

MANNING & KASS ELLROD, RAMIREZ, TRESTER LLP

CRITICAL LAW ENFORCEMENT LEGAL ISSUES: USE OF FORCE, ECDS AND ICDS – FORMULATING A PLAN

Prepared for:

BENICIA POLICE DEPARTMENT

BENICIA, CALIFORNIA

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Prepared by:

Mildred K. O'Linn

Attorney at Law

mko@manningllp.com

Los Angeles Office 801 S. Figueroa St. 15th Fl. Los Angeles, CA 90017 Tel: (213) 624-6900 Fax: (213) 624-6999	Orange County Office 19800 MacArthur Blvd. Suite 600 Irvine, CA 92612 Tel: (949) 440-6690 Fax: (949) 474-6691	San Diego Office 550 West C Street Suite 1900 San Diego, CA 92101 Tel: (619) 515-0269 Fax: (619) 515-0268	San Francisco Office One California Street Suite 1100 San Francisco, CA 94111 Tel: (415) 217-6990 Fax: (415) 217-6999	Arizona Office 6909 E. Greenway Parkway. Suite 200 Scottsdale, AZ 85254 Tel: (480) 477-5269 Fax: (480) 609-4468
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**Critical Law Enforcement Legal Issues:
Use of Force, ECDs and ICDs -
Formulating a Plan**

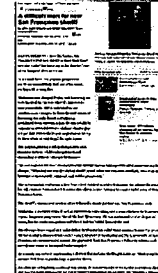
Prepared By:
Attorney Mildred K. O'Linn
mko@manninglp.com
Manning & Kass, Ellrod,
Ramirez, Trester

**Society's Expectations:
"Prime Time" Officers**

- Non-violent people should not be injured
- People on alcohol, drugs, serious psychological distress and the mentally ill should be controlled without injury
- Use Least Amount of Force
- Cause Minimal Injury or None
- Patient, Understanding and Tolerant
- Know difference between
 - intentional immediate threat of harm/fleeing felon
 - individual who needs medical or mental health crisis assistance

**The New Global Warming:
Challenges Facing Agencies Today**

- MEDIA ATTENTION WILL ALWAYS FOCUS ON THE "BAD COP" SYNDROME NATIONWIDE
- DEPRESSED ECONOMY INCREASE IN CRIME, INCREASE IN PUBLIC SYMPATHY FOR LAW BREAKERS, INCREASED MOTIVATION FOR CIVIL SUITS
- INCREASE IN FEDERAL INTERVENTION AND OVERSIGHT
- AGE OF IMMEDIATE INFORMATION AND WIDESPREAD DISTRIBUTION - U-Tube, BLOGS, Twitter



The Numbers are Against Officers

Societal Problems in U.S. Influencing Force Response

- Drug Abusers
 - 2009 8.7% of population (21,800,000)
 - 2008 8.0% of population
 - 2006 20,357,000
 - 2004 7.9% of population (19,100,000)
 - 2004 1,997,993 drug caused emergency room visits
- Serious Psychological Distress (SPD)
 - 2007 10.9% of adults (23,400,000)
 - 2004 9.9% of adults (21,400,000 SPD)
- DUIs (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+)

**American
Police
Beat**

Policing and the mentally ill

by Mark Nichols

If you've been around the block a few times as a police officer, you start to realize some issues that just won't go away.

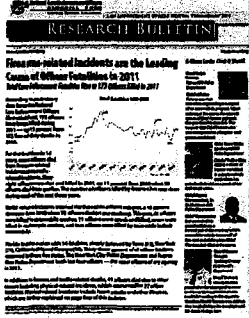
At issue here is this: how much training should cops have on dealing with the mentally ill in a law enforcement capacity? According to a recent article in the Los Angeles Times newspaper, a former soldier's short life and violent death have jump-started the political debate about how well police officers are trained to deal with mentally ill people.

According to the Los Angeles Times, Ellis III served as an Army infantryman in the Iraq war.

He later became well known in California as a police officer. He later became well known in California as a police officer. He later became well known in California as a police officer.

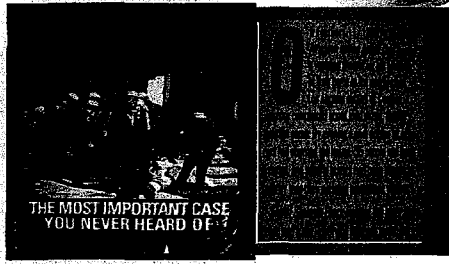
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2011 LEOs KIA



- LEO Deaths in the Line of Duty up 13% from 2010.
- For the 1st time in years more officers died from firearms than traffic related incidents.

The Civil Rights Lottery

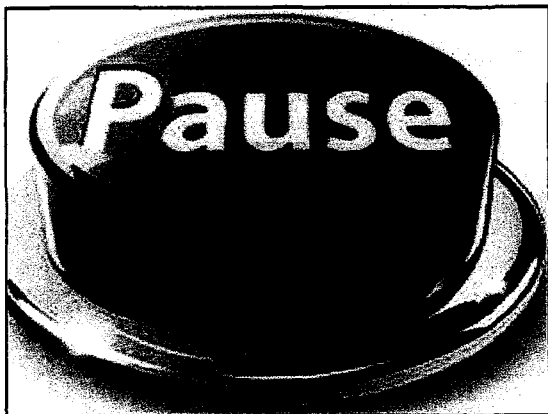


Average \$\$ per Officer per year to Settle Use of Force Cases

- Denver - \$697 per year per officer
- Philadelphia - \$1,360 per year per officer
- Los Angeles - \$2,200 per year per officer
- Chicago - \$2,930 per year per officer

Civil Liability Trends and Issues

- 1:30 OFFICERS IN THE UNITED STATES ARE BEING SUED
- 40-45% OF THOSE CASES INVOLVE ALLEGATIONS OF EXCESSIVE USE OF FORCE



Starting Off on the Wrong Foot

Daily Breeze Local/Metro Hundreds demand 'justice'



Protesters want Riverside officers

Protesters in the city of Riverside, Calif., are demanding that the Riverside Police Department (RPD) release officers involved in the fatal shooting of a young man. The protesters, who are mostly African American, are holding a series of rallies and marches in front of the RPD headquarters. They are demanding that the officers be fired and that the RPD be held accountable for the death of the young man. The protesters are also demanding that the RPD release the names of the officers involved in the shooting.

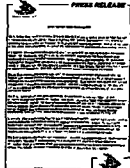
Controlling the Media

Los Angeles Times El Monte Police Tell Their Side of Story in Fatal Drug Raid



El Monte police officers told the Los Angeles Times that they were not involved in a fatal drug raid. The officers said that they were only present at the scene to provide backup for the police. They said that they did not see the suspect who was shot and killed. The police said that they were following a tip from a confidential source that a large quantity of drugs was being stored in a building in El Monte. The police raided the building and found a large amount of drugs. The suspect was shot and killed during the raid. The police said that they were not involved in the shooting.

