



## Electronic Control Devices: Legal Resources

Legal resources for the legal aspects of electronic control devices (ECDs)

# TASER<sup>®</sup> Electronic Control Devices (ECDs) -- Force Update

Michael Brave, Esq., M.S.

National/International Litigation Counsel, TASER International, Inc.

Member/Manager, LAAW International, LLC

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)



---

*Mattos v. Agarano*, --- F.3d ----, 2011  
WL 4908374 (C.A.9 (Hawai'i) 2011)

- No “real” surprises
- The 9<sup>th</sup> Circuit replaces the officers’ perceptions with their own
- Avoid using force on anyone who is not an “immediate threat” of harm
- Do not have people hurt at the end of the encounter
- Consider Alternates: less risk of injury

---

*Mattos v. Agarano*, --- F.3d ----, 2011  
WL 4908374 (C.A.9 (Hawai'i) 2011)

Person must be given a reasonable opportunity to comply with LEO's directives prior to each X26 ECD drive-stun application

“These (3 X26 ECD drive-stun) tasings in such rapid succession provided no time for Brooks to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply.”

(Some courts may require greater justification)

---

# *Mattos v. Agarano*, --- F.3d ----, 2011 WL 4908374 (C.A.9 (Hawai'i) 2011)

For each X26 ECD drive stun to gain volitional compliance, LEO:

1. must not have a reasonable perception that the person is not capable of volitional compliance to commands,
2. must reasonably perceive person is “actively resisting,”
3. must give a warning of the imminent application of force,
4. must give the person a reasonable:
  - time “to recover from extreme pain” experienced,
  - opportunity to “gather herself,”
  - opportunity to “consider her refusal to comply,”

---

*Mattos v. Agarano*, --- F.3d ----, 2011 WL  
4908374 (C.A.9 (Hawai'i) 2011)

5. the duration of time between each X26 ECD drive-stun application (according to *Mattos*) must be > 36 seconds, and

6. LEO needs to include in report that before each X26 ECD drive-stun used to attempt to gain the person's volitional compliance LEO followed these guidelines.

7. Quantum of force will likely be different for multi-cartridge ECD drive stuns

---

# A “Few” Basic Numbers

Deaths:

~ 1 death per 15,385 arrests

~ 1 death per 700 people going to jail

~ 1 death per 600 uses of pepper spray

~ 1 death per 323 arrests using weapons

~ 1 LEO death annually per 5,521 LEOs

ECDs used ~ 1,000 times per day

---

# Absolute ECD FACT!!!!

As of October 22, 2011, no peer reviewed medical, scientific, electrical, or engineering literature, learned treatise, or position paper by a reputable organization, has found, stated, or concluded that a TASER X26 ECD causes cardiac capture, cardiac arrest, ventricular tachycardia, ventricular fibrillation, or lethal cardiac consequences in a human.



---

# Let Me Be Real Clear!!!!

- Nothing said is in any way to infer that officers should unreasonably accept risks
- Usually using objectively reasonable force on a person who is reasonably perceived as an intentional immediate threat is not an issue
- Officers have to do what they can to not have people hurt at the conclusion of an encounter
- Training and knowledge are the keys



---

# 2011 Legal Update

- Questions for you?
- 2011 Society's View of Force
- A Few Numbers and What They Mean
- Use-of-Force Issues Update
- Importance of POV Video/Audio Evidence
- Beware Spoliation of Evidence
- ECD Use Reducing Force Claims
- Considerations to Avoid ECD Excessive Force

Liability



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)

---

# Questions for you .....

I suggest that you may not want to keep:

- plaintiffs' attorneys employed, and in the style of living to which they strive to become accustomed
- US DOJ (misnomer) Civil Rights Division attorneys employed
- ACLU and AI attorneys and staff employed

---

# Questions for you .....

For every (what is the value of “x”)

- “x” arrests “1” will involve use of force?
- “x” arrests “1” person will die?
- “x” arrestees who go to jail “1” will die?

In the US annually how many people

- are current illicit drug abusers (“CIDA”)?
- are classified with substance dependence or abuse?
- go to the hospital ED because of drugs?
- are in serious psychological distress (“SPD”)?
- operate a vehicle under influence of alcohol/drugs?



---

# Questions for you .....

## *“Who do “you” deal with daily?”*

Every year in the US, how many people:

- die from a person DUI of alcohol or drugs?
- die from drugs?
- die from alcohol?
- die from suicide?
- die from firearms?
- die from either drugs, alcohol, suicide, or firearms?



