ECW-use trends will better equip OCSO leadership to make informed decisions to better provide law enforcement services to the community. Accordingly, we recommend that OCSO PSD collect the following statistical information:

- (a) date, time, and location of the incident;
- (b) subject compliance with or without deployment and number of deployment cycles;
- (c) descriptive information about the subject, witnesses, and the deputy;
- (d) the type and brand of ECW deployed;

- (e) the level of resistance displayed by the subject;
- (f) whether the subject possessed a weapon, and whether the deputy was aware of the subject's weapon at the time of the deployment;
- (g) the type of crime involved;
- (h) a determination of whether deadly force would have been justified;
- (i) the type of clothing worn by the subject;
- (j) the point of impact on the subject;
- (k) the distance of the deputy from the subject;
- (l) whether a cover deputy was employed;
- (m) whether a deputy or deputy team arrested the subject under force;
- (n) whether a drive stun was employed;
- (o) the environment, physical, and weather conditions of the location of the incident;
- (p) injuries to the deputy or subject;
- (q) the medical care provided to the subject; and,
- (r) whether the subject was under the influence of drugs or exhibiting behaviors associated with "excited delirium."

7. Civilian Complaints Regarding ECW deployment

We recommend that all civilian complaints regarding ECW use be forwarded to OCSO PSD, assigned a tracking number, and investigated appropriately. Currently, it appears that OCSO will process civilian complaints differently based upon how the civilian made the complaint (i.e. in writing, directly to PSD, at the scene of the incident or at the OCSO front desk). All ECW-related civilian complaints should be processed through PSD regardless of the circumstances surrounding the initial complaint.

OCSO should further consider printing a complaint form with a "tear-off postcard" and PSD's mailing address. Furthermore,

OCSO should notify the complainant in writing upon receipt of the complaint and upon resolution of the complaint. In addition, OCSO should update the complainant on progress of the investigation at regular intervals.

V. Conclusion

Please note that this letter is a public document. It will be posted on the Civil Rights Division's website. While we will provide a copy of this letter to any individual or entity upon request, as a matter of courtesy, we will not post the letter on the Civil Rights Division's website until 10 calendar days from the date of this letter.

As noted above, as the OCSO revises its policies and procedures, we strongly urge the OCSO to closely review and consider the technical assistance recommendations contained in this letter. We hope that these recommendations will be received in the spirit of assisting in our mutual goal of ensuring that the best possible law enforcement services are provided to the people who reside in and travel through Orange County. We look forward to continued cooperation toward this goal. Where possible, we would be happy to provide examples of policies and procedures used by other law enforcement agencies that might address some of the issues we have raised in this letter.

Sincerely,

/s/ Shanetta Y. Cutlar

Shanetta Y. Cutlar
Chief
Special Litigation Section

APPENDIX A
USE-OF-FORCE MATRIX

The use-of-force matrix is a tool employed in both OCSO's use-of-force and ECW policies. The use-of-force matrix is used to define the various levels of resistance a deputy may encounter when confronting a subject during the course of law enforcement duties, and the corresponding levels of a deputy's response to the subject's resistance. See Table 1, below. The matrix consists of six levels of resistance and six corresponding levels of response. The highest level of resistance, for example, is Level 6 or "aggravated physical resistance," defined as "attacking movements with or without a weapon with the apparent ability to cause death or great bodily harm." The corresponding level of response for Level 6 is deadly force. On the other end of the matrix, the lowest level of resistance is Level 1 or "presence," defined as being "on the scene, with accompanying suspicious activity." The corresponding level of response for Level 1 is "command presence," which includes the deputy employing an authoritative tone of voice and body language. According to OCSO's use-of-force policy, the use-of-force matrix "is meant to be used as a guideline for a deputy to select effective, reasonable, and legal force options in a verbal or physical encounter." See OCSO G.O. 8.1.6 (4) (A) (1).

TABLE 1: OCSO Use-Of-Force Matrix

		ORANGE COUNTY SHERIFF'S OFFICE USE OF FORCE MATRIX																	
		Use of Force - Levels of Resistance																	
Resistance Levels	6 Aggravated Physical	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓						
	5 Aggressive Physical	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓						
	4 Active Physical	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓						
	3 Passive Physical	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓						
	2 Verbal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓						
	1 Presence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓						
<p><small>Checked areas represent suggested, acceptable, beginning response levels. Any response in an unchecked area requires explanation. Refer to the explanation for each level of resistance, response and the determining factors when articulating the explanation.</small></p>		Presence	Verbal/Command Presence	Dialogue	Verbal Director	Touch	Restraint Devices	Chemical Agent	Transporters	Take Downs	Pain Compliance	PEACE	Concussion	Weapon/ECW	Control Moves	Restraint	Seizure	Deadly	
		1	2		3			4		5	6								
		Response Levels																	

APPENDIX A (continued)
USE-OF-FORCE MATRIX

OCSO's current ECW policy places the deployment of the ECW at Level 4 on the use-of-force matrix, authorizing ECW deployment only when the deputy encounters a minimum of "active physical resistance." Specifically, the policy states that "the ECW may be used when Level 4 (Active Physical Resistance) or higher resistance is encountered." See OCSO G.O. 8.1.8 (4) (C) (1). OCSO's use-of-force policy defines "active physical resistance" as: "Slight to moderate physical harm: a subject makes physically evasive movements to defeat a deputy's attempt at control. This may be in the form of bracing or tensing, attempts to push/pull away or not allowing the deputy to get close to him/her." Id. at (3) (c).

APPENDIX B
ECW studies commissioned
by the National Institute of Justice

1. **Deaths following electro-muscular disruption.** NIJ's foremost study on ECWs selected a panel of physicians to conduct mortality reviews on a number of deaths that followed ECW deployment. The medical panel is examining incident data from police reports. Police data are being combined with findings from an autopsy, toxicological analysis, medical records of symptoms the subjects experienced after ECW deployment, and care received afterward.
2. **Reconstructing the chain of events surrounding an incident.** NIJ is augmenting medical data by reconstructing scenarios in which an ECW was deployed. NIJ is partnering with the International Association of Chiefs of Police (IACP) to conduct field research to support the reviews.
3. **ECW's effect on internal organ systems.** A study at the University of Wisconsin is assessing the effect of electric current as it moves through the body. The study models the effects of an ECW on internal organs, including the heart. In a related effort, the University of California in San Diego and New Jersey Medical School are studying the ECW's effect on metabolic pathways in the body, as well as the cardiac and respiratory systems.
4. **Less-lethal monitoring system.** Wake Forest University in North Carolina, is piloting a monitoring system where NIJ-funded researchers and medical personnel accompany victims of an incident where a less-lethal device was applied to a hospital. Researchers will gather data for each case attended.
5. **Examining "excited delirium."** Researchers at Wake Forest University are also examining the condition of "excited delirium."

For more information on these studies, please visit:
<http://www.ojp.gov/nij/topics/technology/less-lethal/conducted-energy-devices.htm>.