Filling the News Void



CALIFORNIA POLICE DEPARTMENT FOR THE PRESS

PRESS RELEASE



Getting out in front of the issues

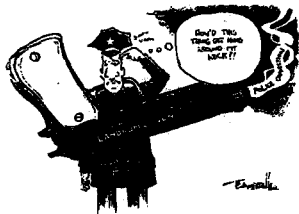
El Monte suspect dead after robbing arrest



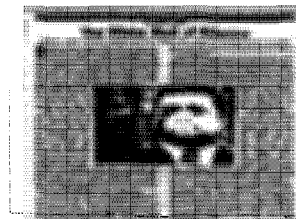
Arrest-Related Death Evidence Collection

1. The suspect was shot and killed during the arrest. The police are currently investigating the circumstances surrounding the death.
2. The police are currently investigating the circumstances surrounding the death.
3. The police are currently investigating the circumstances surrounding the death.
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10. The police are currently investigating the circumstances surrounding the death.

Questions of Credibility



The Loss of the Benefit of the Doubt: High Profile Bad Cops



The Video Dilemma

- When presented with a “controversial” action by officers are you prepared to properly articulate the appropriate standard by which to judge their actions?

That Video

How Will They Be Judged?

- Clear concise articulation of the criteria for evaluating an officer’s use of force at the on-set of the public’s focus on the events is crucial to educate the community prior to the initiation of an agenda by the media or others.

Only, Home

Supreme Court Decisions: The Minimum Standard

“Objectively Reasonable”

Whether the officer’s actions are “objectively reasonable” in light of the facts and circumstances confronting the officer without regard to the underlying intent or motivation.

Graham v. Connor (U.S. Sup. Ct. 1989)

Basic 4th Amendment Force Key Graham Factors...

- 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

Officer/Subject Factors:

- Number of Officers vs. Suspects
- Proximity to Potential Weapons
- Age; Size; Gender; Relative Strength
- Special Knowledge or Skill Level
- Injury or Exhaustion
- Mental Illness or Drug Usage
- Prior Contacts
- Environmental Factors

Eight Major Areas of Concern Capt. Gordon Graham, CHP

“High Risk/Low Frequency Events”

- Vehicle Operations
- Use of Force
- Use of Deadly Force
- Taking People Into Custody
- Forced Entries
- Special Relationship Situations
- Job Based Harassment
- Ethics/Integrity Issues

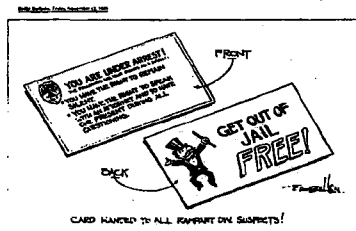
Concern for Corrections

- Overdetention
- Suicides, medical care and medication
- Citizen complaints
- Policy compliance and documentation
- Special relationship situations (transvestites)
- Use of force (cell extractions, inmate disturbances)
- Housing conditions
- Intake processing, verification and documentation
- Job Based Harassment
- Ethics and Integrity Issues

Risk Management: Off Duty Concerns

- Alcohol
- Sex
- Guns
- Sex
- Drugs
- Sex
- Secondary Job
- Sex
- Fast Cars

Get Out of Jail: Pass Go - Collect \$\$\$



While it's true that Tasers have prevented thousands of life-or-death standoffs between perps and police, they often serve as a crutch for cops who want to suppress suspects without breaking a sweat. Here are a few examples of when cops may have been a bit hasty pulling the Taser trigger.

→ Louise Jones, a 67-year-old grandmother in Kansas City, Missouri, pulled up to her house one night in June 2004. She honked at a police cruiser near her driveway and was given a ticket. Jones was uncooperative and pushed the officer, who fired his Taser. Jones and her husband were later awarded \$310,000 in damages.

→ After a bar fight on Saint Patrick's Day 2000, Matthew Fleuret was arrested on an accusation of obstructing a Deputy. Later, in a holding cell at California's Orange County Jail, Fleuret was pressed to the floor by at least five officers. Video of the incident shows one deputy pulling Fleuret's arms back and other policemen shaking him with a Taser as many as eleven times during a period of thirty-seven minutes. Fleuret's lawsuit against Orange County resulted in a \$750,000 settlement this year.

→ In 2004, when she was seven months pregnant, Malika Brooks was driving her son to school in Seattle. After being pulled over for going 32 mph in a 20-mph zone, she declined to sign the speeding ticket, so officers arrested her. When she refused to leave her car, she was tased three times, on the thigh, neck, and shoulder.

→ Andrew Mayes, a journalism major at the University of Florida in Gainesville, was asking John Kerr, a spokesman in public safety in 2007 when his microphone was cut off. Mayes (policestation, sitting with campus police) gave him a permit, and university police officers attempted to remove him from the scene. When he struggled, four police officers tried to restrain him. Despite Mayes' cries of "Don't leave me, don't leave me!" he was tased in the shoulder — and a video of the incident became a YouTube classic. —M.J.G.

2011 PERF: ECW Guidelines

2011 ELECTRONIC CONTROL
WEAPON GUIDELINES

The 2011 guidelines are based on a set of principles that foster the responsible and accountable use of ECW, while recognizing that they are an appropriate tool for officers who must resort to use of force. These guiding principles are the following:

1. ECWs should be considered non-lethal weapons.
2. ECWs should be used as a weapon of last resort, not a tool of convenience.
3. Officers should not rely on ECWs in situations where more effective and less risky alternatives are available.
4. ECWs are just one of a number of tools that police have available to do their jobs, and they should be considered one part of an agency's overall use-of-force policy.
5. In agencies that deploy ECWs, officers should receive comprehensive training on when and how to use ECWs.
6. Agencies should monitor their own use of ECWs and should conduct periodic analyses of practices and needs.
7. Agencies should consider the expectations of their community when developing an overall strategy for using ECWs.

Three Types of Torts

- NEGLIGENCE ACTIONS
- INTENTIONAL TORTS
- CONSTITUTIONAL TORTS

Get Out of Jail: Pass Go Collect \$\$\$



\$750,000 Attorneys' Fee Award in California Pepper Spray Case

Anti-logging protesters who sued Humboldt County, California officials over the use of pepper spray during 1997 nonviolent demonstrations have agreed to a \$750,000 attorneys' fees settlement. The settlement amount is a little more than one-third of the \$2 million that attorneys had sought on behalf of eight nonviolent protesters who had liquid pepper spray swabbed in their eyes after they chained themselves together to protest logging practices. The case was tried three times in San Francisco federal court before a jury was able to reach a verdict in April, finding that the use of pepper spray was excessive use of force. The jury, however, awarded the eight plaintiffs only \$1 each in damages. San Francisco attorneys Dennis Cunningham, Robert Bloom, and Gordon Kaupp were among the lawyers who represented the plaintiffs.

\$210,000 Settlement in Oakland Demonstration Case

In December, 2005, the City of Oakland agreed to pay \$210,000 to settle a lawsuit filed by a woman, Sri Louise Coles, who was injured when police fired a bag of lead shot at her head at an anti-war demonstration, inflicting a golf ball-size welt to her jaw. Coles was one of at least 58 people who were injured at an April 7, 2003, demonstration at the Port of Oakland against the Iraq War. Oakland police fired wooden bullets, sting ball grenades and shot-filled beanbags at protesters. At least 46 of the victims have sued the city, and settlements have been reached in more than twenty of the cases. The Oakland Police Department has since revised its policies to ensure that such tactics aren't used indiscriminately.