---

# 2011 Legal Update – Bottom Line

- Documentation is VERY important.
- Avoid “putting officers on notice” of unnecessarily inflated standards
- Train investigators to properly investigate incidents and arrest-related deaths
- Have clear and unassailable evidence of force use (to avoid he said/she said)
- Do NOT allow evidence to fail to be captured or collected or to be spoiled (lost)

---

# 2011 Legal Update – Bottom Line

Officers must be trained to:

- use least injurious (risk/benefit analysis) force
- make least injurious force-option decisions based on:
  - knowledge/understanding of:
    - “quantum of force” decision making
    - physiological, metabolic, and serious psychological distress identifiers
  - identified collected intel
- use verbal de-escalation skills where appropriate
- use crisis-intervention techniques where appropriate
- generate optimal force-use recordings



---

## Avoid the costly mistakes that others have made

- Decision to use force & chosen force option
- Record full incident from LEO's perspective
- Create complete documented time record
- Use ONLY issue competent investigators/MEs
- Capture all available evidence
- Ensure complete and adequate investigation
- Resolve evidence conflicts
- All opinions are legally, medically, scientifically supported to reasonable degree of certainty?



---

# 2011

# Basic Force

# Concepts/Expectations



---

# 2011 – Society's View of Force

(Officers in untenable force decision predicaments)

- Should use least amount of force
- Should use least injurious force option
- Should be more patient and understanding
- Should be tolerant of people acting out
- Should know difference between person who:
  - is an intentional immediate threat of harm
  - is fleeing from (serious physical harm) offense
  - needs medical or mental health crisis assistance(rather than committing crimes)



---

# 2011 – Society's View of Force

(Officers in untenable force decision predicaments)

- Should not injure a person who is not
  - an intentional immediate threat of harm, or
  - fleeing from a (serious physical harm) offense
- Subject should not be injured at end of encounter with law enforcement

---

# 2011 – Society’s View of Force

(Officers in untenable force decision predicaments)

- Officers are often judged on injury outcomes – not force used
- Officers should try to not injure a person who is not an “intentional” immediate threat of harm

---

# 2011 – Society’s View of Force

(Officers in untenable force decision predicaments)

Non-violent (not “immediate threat”) people should not be injured – people who need to be controlled who are:

- Acting as they are due to medical crisis
- Acting due to serious psychological distress (“SPD”)
- Acting due to drug and/or alcohol abuse
- Subject who is simply questioning authority
- Subject who does not understand the police encounter
- Subject who is passively resisting
- Subject is simply not cooperating

---

# Basic Force Numbers



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)

---

# Basic Numbers:

## Annually:

- 1 LEO death per 5,521 officers
- 1 LEO injured per 56 officers
- 1 LEO assaulted per 18 officers

## Averages over last decade:

- 900,000 LEOs
- 163 LEO deaths per year
- 16,041 LEO injuries per year
- 50,069 LEO assaults per year

---

# Basics (of force) Numbers:

(US) Societal problems influencing force response increases):

- **Current Illicit Drug Abusers (“CIDA”) increasing:**
  - (2009) 21,800,000 CIDA (8.7% of population age 12+)
  - (2004) 19,100,000 CIDA (7.9% of population age 12+)
- (2009) 22,000,000 (8.9% of population age 12+) classified with substance dependence or abuse in the past year based on DSM-IV criteria
- **Drug caused hospital emergency room visits annually:**
  - (2007) 1,883,272
- **People in serious psychological distress (“SPD”) annually:**
  - (2007) 23,400,000 SPD (10.9% of adults)
  - (2004) 21,400,000 SPD ( 9.9% of adults)

---

# Basics (of force) Numbers:

(US) Societal problems influencing force response increases):