Civil Rights Statutes

- Chapter 42 of the United States Code
- Section 1981: Racial Discrimination
- Section 1983: Deprivation of Civil Rights under Color of Law
- Section 1985(3): Conspiracy to Violate Civil Rights
- Section 1986: Failure to Protect
- Section 14141: Pattern and Practice

U.S. v. Powell: Terry Frisk NOT SOP

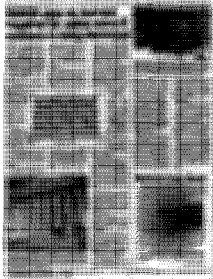
(54 F.3d 488 (9th Cir. 2011))

- Traffic stop for burned-out headlight; Driver DUS – asked passengers if had valid DLs
- Powell back-seat passenger – DUS + caution for “priors” for armed robbery
- “Solely” on caution data, officer ordered Powell out of the car and conducted a pat-down.
- During pat-down Powell attempted to flee = caught + HC
- Backpack from the back seat = handgun = arrested
- Powell searched incident to arrest = crack cocaine

U.S. v. Powell: Terry Frisk Reasonable Suspicion: Armed and Dangerous?

- Sole basis for frisking was caution data re “priors” for armed robbery - Did not justify a reasonable suspicion that Powell was armed and dangerous the night of the traffic stop.
- Caution data can be relevant in establishing reasonable suspicion.
- In most cases a prior criminal record is not, by itself, sufficient to create reasonable suspicion. Before the pat-down:
 - completely cooperative and friendly with the officers
 - not threatening or evasive conduct
 - did not display any of the typical signs usually associated with illegal or dangerous activity
 - Significant that during the traffic stop, prior to receiving the caution data, an officer told Powell that he was free to leave if he wanted to.
- Court held: Pat-Down out and all evidence seized during traffic stop suppressed.

Kentucky v. King



Kentucky v. King – Knock Knock...Don't Flush

US Supreme Court 2011

- LEOs follow suspected drug dealer to apartment – Smelled marijuana;
- Knocked loudly; Announced “Police” and heard noise inside the apt consistent with destruction of evidence;
- Issue was Exigent Circumstances Rule vs. Police-Created Exigency Doctrine (cannot create the exigency)

Forcefully Knocking and Loudly Announcing Police Okay

- Warrantless Searches is reasonable under exigent circumstances when LEOs did not create exigency by engaging or threatening to engage in conduct in violation of the 4th Amendment
- State court additional requirement that if reasonably foreseeable that LEOs conduct (ie knock “Police”) would create exigency (ie. Sounds like destroying evidence) then warrantless search improper

Federal Civil Rights Actions Criminal Statutes

Chapter 18 of United States Code

- Section 241: Conspiracy to Violate Civil Rights
- Section 242: Violate Civil Rights

US/DOJ Civil Rights Division Criminal Section

- Fiscal year 2000
 - 45 attorneys reviewing civil rights investigations
 - 65% involve allegations of “color of law” violations
 - 8 to 10 thousand result in 2500 preliminary investigations
 - 20% (560) warrant substantial investigation
 - 2.5% (70) grand jury indictments
 - 30 to 40 LEO convicted annually

Putting Cops in Jail



Investigation of the New Orleans Police Department

United States Department of Justice
Civil Rights Division
March 16, 2011

**2008 - Former LAPD and Former LBPD
Found Guilty of Conspiracy to Violate Civil Rights**

- Jury found former LAPD Officer and his brother, former Long Beach Officer guilty of:
 - conspiring to violate civil rights;
 - conspiring to possess narcotics with intent to distribute;
 - possession of narcotics with intent to distribute.
- one was also found guilty of several firearm offenses and deprivation of rights under color of law.

Criminal Consequences

- One faces a sentence of up to life imprisonment and a significant fine.
- Second faces a sentence of up to 50 years imprisonment and a fine.
- Other law enforcement officers from LAPD, LBPB, LASD and CDCR have previously plead guilty to federal crimes in connection with the conspiracy.

"The FBI, along with its law enforcement partners, will continue to root out the small percentage of sworn personnel that act outside the law."

- Civil Rights Division committed to vigorous enforcement of the federal criminal civil rights statutes - laws that prohibit willful acts of misconduct by law enforcement officials.
- In Fiscal Year 2007, the Criminal Section convicted the highest number of defendants in its history, surpassing the record previously set in Fiscal Year 2006.
- DOJ has compiled a significant record on criminal civil rights law enforcement misconduct prosecutions in the last seven years. During the last seven years, the Criminal Section obtained convictions of 53% more defendants (391 vs. 256) in color of law cases than the previous seven years.

**Jury awards Long Beach officers
\$4M in 'Lobstergate' case**

- 02/14/2008 —A jury awarded \$4 million to three Long Beach officers who claimed they were labeled as snitches and denied promotions after they reported members of a port security team were hunting lobsters instead of terrorists.
- The three officers filed a civil lawsuit in July 2006, alleging other members of the department's Port Security Team of misconduct while on the job in what police brass called "Lobstergate," because lobster shells were found in one of the squad's boats.
- After three days of deliberations, the jury awarded \$1.16 million to Sgt. and \$1.56 million and \$1.36 million to Officers.

42 U.S.C. Section 1983

- "Every person who under color of any statute, ordinance, regulation, custom or usage... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings or redress..."

**Monell v. New York Dept. of
Social Services (1978)**

- The "Deep Pocket" Case
- U.S. Supreme Court decision holding that an "Agency" is a "Person" under the Civil Rights Statutes
- Governmental entity liable for "policy, practice or custom" that inflicts injury
 - Samoan Bridal Shower case

Policy, Practice or Custom

- **Policy** -- Written ordinances, general orders, memorandums, department rules and regulations, direct orders by a final policymaker, operating procedures and training manuals adopted by the agency
- **Practice or Custom** -- Persistent widespread pattern of unconstitutional conduct with actual or constructive knowledge of a responsible policymaker
- **Key Words:** Habitual, well-settled or officially tolerated

Individual Liability: Officers, Supervisors and Trainers

- Officers with Immediate Contact: Assault, Battery, Trespass
- Misconduct under Color of Law = Civil Rights
- Actions by Policymaking Officials
- Officers Present Who Fail to Provide Protection
 - “Bystander” liability requires contemporaneous knowledge of wrongful conduct and an opportunity to intervene U.S. v. Keon
- Breach of Standard of Care = Negligent Hiring, Training, Supervision, Retention

Specific Theories of Liability

- Actions by Policy Making Officials
- Unconstitutional Ordinances
- Affirmative Policy
- Implicit Authorization of Harassment
- Failure to Correct Unconstitutional Condition
- Inadequate Hiring, Training & Supervision
- Violation of Statutory Duty Chino v. Carlo

Penal Code § 851.5 Right of Arrested Person to Make Telephone Calls;

- (a) Immediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls, as described in subdivision (b).
- The arrested person shall be entitled to make at least three such calls at no expense if the calls are completed to telephone numbers within the local calling area.

Penal Code § 851.5 Posting of Sign

- (b) At any police facility or place where an arrested person is detained, a sign containing the following information in bold block type shall be posted in a conspicuous place:
- arrested person the right to free telephone calls within the local dialing area, or at his own expense if outside the local area, to three of the following:
- (1) attorney /public defender ... phone call shall not be monitored, eavesdropped upon, or recorded.
- (2) bail bondsman.
- (3) relative or other person.

Penal Code § 851.5

- (c) If, upon questioning during the booking process, the arrested person is identified as a custodial parent with responsibility for a minor child, the arrested person shall be entitled to make two additional calls at no expense if the calls are completed to telephone numbers within the local calling area to a relative or other person for the purpose of arranging for the care of the minor child or children in the parent's absence.

Defenses Available to Peace Officers

- No Absolute Immunity unless Judicial Process
- Qualified Immunity:
 - Whether reasonable officer could have believed actions were lawful in light of clearly established law and the information the officer possessed? *Hunter v. Bryant*
 - Officer permitted to make reasonable mistakes even as to what the law requires *Saucier v. Katz*
 - Must stay abreast of legal decisions *Elder v. Holloway*

Additional Defenses Available to Peace Officers

- Good Faith
- Probable Cause
- Self-Defense; Justification; Consent
- Assumption of the Risk
- Contributory & Comparative Negligence
- Acting upon a Valid Warrant
- Written Release

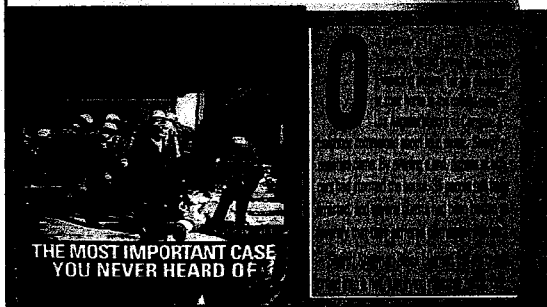
Damage Awards: What it Costs to Lose

- Compensatory Damages
Purpose is to make the injured party whole
- Punitive Damages
Purpose is to punish and deter future conduct of a similar nature = Personal responsibility of individual
- Only Wisconsin (mandatory) and California (discretionary) permit payment of punitive damages by agency

Attorney's Fees -- \$1988

- "Prevailing Party"
- Pro Se Litigant Not Entitled to Fees
- *Rivera v. City of Riverside*
 - \$33,000 in damages awarded by jury;
 - \$245,000 attorney's fees granted by District Court.
- Civil rights defendants may make lump sum settlement offers which includes attorney's fees and waivers thereof.
- Do not get both lodestar and fee enhancement.

Bad Reports + Missing Evidence = Punitive Damages



Documentation

- *Whiteley v. Warden*:
 - If it is to the agency's benefit and it is not in writing it did not happen.
- Bad Police Reports have caused far more litigation than Bad Police Work!

K-9 reports and Evidence video

Failure to Train Canton v. Harris (1989)

- Inadequacy of training may serve as the basis for civil rights liability only where the failure to act amounts to "deliberate indifference" to the civil rights of persons with whom police come into contact
- Recent Cases indicate a trend:
 - Canton case no longer merely a discovery tool
 - FTT claims getting before juries

Elements of Failure to Train

- Constitutional right violation occurred
- Failure to train occurred
- "Deliberate Indifference" to training needs
- That failure to train caused injury
- Policy must be the moving force behind the constitutional rights violation

Factors Demonstrating Failure to Train: Quantity

- Not Single Incident Oklahoma City v. Tuttle
- State Minimums Davis v. Mason County
- Task Analysis
- Widely Accepted Standards of the Profession
- Obvious Deficiency or High Profile Issue

Factors Demonstrating Failure to Train: Quality

- Burden of training quality rests with training agency
- Training by certified instructors?
- Training instructor received?
- Was training state-of-the-art?
- Was comprehension checked?
- Was testing reviewed?
- Remediation provided?
- Training job related?
- Training documented?
- Training safe?
- Risks acknowledged?

Failure to Train Claims – Review of Recent Trends

- Medical Care
- Dealing with the Mentally Ill
- Use of Force/ICD/ARD
 - TASER ECDs
 - Excited Delirium
 - Restraint Asphyxia
 - Compression Asphyxia
- False Arrest/False Imprisonment

Abston v. City of Merced Denial of MSJ by USDC, ED CA 05/24/11

- Traffic stop of speeder/EDP resists/assaults LEO = ICD
- Use of Baton, foot pursuit, 2nd LEO, OC, 3rd LEO, hands on, foot pursuit, TASER, 3 LEOs wrestled, TASER, 4th LEO, CDCR and Paramedics together finally subdue
- TASER=probe mode to back 4x
- Abston kicked LEO 1 = Torn rotator cuff which required surgery
- Expert Witness called into question LEO training with respect to:
 - TASER ECD use;
 - Excited Delirium;
 - Use of force on suspects who are mentally impaired or under the influence;
 - Restraint asphyxia;

Abston v. City of Merced

Claims included §1983, Assault/Battery, Wrongful Death, Negligent Hiring, Retention, Training, Supervision and Discipline

- "Plaintiffs' inadequate training claim is tenuous; they have not provided any records, documentation, or explanation of the City of Merced's training and policies."
- "Mr. Clark's expert report and Officer Defendants' deposition testimony, however, raise questions whether the identified deficiencies in the City of Merced's training with respect to Taser use, excited delirium, and use of force on suspects who are mentally impaired or under the influence also included restraint asphyxia. Drawing all inferences in Plaintiffs' favor, this evidence is sufficient to withstand a motion for summary judgment on failure to train. Defendants' motion for summary judgment as to the Second and Third Causes of Action on Plaintiffs' failure to train claim is DENIED."

Abston v. City of Merced

Claims included §1983, Assault/Battery, Wrongful Death, Negligent Hiring, Retention, Training, Supervision and Discipline

- "Plaintiffs' inadequate training claim is tenuous; they have not provided any records, documentation, or explanation of the City of Merced's training and policies."
- "Mr. Clark's expert report and Officer Defendants' deposition testimony, however, raise questions whether the identified deficiencies in the City of Merced's training with respect to Taser use, excited delirium, and use of force on suspects who are mentally impaired or under the influence also included restraint asphyxia."
- So MSJ DENIED.

Status of *Abston* Appeal

- Officers received QI on all TASER-related claims, but QI immunity was denied as to general excessive force claims.
- Defendants filed a timely interlocutory appeal on QI immunity issue.
- Appeal is pending before the Ninth Circuit; has been fully briefed (as of 1-4-12) and is awaiting a decision - which given the Ninth Circuit's backlog might not be for 6 months to 2 years.
- The settlement conference set for 7-8-11 was taken off calendar in light of the pending appeal on QI.

Who is Focus of Force?

RECOGNIZING HIGH RISK INCIDENTS:

- High Profile?
 - High Profile Personality
 - Government Official
 - Celebrity
 - Video or Audio Recording
 - Media Inquiry

RECOGNIZE EXPOSURE POTENTIAL

- In-Custody Death or Significant Injury
- Attorneys Involved in Personnel Complaints
- Civil Rights Plaintiff's Attorney Handling Criminal Defense
- Use of Force Involving:
 - Multiple ECD deployments (Heston)
 - Canine deployment
 - Pursuit with injuries or use of force
- Sexual Misconduct Allegations

RECOGNIZE HIGH RISK EMOTIONAL ELEMENTS

- Civil Rights Demonstrations
- Allegations of Discrimination:
 - Racial
 - Sexual Preference
 - ADA
- Children or Animals
- Mentally Ill or Homeless Persons

Asphyxia?