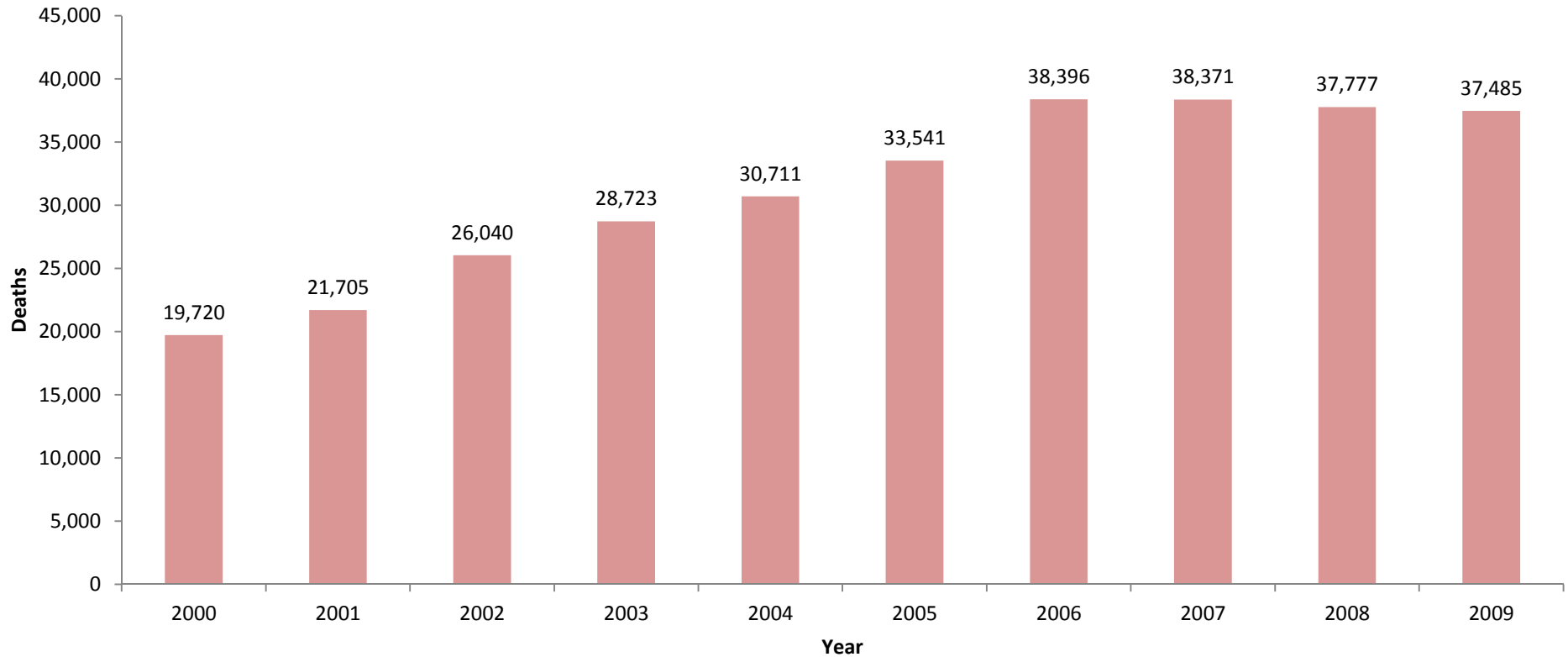
- **Drunk or Drugged Driving (2006-2009):**
  - **30,600,000 DUI alcohol in past year**
    - 13.2% of 16+ population
    - Highest rate - Wisconsin – 23.7% of population
  - **10,100,000 DUI illicit drugs in the past year**
    - 4.3% of 16+ population
  - **(2008) 32% of all traffic related deaths—nearly 12,000 deaths—were the result of alcohol-related crashes**





# Basics (of force) Numbers:

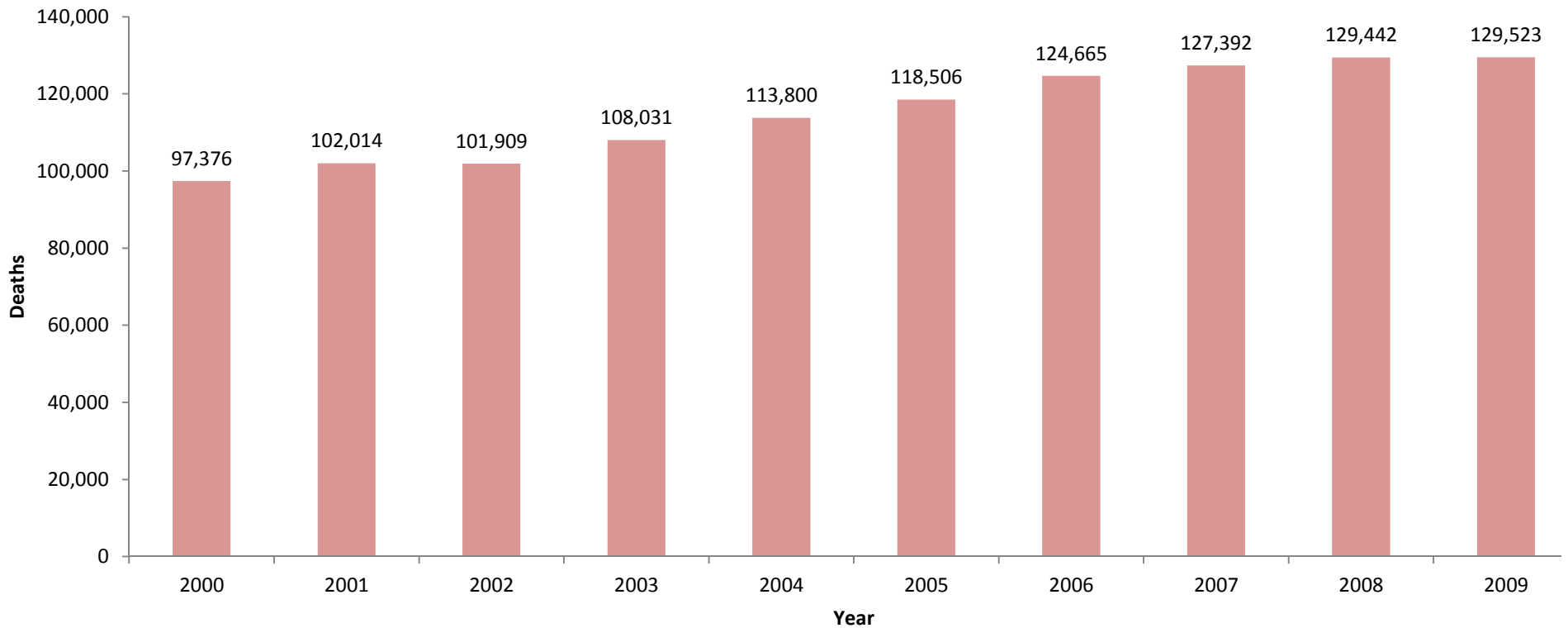
US Drug Deaths 2000 through 2009  
(312,469 deaths)