- "...did not remove the restraints, put him in a position where he could breathe or start CPR, all contrary to their training and policies,"
- "The officers made the incredible claim for the first time at trial that they didn't perform CPR because they thought (Jackson) might be on PCP and it could intoxicate them through skin contact."
- Officers held Jackson on the ground to wait for an ambulance because they couldn't get him into a patrol car. Even with his hands and ankles bound, the man reportedly continued to struggle.
- Two officers used their hands and knees to pin down his arms and shoulders, and two held his legs and another applied weight to his buttocks with his hands.

Plaintiff's Counsel Theme Song

- "It is our sincere hope that this verdict will finally induce the department to properly train its officers on how to avoid more unnecessary restraint deaths from occurring."
- "The trial also exposed the department's wholly inadequate handling of missing persons reports like the one made by Sheryl Nash the day before the incident and its lack of state-mandated training on proper methods of dealing with persons suffering from a mental illness."

TASER: Weapon of Choices

Recent Court
Decisions

Risk
Management
Concerns



Considerations re Use of Force: Force Must be Justified

- Multiple/Long Duration ECD Applications
- Document Control/Cuff Under Power Efforts and Use 3-Point Stun
- Force Decisions & Available alternatives
- Verbal Commands/Warnings Given and Opportunity to Comply
- Potential Foreseeable Injury to Subject
- Prior knowledge of Subject's Health/Mental Condition etc.

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



Preferred Target Zone Rear (when possible)

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



TASER Deployment Drive Stuns

- (1) Only one dart from the cartridge hits suspect (3 Pt Stun)
- (2) Both darts hit the suspect close together not allowing for total EMD (4 Pt Stun)
- (3) Additional control is needed when handcuffing assaultive/high risk



TASER Deployment 3-Point Contact Drive Stun

- A 3-point Drive stun occurs when the contact point of the front of the TASER cartridge are used in conjunction with 2 points of contact from the darts.
- This may be required if the distance between the darts from the cartridge are too close together not allowing for neuro-muscular incapacitation (NMI) or a closed electronic circuit and malfunction of the TASER. This will have similar effects of both darts making contact at the distance between the darts and point of cartridge contact.
- The drive stun contact point should be at least 4 inches away from the contact point of the darts. The greater the distance between the darts and the drive stun point, the greater the effect on the suspect. The 3-point stun will cease its effectiveness if the TASER is not in contact with the suspect.

Training for Success: 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

Bryan v. McPherson

608 F.3d 614 (9th Cir. 2010)

- Bryan is driving while wearing nothing but boxer shorts
- Stopped for second ticket of the day and exits car while agitated
- "Yelling gibberish and hitting his thighs"



***Bryan v. McPherson- The
Quantum of Force***

- "TASERS LIKE THE X26
CONSTITUTE AN
"INTERMEDIATE OR
MEDIUM, THOUGH NOT
INSIGNIFICANT, QUANTUM
OF FORCE."

***Bryan v. McPherson –
Nature and Quality of the Intrusion***

- Recognize important role ECDs play
- Ability to defuse situation from a distance can obviate need for more severe, or even deadly, force and thus protect officers, bystanders and suspects alike.
- Held ECDs = Intermediate, significant level of force that must be justified by "a strong government interest that compels the employment of such force."

***Bryan v. McPherson
EXCESSIVE FORCE?
Graham Factors as Risk Factors***

- Immediate threat to safety of officers/others
- Actively resisting (vs. passive)
- Circumstances tense, uncertain, rapidly evolving ("pace" of events) "Split-second judgments"
- Severity of the crime at issue
- Attempting to evade seizure by flight

***Bryan v. McPherson
Dealing with the Mentally Ill?***

- *Officer MacPherson now argues that use of the taser was justified because he believed Bryan may have been mentally ill and thus subject to detention.*
- *To the contrary: if Officer MacPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means.*
- *As we have held, "[t]he problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." Deorle, 272 F.3d at 1282-83.*

***Bryan v. McPherson
608 F.3d 614 (9th Cir. 2010)***

- *Although we have refused to create two tracks of force analysis, one for the mentally ill and one for serious criminals, we have found that even "when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual."*
- *The same reasoning applies to intermediate levels of force. A mentally ill individual is in need of a doctor, not a jail cell, and in the usual case—where such an individual is neither a threat to himself nor to anyone else—the government's interest in deploying force to detain him is not as substantial as its interest in deploying that force to apprehend a dangerous criminal.*

***Bryan v. McPherson
608 F.3d 614 (9th Cir. 2010)***

- *Moreover, the purpose of detaining a mentally ill individual is not to punish him, but to help him. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.*
- *Thus, whether Officer MacPherson believed that Bryan had committed a variety of nonviolent misdemeanors or that Bryan was mentally ill, this Graham factor does not support the deployment of an intermediate level of force.*

***Bryan v. McPherson* –
Additional Factors To Be Considered**

- Failure to Warn Bryan that he would be shot with X26 if he did not comply
- Required to consider what other tactics if any were available to effect the arrest. (LIM) *Headwaters* and *Chew*
 - Additional officers enroute
- Not dispositive = Factor significantly into *Graham* analysis

Buckley v. Haddock

292 Fed. Appx. 791
2008 WL 4140297 (11th Cir. 09/09/08)
(US Supreme Court Cert. denied 05/18/09)

Officers are supposed to know if force is okay

- Sobbing speeder failed to sign speeding ticket
- Compliance force = driver would not walk

District Court (unpublished decision) –

- Force not objectively reasonable, No officer would believe it was reasonable = No Qualified Immunity

Circuit Court (Higher Court unpublished decision) –

- Chief Judge – Objectively Reasonable plus QI
- Appellate Judge – 2 uses OR, 3rd use not OR, QI
US Supreme Court Cert. denied on 05/18/09

***Young v. County of Los Angeles*
9th Circuit 08/26/11**

“TEXTBOOK VIOLATION OF 4TH AMENDMENT”

- USE OF SIGNIFICANT FORCE WITHOUT WARNING
- AGAINST AN INDIVIDUAL WHO COMMITTED ONLY MINOR MISDEMEANOR;
- POSED NO THREAT;
- NOT SEEKING TO FLEE;
- NO USE OF AVAILABLE LESS INTRUSIVE ALTERNATIVES

***Young v. County of Los Angeles*
9th Circuit 08/26/11**

- OC AND BATON STRIKES FOR SEATBELT VIOLATION AND FOR REFUSAL TO RETURN TO TRUCK
- DRIVER WENT AND SAT ON CURB EATING HIS BROCCOLI.
- WITHOUT WARNING OF INTENT TO OC - OFFICER SPRAYED DRIVER FROM THE BACK WITH OC THEN STRUCK WITH BATON AS DRIVER WAS BACKING AWAY.
- DRIVER'S REFUSAL TO GET BACK IN TRUCK WAS A VIOLATION OF LAW. *BLANKENHORN v. CITY OF ORANGE*
- DRIVER NOT AN IMMEDIATE THREAT OF HARM OR A FLIGHT RISK.