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)

# Basics (of force) Numbers:

US Deaths 2000 through 2009  
Drugs, Suicide, Firearms, and Alcohol  
(1,023,135 Deaths)



---

# Basics (of force) Numbers:

## LEO Face-to-Face Encounters :

- (2008) 40,000,000 (17% of population)
- (2005) 43,500,000 (19% of population)
- (2002) 45,000,000 (21% of population)

## LEO Used or Threatened Force:

- (2008) 560,000 (1.4% of face-to-face encounters)
- (2005) 695,000 (1.6% of face-to-face encounters)
- (2002) 675,000 (1.5% of face-to-face encounters)

---

# Basics (of force) Numbers:

**(2008) Force:**

- ~ 280,000 (50%) were pushed or grabbed
- ~ 140,000 (25%) had a gun pointed at them

**Felt Force Was Excessive**

- (2008) 414,000 (74%)
- (2005) 577,680 (83%)

**Reported Being Injured by LEOs' Force**

- (2008) 106,400 (19%)

---

# Basics (of force) Numbers:

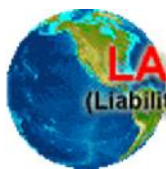
About 2.1% of all arrests involved LEO use of weapons

Pre-Arrest/Arrest Risk of Death:

- risk of death is 6.5 deaths per 100,000 arrests or
- 1 death per 15,385 arrests

If 2.1% of arrests involve use of LEO weapon

- with 1 death per 15,385 arrests
- then 2.1% of 15,385 arrests is 323 arrests with weapons
- thus, by these numbers the rate of arrestee death is 1 death per 323 LEOs' uses of weapons in arrest



---

## Basic Arrest Related Death (“ARD”) Numbers

- Pepper spray – approximately 1 in 600 will die
- Positional asphyxia – in a pepper spray study in 7 out of 63 “clear cut” cases of suspect death the death was attributed to positional asphyxia

---

## Death Rate in Jails

- (2000-2007) Local Jails (in-custody deaths):
  - 8,110 deaths in local jails from 2000 through 2007
  - 1 death per 658-709 inmates (depending on year)
- Rates of jail in-custody deaths:
  - Local Jails: 141-152 deaths per 100,000 inmates
  - Nevada: 247 deaths per 100,000 inmates
  - National average: 250 deaths per 100,000 inmates
  - Western states: 219 deaths per 100,000 inmates
- Ontario: 211.5 deaths per 100 000 inmates

---

# Basic Legal Concepts (Constitutional Law)



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)



---

# Basic Legal Concepts

- Plaintiffs can allege (almost) anything
- Plaintiffs' primary goals:
  - To get attorneys' fees (42 USC § 1988)
  - To get in front of a jury
    - Know some judges will not follow the law
    - Know some judges are anti-law enforcement
    - Know some judges/juries emotion over law or logic
  - To extort a settlement
  - Beware the anti-law enforcement crusader

---

# Basic Legal Concepts

- Burden of proof in a civil case:
  - by a preponderance of the evidence
  - more likely than not
  - 50.1 percent
- Summary judgment motion (MSJ):
  - court “MUST” take the facts as offered by the MSJ opposing party
    - UNLESS incident recording trumps party’s stated facts  
(*Scott v. Harris*, USSC)

---

# Basic Legal Concepts

- Qualified immunity
  - Protection from suit
  - Two part test:
    - Constitutional right was violated
    - Law had put officer on notice that what he did was in violation of the constitution (excellent example is *Bryan v. MacPherson* (November 30, 2010))
- Money:
  - Unlimited damages (for practical purposes)
  - 42 USC § 1988 attorneys fees (since 1976)



---

# Basic Legal Concepts (Law Enforcement Force)



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)

---

# Use-of-Force Issues Update

- Numerous Force Paradigms Are Changing
- Qualified Immunity Narrowing
- Morphing More Restrictive Force Guidelines
- Scrutiny of Officer's Decision to Use Force
- Importance of Optimal Force Reporting

---

# Qualified Immunity Narrowing

- Qualified Immunity – Putting officers on notice
- What puts officers on notice is broadening
  - Historically – legal precedent
  - 2011 includes
    - Department Policies
    - IACP Model Policies
    - PERF Guidelines
    - DOJ/CRD Mandated (so-called) “Best Practices”
    - TASER Training Materials
    - Others
- Beware – “scientifically proven” or “not proven” bases

---

# Constitutional Force Standards

- Eighth Amendment:
  - Applies to convicted and incarcerated
  - Cruel and Unusual Punishment Standard
- Fourth Amendment:
  - Applies to free persons who are “seized”
  - “Objective reasonableness” Standard
- Fourteenth Amendment:
  - Applies to pre-trial detainees and “catch all”
  - Shock the Conscience (little time to decide/act)
  - Deliberate Indifference (time to decide/act)

---

# Basics (of force):

- Any force option can be abused
- It is the person who abuses the force option - not the force option
- “Almost every use of force, however minute, poses some risk of death.” *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280, n.12 (11th Cir. 2004).
- “Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Graham v. Connor*, 490 U.S. 386, 396 (1989).



---

# Morphing More Restrictive Force Guidelines

- Do not abuse your authority
- Risk/benefit force standard
- Officer's objective for using force
- "Quantum of force" analysis

---

# Morphing More Restrictive Force Guidelines

Constitutional standard purpose:

- (former) do not intentionally abuse your government endowed authority
  - “[T]he Fourth Amendment addresses ‘misuse of power,’ not the accidental effects of otherwise lawful conduct.” *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *i*, 243 F.3d 157 (4th Cir. 2001).
- (present 4<sup>th</sup> Amendment) risk/benefit standard

---

# Morphing More Restrictive Force Guidelines

4<sup>th</sup> Amendment Risk/Benefit Force Standard:

**“[I]n judging whether [officer’s] actions were reasonable, we must consider the risk of bodily harm that [officer’s] actions posed to [suspect] in light of the threat to the public that [officer] was trying to eliminate.”**

*(Scott v. Harris, 550 U.S. 372, 383 (2008))*

---

## Risk Benefit Standard

**Officer must weigh the foreseeable risks of harm posed by his use of force against his reasonable perceptions of the subject's actions or behaviors the officer is attempting to stop or control.**

---

# Basic Legal Concepts

(Explaining 4<sup>th</sup> Amendment  
Force Standard)



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)

---

# Why is the person in need of a force response?

- Violent criminal
- Fleeing person
  - Serious (physical injury) offense
  - Non-serious (physical injury) offense
- Health/mental crisis (perceived as victims):
  - Person in Serious Psychological Distress (SPD)
  - Drug abuser (under influence of drugs/alcohol)
  - Excited delirium / neuroleptic malignant syndrome
  - Other (diabetic, thyroid imbalance, seizures)



---

# What is your objective for using force?

- **Defensive Force** - Subject reasonably perceived as an immediate threat of harm
- **Capture Force** - Subject fleeing from (serious physical harm) crime and officer is justified in tackling subject on the current surface
- **Restraint Force** - Force to facilitate restraint (including turtling)
- **Compliance Force** - Force to gain volitional compliance to commands
- **Distraction Force** – To facilitate restraint of cognitively impaired person



---

# “Quantum of Force”

“*Quantum of force*” basically means:

- the reasonably foreseeable (to the officer) effects and injuries of a chosen force option under the totality of the circumstances of the force option use



---

# “Quantum of ECD Force”

## Probe Deployment

- Probes up to ½” into body
- Pain: excruciating, intense pain felt throughout entire body
- NMI
- ECD commandeers person’s muscles and nerves
- Temporary paralysis
- Causes uncontrolled fall

## Drive Stun Deployment

- Pain: only transitory, localized
- No NMI
- Non-incapacitating effect
- Without incapacitating muscle contractions
- Without significant lasting injury
- Has markedly different physiological effects than probe mode

---

# “Quantum of ECD Force”

## Probe Deployment

ECD in general “is more than a non-serious or trivial use of force but less than deadly force”

- Intermediate and significant quantum of force
- ECD use must be justified by a strong government interest
- ECD higher force than OC or nunchakus (*Forrester*)

## Drive Stun Deployment

Less-than-intermediate quantum of force

- Amount of force more on par with pain compliance techniques



---

# 4<sup>th</sup> Amendment – Dart Mode

## (Department Policy Guidance)

ECD in dart mode constitutes an “intermediate, significant level of force that must be justified by the governmental interest involved, \*

ECD against a non-violent misdemeanor who appeared to pose no immediate threat and who was given no warning was unconstitutional excessive force #

---

# “Quantum of ECD Force”

To use ECD in probe mode:

Officer must reasonably perceive subject to be:

- an immediate threat of harm/injury or
- fleeing or flight risk from (serious physical harm) offense
- need to consider necessity of warning

Be aware of foreseeable risks of secondary injury, especially falls from heights or on hard surfaces

---

# Officer's Decision to Use Force

- Rapid, objective determination of degree of “immediate threat”
- Importance of training for intel gathering and actions to be taken based upon that intel
- Understanding of changing force standard paradigms

---



**DANGER**

Do “NOT” confuse or substitute  
Constitutional force threshold standards  
with selected usually more restrictive  
judicial case extracted force  
considerations or policy restrictions!!!!  
- “Shall” versus “Should”



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)

---

# Force Standards

(Do NOT confuse legal force thresholds with “*perfection*” practices)

- 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:
  - Best force decision based upon information
  - 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 officer’s perspective)

---

What is Your Force Management Objective?  
Consider encouraging/training – “*perfection standards*” full knowledge possible minimum injury force practices? (Not to be confused with, or substituted for, Constitutional force standards or threshold(s).)