***Young v. County of Los Angeles* –
MSJ Argument**

- On appeal did not argue that Young posed any physical threat to him prior to the use of OC nor that he feared such a threat.
- ...struck Young with the baton because he “believed that Young was trying to gain a position of advantage over him, from which he could then launch an assault,” and that he “believed that Young was about to throw the broccoli at him in order to cause a distraction before assaulting him.”

***Young v. County of Los Angeles*
Recorded Media Review Issue**

- The officer in this matter recorded in incident report that driver had responded to his orders with the objection, “F*** you, I don’t want to, I’m eating my vegetables.”
- The audio transcript records no such statement by the driver.

Young v. County of Los Angeles - OC and Batons

- Put OC at the same level or quantum of force as the TASER ECD in probe mode – an “intermediate” level of force.
- “However, because we conclude that the use of intermediate force is unreasonable when an officer has detained a suspect for minor infractions and the suspect clearly poses no threat to the officer or the public safety, we reverse as to Young’s excessive force and negligence claims.”

Young v. County of Los Angeles ECDs, OC, Batons = Intermediate Force

- “Both pepper spray and baton blows are forms of force capable of inflicting significant pain and causing serious injury.
- As such, both are regarded as “intermediate force” that, while less severe than deadly force, nonetheless present a significant intrusion upon an individual’s liberty interests.

Young v. County of Los Angeles – OC Discussion

- OC= intense pain; burning sensation; gagging; temporary paralysis of larynx;
- Dangerous weapon under federal U.S. Sentencing Guidelines = extreme pain; capable of causing protracted impairment of a function of a bodily organ; lifelong health problems ie. asthma
- Point to retired LASD Lt. as expert and POST = very serious and debilitating consequences; only use as defensive weapon;

Young v. County of Los Angeles – Baton Discussion

- Batons significant use of force capable of causing pain and bodily injury = intermediate force
- California training re batons = deadly weapon that causes deep bruising; blood clots = strokes; only as response to aggressive or combative acts
- LASD – head strikes with baton = Deadly Force

Young v. County of Los Angeles – Graham Factors Discussion

- Immediate Threat to Officer/Public Safety
- Severity of Crime at Issue (misdemeanor+non-violent and no threat)
- Actively Resisting or Attempting to Evade Arrest by Flight
 - Court Notes Officer’s Provocative Conduct (here unexpected OC while eating broccoli = caused response of moving and circling) or baton blows while on the ground
- Less Intrusive Measures
- Warning prior to Use of Force

Mattos v. Agarano En Banc 9th Circuit Decision

- (WA) Brooks v. Seattle
- DOI 11/23/04
- Drive-Stun
- 7 months pregnant
- Traffic Stop – speeding 32 mph in 20mph zone
- Refusal to Sign Ticket (repeatedly)
- 3 LEOs – 2 PO, 1 Sgt
- Force: armlock, spark test +27 secs – drive-stun to thigh; +36 secs – drive-stun to arm; +6 secs – drive-stun to neck; taken to ground + HC
- Resistance= locked up muscles and clutched steering wheel
- October 17, 2011
- (HI) Mattos v. Agarano
- DOI 08/23/06
- Probe deplyment
- Female victim of Domestic Dispute
- 2 LEOs vs. H+Wife
- Resistance? Extended her arm to stop breasts being smashed against LEO’s body;
- ECD w/o warning to Mrs.
- Mrs. fell hard
- Charges dropped

Mattos v. Agarano
Totality of the Circumstances Discussion

- Brooks bears some responsibility for the escalation of the incident... however, two specific factors in this case that we find overwhelmingly salient.
1. Brooks told officers she was pregnant - less than 60 days from due date;
 - Officers even discussed where they should apply ECD
 2. The LEO drive-stunned Brooks 3 times over less than 1 minute.

Mattos v. Agarano
Use of ECD in drive-stun mode

- Does not prohibit use of an ECD in drive-stun mode to gain compliance from individual "actively resisting" arrestee
- On an "actively resisting" arrestee solely to gain compliance with LEO's commands (ie. person is not reasonably perceived to be an immediate threat or a flight risk):
 - Each and every application of a force option by a LEO must be legally justified.
 - Must give the person reasonable opportunity to comply with the LEO's directives prior to each ECD drive-stun application
- Note: Court mentions "record is not sufficient for us to determine what level of force is used when taser is deployed in drive-stun mode."

Mattos v. Agarano
Drive-Stun re Non-Threatening Active Resister?

- Before each activation of ECD in drive-stun mode to attempt to gain compliance must:
 - Give reasonable opportunity to comply with LEO's directives prior to each ECD drive-stun application;
 - Must have reasonable perception that subject is:
 - capable of compliance;
 - "actively resisting."
 - Give a warning of the imminent application of force;.
 - Allow person time:
 - "to recover from the extreme pain" experienced;
 - a reasonable opportunity to "gather" themselves;
 - reasonable opportunity to "consider [their] refusal to comply" with commands before each ECD drive-stun application;

Mattos v. Agarano
Drive-Stun re Non-Threatening Active Resister?

- With regard to multiple deployments the duration of time between each ECD drive-stun application (according to this case) must be:
 - more than 36 seconds, to give the person reasonable time to recover from the extreme pain, "gather" themselves, and to consider refusal to comply;
- LEO should include in report that before each ECD drive-stun used to attempt to gain compliance - LEO followed these guidelines.

Glenn v. Washington County
(9th Cir. 11/4/11)

- On 9/15/06 18-yr old Lukus Glenn was distraught, intoxicated, destructive and violent and when he became suicidal threatening to cut his throat with a pocketknife. Parents called 9-1-1.
- Responding personnel reported to staging area re rifles in home;
- Off-duty deputy responded to residence and began shouting *!!@ gunpoint; 2nd deputy arrived and also *!!@ gunpoint;
- Witnesses described deputy 1&2 as very unprofessional;
- Witnesses were ordered to change locations (some behind deputies others into house);
- Advised Back-up enroute and Sgt. Reminded deputies re tactical breathing and that ECD would be possible alternative;

Glenn v. Washington County
Excessive Force and No O.I.

- 3rd deputy arrived with ECD and beanbags;
- Deputy 2 ordered deputy 3 to use beanbags;
- 6 beanbag rounds deployed ("BEANBAG, BEANBAG") and Lukus moved away.
- Beanbags = provocative conduct;
- Lukus moved towards house where deputies had told family to go
- 11 shots fired by deputies 1 & 2

Force Analysis by 9th Circuit

- 1) Severity of Intrusion
 - Beanbag rounds: Lead shot in a cloth sack;
 - Can cause SBI/Death IF (Deorle = less than deadly)
- 2) Government Interest - Evaluated by:
 - Immediate threat; (suicide?)
 - Severity of crime; (suicide?)
 - Actively resisting arrest or attempting to evade; (complicated)

AND

Totality of Circumstances; Available Alternatives; Proper Warnings; EDP?