Some legal case based “*perfection standards*” considerations likely do not reflect federal Constitutional force standards or thresholds in numerous jurisdictions.

Meaning, these “*perfection*” considerations are (in many circumstances) considerably more restrictive than applicable federal Constitutional rights standards.

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



---

# What is Your Force Management Objective?

Consider if officers actions could be perfectly scripted in the 20/20 vision of hindsight – the “*Perfection Standard*” ... which is a “*should*” paradigm – NOT a Constitutional standard.

How would you use it? (if at all ....?)

Force Decisions and Reporting:

Court Decisions Lessons Learned

Approaching the Hollywood Scripted 20/20 Hindsight –

“*Perfection Standard*” in training and guidance.



---

# 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)

---

# ECD Basic Force Analysis



**LAAW International, Inc.**  
(Liability Assessment & Awareness International, Inc.)

---

## *Recognition of Important Role of ECD to Protect*

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

*\* (Bryan, 9<sup>th</sup> Circuit, 11/30/10)*

---

# (Usually) Not a Problem ...

ECD use in probe mode:

If

- officer is justified in using force and the person is an objectively perceived immediate threat of harm to officers or others, or
- the person is trying to flee from a (serious physical harm) offense (and the officer would be justified in tackling the person and the specific surface),

then reasonably limited ECD use is almost always legally justified.

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

---

## 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 (settled for \$85,000)
- (Cert. denied 05/18/09) *Buckley v. Haddock*, 292 Fed.Appx. 791 (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); (qualified immunity upheld by 301 Fed.Appx. 704 (C.A.9 (Wash.) Nov. 25, 2008)
  - Fleeing residential burglar (5 ECD uses, first 3 ok)

---

# *Bryan v. MacPherson*

- *Bryan v. MacPherson*:
  - 630 F.3d 805 (C.A.9 (Cal.), November 30, 2010), superseding 608 F.3d 614 (C.A.9 (Cal.) 06/18/10)
    - superseding 590 F.3d 767 (C.A.9 Cir. 12/28/09)
  - Seat belt violation, failed to comply, clenched fists, profanities, acting out.
  - Probe deployment while standing on pavement
  - ECD deployment objectively **UN**reasonable
  - Officer granted qualified immunity

---

## *Bryan v. MacPherson*

“We recognize the important role controlled electric devices like the [TASER X26 ECD] can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike. We hold only that the X26 [ECD] and similar devices constitute an intermediate, significant level of force that must be justified by “ ‘a strong government interest [that] compels the employment of such force.’ ”





---

## A few ECD cases to consider:

- *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir.(Minn) Jul 22, 2009)
  - Female car passenger, beer tankards at feet, husband (driver) arrested for OMVWI.
  - Settled for \$200,000.
- *Stych v. City of Muscatine, Iowa*, 655 F.Supp.2d 928 (S.D. Iowa Sept. 18, 2009)
  - Fn 12 - “Plaintiff has presented testimony from two witnesses attesting to how important it is for police officers to listen.”

---

## A few ECD cases to consider:

- (02/25/09) (UR) *Releford v. City of Tukwila*, Slip Copy, 2009 WL 497131 (W.D.Wash.,2009)
  - 6’5”, 280 pounds, simultaneous ECD discharge, and simultaneous ECD discharge while on ground. Arrested on warrant, not on recently committed crime.
- *Parker v. Gerrish*, 547 F.3d 1 (1<sup>st</sup> Cir. (Me.) Nov. 5, 2008)
  - *Parker v. City of South Portland*, 2007 WL 1468658 (D.Me. May 18, 2007)

---

## A few ECD cases to consider:

*Cockrell v. City of Cincinnati*, Slip Copy, 2010 WL 4918725 (S.D. Ohio, November 24, 2010)

- Use of ECD on fleeing jay walker unreasonable
- Plf did not pose a threat of immediate harm
- Court finds that it was clearly established on July 3, 2008 that the use of a[n ECD], against a fleeing jaywalker, i.e., a non-violent misdemeanor who posed no threat of harm to anyone, was prohibited by the Constitution.

---

## A few ECD cases to consider:

*Cockrell v. City of Cincinnati*, Slip Copy, 2010 WL 4918725 (S.D. Ohio, November 24, 2010)

- **Policy:** City continued to advise its officers that the use of the [ECD] on a nonviolent fleeing misdemeanor was permissible.
- Consequently, Plf has alleged sufficient facts to go forward on his claim that the City's policy, which explicitly permits such [ECD] deployment, is unconstitutional on its face.