- 3) Gravity of Intrusion (WCSSO policy characterized as LTL to be used only vs. ominous/active resistance)

Bottomline on Glenn

- So:
 - EDP only a real threat to self
 - Warning not effective
 - Provocative conduct caused force escalation
 - Less intrusive alternatives ie Talk, Time, TASER, Team, . . .
 - Beanbag rounds inaccurate and unreliable

Considerations to Avoid ECD Excessive Force Liability

- Identify objectives for using force
- Document reasonable perceptions of actions/behavior
- Consider foreseeable risks of injuries from force
- Consider foreseeable secondary risks of injury
- Use caution when using on ECD on elevated risk population
- Avoid intentionally targeting sensitive areas
- Avoid use solely for pain compliance
- ECD use must = current law and agency policy/training
- Use only to accomplish lawful objectives
- \emptyset use for punishment
- Use "window of opportunity" to restrain
- Train re when and how to use with other force options

Arrest Related Death Risk Management: DEVELOPING A PLAN OF ACTION

- Address training needs of LEOs and Jailers re:
 - Escalation/De-Escalation, Use of Force;
 - DT skills, Team Tactics, ECD 3-Point Stun, Cuffing Under Power;
 - Verbal Skills; Report Writing and Report Review;
- Train LEOs and Communications Personnel to recognize At-Risk Circumstances (ie. History of Mental Illness/Drug Usage; Obese; Sweating Profusely; Extreme Hyperactivity ...) and to implement plan of action;
- Prepare PIOs in advance to address such incidents (ie. Mock Press Conferences of high profile incidents prior to Frying Pan experience);

Arrest Related Death Risk Management: DEVELOPING A PLAN OF ACTION

WHEN DEALING WITH AT-RISK CIRCUMSTANCES:

- Evaluate immediacy of the need for hands-on force, ECD, Team Tactics or other force options; ("Haste vs. Pause Button")
- Stage Emergency Medical Personnel in advance of physical action when warranted;
- Supervisor on-scene prior to Use of Force;
- Formulate a plan of action re use of force options and ultimate end game plan (ie. Avoid the "Cluster of Confusion");
- Radio transmission re time of initiation of Use of Force and causative factors (ie. physically assaultive, combative, suicidal or detailed description);
- Radio transmission re time of placing subject in custody and status (ie. "Subject in custody with paramedics, in E/C, seated upright and breathing") with periodic updates to entry re status;

Arrest Related Death Risk Management: DEVELOPING A PLAN OF ACTION

- Supervisors focus when possible on the condition of the subject and getting medical attention engaged and radio log entries made promptly;
- Conduct Post-Incident Investigation according to established protocols including medical evidence re ARD/ICD (see ICD investigation and Excited Delirium protocols);
- Documentation prepared in conjunction with review of any audio/video evidence and ECD dataport downloads;
- Reports reviewed and approved by supervisor with input from department SME and legal counsel as appropriate;
- Prepare PIO to address the particular incident;
- Preparation for prosecution of subject if criminal charges are warranted;
- Post-Incident debrief and review of policy and training issues (long term planning);

DRAFT RECORDED MEDIA REVIEW POLICY

General Purpose

- It is the policy of the _____ Police Department that official statements and written reports should be prepared with a goal of factual accuracy and thoroughness.
- The review of existing recorded media relating to an incident such as video and audio recordings or electronic data may correct and enhance the reliability of an officer's recollection of events and more accurately document the events in the form of reports or statements.
- Therefore in preparing written reports and in preparation for giving statements, officers will review evidence known to exist to achieve optimal accuracy with regard to the events and circumstances prior to giving statements and preparing reports.

DRAFT RECORDED MEDIA REVIEW POLICY

State of Mind Concern

- Officers should keep in mind when preparing reports and giving statements that such recorded media, while helpful in preparing reports and documenting events, is rarely a complete reproduction of the events. Furthermore, such recorded media does not typically document important concerns such as an officer's state of mind during the events or the context in which the events were occurring.

DRAFT RECORDED MEDIA REVIEW POLICY

Types of Media

- Such review will include when available, audio or video recordings of the events including such items as photographs, video or audio recordings of the actual events and the officer's own observations, and electronic data such as ECD dataport downloads.
- Examples:
 - Car cams;
 - TASER cams and Dataport downloads;
 - AXON or other on-officer video recordings;
 - On-officer voice recordings;
 - Video/Audio recordings of interviews;
 - Radio communications and dispatch entries;
 - Telephone recordings;
 - MDT messages;
 - Third-party sources such as photographs, video or audio recordings from cellular phones, security cameras;

DRAFT RECORDED MEDIA REVIEW POLICY

Integrity of Evidence re Types of Media

- Officers will assure that the original recorded media is maintained in a secure manner and is not altered in any manner during the review process.
- Officers will request assistance from supervisors in obtaining access to any existing recorded media if the officer is unfamiliar with the safe and secure manner of retrieval of the particular media. Supervisors will assist the officer in obtaining access to such items and in maintaining the integrity of the recorded media evidence. Note that where specific policy exists with regard to access or operation of technology or equipment, officers and supervisors shall follow the specific policy relevant thereto with regard to such technology or equipment.

DRAFT RECORDED MEDIA REVIEW POLICY

Specific Concerns

- Urgency of Required "Public Safety" statements may require prior review of recorded media initially;
- In circumstances where employees will be interviewed with regard to their actions in a Use of Force incident:
 - Allow review when practicable;
 - In incidents where employees will be separated prior to interview the review shall be done individually (with representative present)
- A supervisor may decide to delay review of media in circumstances that raise extraordinary concerns such as potential destruction of evidence. In such circumstances a command level officer will be consulted promptly to discuss any potential concerns and will make a determination as to the appropriateness of the media review.

DRAFT RECORDED MEDIA REVIEW POLICY

Documentation of Recorded Media Review

- When an officer submits a report containing documentation of their actions or observations based on the review of available media, officers will list in their report all of the media which has been reviewed.
- In circumstances where an officer has previously prepared and submitted a report about the events to a supervisor prior to reviewing media that is determined to exist, the original report will be maintained and any additional or varying observations and information will be submitted in a supplemental report.
- During recorded interviews regarding any event, the interviewer should establish what media if any the officer being interviewed has reviewed.

Arrest-Related Death Evidence Collection

1. Highly Perishable Evidence (some items repeated below)

- a. Get the AED (Automatic External Defibrillator) or cardiac monitor downloads (including rhythm strips and technical operational downloads). This is usually erased when the next paramedic shift starts. This information can eliminate "electrocution" by the TASER CEW (Conducted Electrical Weapon) 95% of the time. However, it is erased 80% of the time. Note that there can be 4 defibrillators: (1) Squad car, (2) Paramedics, (3) Ambulance, and (4) Hospital.
- b. Maintain as evidence the CEW wires and probes! Microscopic analysis of the probes and wires will often show that no electrical current was delivered (as one probe missed) and eliminate the TASER CEW as a factor.
- c. Core (rectal or liver) body temperatures at as close to time of collapse as possible by medical personnel. Not considered important by EMS or Emergency Department (ED) staff for therapy but important for Excited Delirium diagnosis.
- d. Paramedic pulse oximeter recording if available.
- e. End tidal CO₂ measurement from paramedics during CPR (cardio-pulmonary resuscitation) or after they intubated the subject. Often not recorded.
- f. Antemortem (pre-death) blood sample from ED in proper preservative tube for "quantitative" analysis – not just "qualitative" analysis.
- g. If postmortem blood sample – get several blood samples (especially peripheral samples) and place in proper preservative tube for quantitative analysis – to avoid continuing metabolism within the tube.