---

## A few ECD cases to consider:

*Cavanaugh v. Woods Cross City*, 625 F.3d 661  
(C.A.10 (Utah) November 3, 2010)

- no qualified immunity for officers who used [TASER ECD] on potentially suicidal woman involved in domestic dispute where she walked “quickly” away from officers and toward home; use of [ECD] without warning against misdemeanor violated clearly established law; incident occurred in 2006).

---

## A few ECD cases to consider:

*Snauer v. City of Springfield (OR)*, 2010 WL 4875784 (D.Or. 10/01/10)

- Fleeing person's fall from top of 6-7 foot fence
  - Multiple spinal fractures
- “Any reasonable police officer would know from the training received in this case that [using a TASER ECD in probe mode on] a suspect who is cresting a six to seven foot high fence would likely result in serious injury.”
- On 09/16/11 police win jury verdict



---

*Buckley v. Haddock*, 292 Fed.Appx. 791  
2008 WL 4140297 (11<sup>th</sup> Cir.(Fla.) Sep 09, 2008)  
(US Supreme Court *Cert. denied* on May 18, 2009)

Officers are supposed to know if force is ok?

- District Court (unpublished decision) – not objectively reasonable, no officer would, no qualified immunity (QI)
- Circuit Court (unpublished decision):
  - 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

---

# Analyzing Fourth Amendment Force



---

# 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

---

# *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))



---

# Additional Force Factors

extent of the injuries sustained as a result of the force used.

- "[T]here is no requirement that an injury be permanent for it to be actionable." *Rohrbough v. Hall*, 4:07cv0996 ERW at 11 (D.E.Mo. Oct. 23, 2008).
- "Plaintiff's allegations that she told [the officer] that the handcuffs were too tight and were causing her pain and that she suffered injuries as a result, her right to be free of such force was clearly established in 2008. " *Ramsey v. Connor*, 2011 WL 9129 (E.D.Mo. January 3, 2011)

---

# 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.

---

# Clarifying the *Graham* Factors:

(Actively Resisting)

## *Releford*:

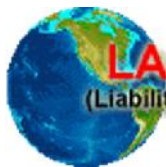
- Fact that Releford stopped and raised his hands over his head, asked legitimate questions about why he was being arrested, and was likely confused by the officers' conflicting commands to turn around – the Court cannot term plaintiff's behavior "active resistance." Indeed, his behavior suggests at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

---

# 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
- *Cockrell* -- jaywalking





---

# 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)

---

# ECD Force Must be Justified

## *Beaver:*

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

## *Scott v. Harris:*

- Risk of harm to suspect from force to be used *versus* threat from suspect officer is trying to eliminate or prevent



---

# ECD Force that Must be Justified

(Multiple ECD Applications)

## Multiple ECD Applications:

- Is suspect an immediate threat?
- Is suspect about to flee (a serious offense)?
- 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*)

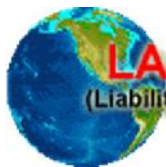


---

# 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.
- Extent of foreseeable injuries from application of chosen force option





---

# 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
- Time between force applications to give time for voluntary compliance (tolerance factors)
  - Concern of too short a time between applications

---

# Officer's Force Decision & Report?

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

- 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)
  - Option – use of ECD as discomfort/pain to cause distraction to attempt to capture, control, restrain, and/or other lawful force objective
    - E.g. *Lomax v. Las Vegas Metro Police Department*
    - *Stanley v. Baytown*
    - *Tucker v. Las Vegas Metro Police Department*

---

## 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.*

---

# Considerations to Avoid ECD Excessive Force Liability

---

# Considerations to Avoid ECD Excessive Force Liability

Force decision must reasonably consider (as time and circumstances reasonably permit):

- Officer's objective for using force
- Officer's reasonable perceptions of the subject's actions or behaviors the officer is attempting to stop or control
- Foreseeable risks of injuries or harm to subject resulting from force to be used
- Foreseeable secondary risks of injury

---

# Considerations to Avoid ECD Excessive Force Liability

- ECD use must comport with current law
- ECD use is within Agency Policy/Training
- Use ECD only to accomplish lawful law enforcement objectives
- Use window of opportunity to restrain
- Do not use an ECD for punishment

---

# Considerations to Avoid ECD Excessive Force Liability

- Justify and document every use or application of force, including:
  - each ECD trigger pull or 5 second discharge
  - probe deployment, drive stun deployment
  - ECD effects, delivered charge, no charge, etc.
  - fully document subject's threats or behaviors
- Avoid multiple, repeated, prolonged, or continuous ECD exposures unless necessary to counter reasonably perceived threat(s) and is justifiable—document your justification

---

# Considerations to Avoid ECD

## Excessive Force Liability

- Know your objectives for using force
- Avoid using ECD on elevated risk population member, unless necessary and justifiable
- Avoid intentionally targeting sensitive areas when possible
- Do not use pain compliance if circumstances dictate that pain is ineffective





---

# Considerations to Avoid ECD Excessive Force Liability

- Using force for compliance (when feasible):
  - Must give a warning
  - Must give adequate time for volitional compliance
  - Verify person is capable of complying
  - Avoid conflicting commands
- Prepare clear, complete, unambiguous reports



---

# **Tactical Considerations to Avoid ECD Excessive Force Liability**

---

# Arcing Distance

Factors that may reduce the arcing (jumping) distance:

- 25 foot and 35 foot cartridges
  - Thinner wire insulation
  - Longer wires = more resistance
- Wires touch
- Wires fall on conductive surface such as concrete or wet grass

---

# Preferred Target Zone Rear

(when possible)

- Below neck (blue zone)
  - Large muscles
  - Avoid head



---

# Preferred Target Zone Front

(when possible)

## Lower torso (blue zone)

- More effective
  - Split hemisphere
  - Larger Muscles
- Reduces risk of hitting sensitive body areas – refer to TASER warnings
- Increases dart-to-heart safety margin distance \*
- Do not intentionally target genitals



---

# Deployment Distance Considerations

Deployments from 0-7 feet (0-2 meters):

- Higher hit probability
- Limited probe spread = low amount of muscle mass affected
- Short reactionary distance
- Consider targeting the waist area to “split the hemispheres”



---

# Controlling/Cuffing Under Power

- You can go hands on with the subject during the 5-second cycle without feeling the effects of the NMI
  - Electricity essentially follows the path of least resistance
  - Do not place hands on or between probes

---

# Controlling/Cuffing Under Power

- Move in and control the subject while the TASER ECD is cycling and the subject is incapacitated
- EDPs, focused, intoxicated, excited delirium individuals, etc may not comply with verbal commands



---

# Controlling/Cuffing Under Power

- Use each TASER ECD cycle as a “window of opportunity” to attempt to establish control or cuff while the subject is affected by the TASER ECD cycle
- The need for multiple cycles may be avoided by controlling/cuffing under power if contact officers are available

---

# Trigger

## Continuous Discharge

- Remember if you hold the trigger back the ECD will continue to discharge after the 5 second cycle until you release the trigger
  - (as long as the battery charge is sufficient to support discharge).
- Holding the trigger back may result in inappropriate continuous or prolonged ECD discharges and allegations of excessive force or subject injury



---

## Avoid Extended, Repeated or Prolonged TASER ECD Applications Where Practicable

- Avoid extended, repeated, or prolonged ECD applications where practical
- The application of the ECD is a physically stressful event
- Attempt to minimize the physical and psychological stress to the subject

---

## Avoid Extended, Repeated or Prolonged TASER ECD Applications Where Practicable

- Only apply the number of cycles reasonably necessary to capture, control or restrain the subject
- Human studies have shown that ECD applications do not impair normal breathing patterns
- If circumstances require extended duration or repeated discharges, the operator should carefully observe the subject and provide breaks in the ECD stimulation when practicable

---

# One Probe Hit With (three-point) Drive-Stun Follow up

- If only one probe impacts the subject, a drive stun with the cartridge still attached can act as the second probe and complete the circuit, thus may cause NMI

---

# Injuries From Falls

- NMI frequently causes people to fall
- Falls, even from ground level, can cause serious injuries
- Consider the environment and the likelihood of a fall related injury

---

# Contingencies

- No weapon system will operate or be effective all of the time
- An ECD or cartridge may not fire or be effective
- Be prepared to transition to other options

---

# Importance of Optimal Force Reporting

- Officers must understand importance of and uses of reports – often do not
- Reports must be able to stand alone
- Reports need to be detailed as necessitated by the incident or its consequences
- Importance of chronological reporting with headers



---

# Importance of POV Video/Audio Evidence

- Eliminates he said/she said
- Motions for summary judgment (“MSJ”) – Courts must view facts from perspective most helpful to non-moving party
  - MSJ Orders drive most force precedent
  - Most MSJs denied because of he said/she said
  - Denied MSJ equals huge plaintiff benefit
- Spoliation of evidence

---

# ECD Use Reducing Force Claims

- Multiple studies finding ECD use decreases subject and officer injuries
- No other force option has even 1/10<sup>th</sup> the peer-reviewed published studies of ECDs
- No other force option is even close on providing use and accountability documentation

---

# Conclusions

- Keep abreast of morphing force expectations
- Many agencies have seen significant reductions in injuries and excessive force complaints and litigation after deploying TASER ECDs
- Train officers in smart and proper use of ECDs in compliance with judicial guidelines
- Understand the importance of POV incident capture and optimal reporting
- Evidence once captured – must be available

---

# Electronic Control Devices Are Not Risk Free.

	 <b>WARNING</b>
	<b>Electronic Control Device</b> <ul style="list-style-type: none"><li>• Can temporarily incapacitate target.</li><li>• Can cause injury.</li><li>• Obey warnings, instructions and all laws.</li><li>• Comply with current training materials and requirements.</li><li>• See <a href="http://www.TASER.com">www.TASER.com</a>.</li></ul>