2. Important Requests for ME (Medical Examiner)

- a. Hair sample and chronic drug use analysis (\$75). At least save a head hair sample (pencil thick when twisted) and a pubic hair sample.
- b. Mash Miami brain test (\$400). (1-800-UM-BRAIN and www.exciteddelirium.org)
- c. Due to the importance of the hair and brain test, the LEA (Law Enforcement Agency) should offer to pay for them. The \$475 is nothing compared to the typical \$1 million settlement for an ARD (arrest-related death).
- d. Save the heart (histologic heart blocks may be very important).
- e. If any TASER probes were within 5 cm (2 inches) of the heart, ME should measure the exact distance (in millimeters) from the tip of the probe to the outer surface of the heart. Document all probe locations.
- f. Save blood sample for genetic testing for "long QT" syndrome.
- g. Collect and analyze gastric contents.

3. Acute Medical Information.

- a. Body Core (rectal or liver) Temperature at time of death and as close to collapse as possible.
- b. Collect 10 ml (milliliters) of blood as soon as possible after ED arrival for later quantitative drug testing.
- c. Document (ideally photograph) all TASER probe and wound locations. Record if they removed the probes or subject arrived without.
- d. Within 24 (preferably less than 12) hours of collapse, brain samples must be properly collected and frozen. Call 1 800 UM BRAIN (also www.exciteddelirium.org) for shipping instructions.
- e. In suspected cocaine, methamphetamine, PCP, etc. smoking cases, swabs of mouth and bronchial tree are helpful for chemical analysis.
- f. Remind treating physicians to keep documentation objective and don't write about things they do not understand. Occasionally hospital records will include statements about a "TASER" wound even though there was no TASER CEW used near that specific location.

4. Chronic Medical Information.

- a. Obtaining hair and toe-nail samples. Twist strands of longest head hair available like a lock, about as thick as a pencil lead, hold together to keep strands aligned as you cut as close to skin as possible. Transfer lock to tin foil or paper, fold (to hold together), and secure. Collect similar samples from longest pubic/groin hair.
- b. Obtain all available past medical records.
- c. Obtain printouts from pharmacies used by suspect for past 2 years.
- d. Obtain all criminal justice records.
- e. Obtain all rehabilitation and treatment records.

5. Circumstances Regarding Arrest.

- a. Distance CEW fired, probe spread, *probe location*, and duration of cycles.
- b. TASER CEW effects (such as change in behavior).
- c. Subject's influence (drugs, alcohol, emotionally disturbed).
- d. Any other use of force employed?
- e. Was an AED, defibrillator, or cardiac monitor used?
- f. Did the AED report a shockable rhythm?
- g. Is there a printout (download) from the AED or cardiac monitor?
- h. How long between the CEW exposure and the subject's collapse?
Specifically detailed chronicle of all witnessed behaviors, actions, inactions, physiological status, etc.
- i. Was the subject walking, fighting, or talking after the exposure?
- j. MEs contact info or supporting info from medical attendants and ED
- k. Hospital exam information (if conducted).

6. Interviews.

- a. Treat the EMTs (Emergency Medical Technicians) and Paramedics etc at the scene like any other witnesses. Get complete statements from them about what they observed and what interventions they made. Very often, they can make medical observations that the LEOs (Law Enforcement Officers) might not realize are important but

they will have forgotten by the time their depositions are taken two to three years later. Where did the probes land? *Don't assume that their standard report has enough information — it does not.*

- b. Try to get eyewitness statements that address the rapidity with which the subject went from screaming, struggling, and yelling to unconscious, not breathing and pulseless.¹
- c. Get statements that include whether or not the subject could be heard to be breathing, screaming, yelling, etc throughout their confrontation against LEOs efforts to capture, control, and restrain. Screaming and yelling require that air is moving over the vocal cords and demonstrates that at least some degree of ventilation had to take place. How much yelling and screaming?
- d. Debrief LEOs and witnesses regarding words and actions manifested by subject. Get details of patterns of walking, talking, gestures, facial expressions, breathing, pulse, etc. Ask interviewees to replay their memory with attention to DUI (Driving Under the Influence)/DRE (Drug Recognition Expert) type details. Sounds, even grunts, growls, and snarls, are important. Get collaborative reports.
 - i. Was suspect growling? How?
 - ii. What words could you make out?
 - iii. Huffing and puffing?
 - iv. Sweating?
 - v. Drooling?
 - vi. Eye movements?
 - vii. Balance?
- e. If subject is only injured and survives, debrief as soon as possible about subjective feelings, thoughts and drug effects. They were the only ones inside their bodies and looking out so ask how they saw and heard the world. Don't translate anything into your own words but describe mannerisms and expressions accompanying their descriptions.
- f. SOUNDS: Ask all witnesses to describe any unusual sounds they heard. If they describe sounds like "arcing" or "electrical short" there was probably a connection break and the suspect was not getting current delivered at that time. Even "clicking" heard in a noisy situation or from > 10 ft, in a quiet situation, is indicative of a broken connection. Like a car or refrigerator, when the TASER CEW is making noise, there is usually something wrong. Adverse witnesses love to go on about the electrical noise, thinking they are hurting the police when the opposite is true.

¹ Remember a respiratory death takes minutes whereas a cardiac death takes only a few seconds. Try to specifically determine the time sequence as clearly and carefully as possible in the early phase of the investigation. Advise LEOs to collect as much information about the passage from activity to unconsciousness as possible. The sequence of events for a sudden cardiac death as opposed to a respiratory death are markedly different and chronicling exactly what happened, how fast, when, and whether there was resistance, exertion, struggling, or fighting until "all of a sudden" or like a "light switch" things changed can be most important information.

7. Evidence Collection.

- a. Photos of wounds and CEW probe or drive-stun impacts with ruler.
- b. Photos showing distance of probe or drive-stun spread (scale).
- c. Keep the original CEW battery in the CEW (DO NOT Remove). This will keep the integrity of the internal clock.
- d. Do not discard probes or wires (treat them as evidence). Do not let EMS place probes in "sharps" container as information can be gathered from the probes and wires as to whether or not they actually delivered current.
- e. Download CEW data within 48 hours of the event and maintain evidentiary copy of download (including time drift)
- f. Collect 2-3 AFID (Anti-Felon Identification) tags and note their location; this will be helpful if multiple CEWs or cartridges were deployed.

8. Medical/Autopsy Data and Tissues

- a. All treatment records
 - i. EMS
 - ii. Emergency department
- b. Autopsy report
- c. Autopsy microscopic slides (if any were prepared)
- d. Autopsy gross tissues (if any were retained)
 - i. Heart is especially useful

9. If the CEW Did Not Perform as Expected:

- a. What was the failure or challenge?
- b. What was the subject wearing (especially, multiple layers, thick layers, loose clothing, etc.)
- c. Was the CEW dropped or subject to a high-moisture environment?
- d. What were the operating conditions?
- e. Did the CEW fire?
- f. Did LEOs hear loud arcing – especially across the front of the CEW?
- g. Drive-stun or probe deployment?
- h. When was a last successful download or spark test done?

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Excited Delirium Checklist

Excited delirium or excited delirium syndrome is only one form of potential sudden death that law enforcement officers may encounter. Other potential causes of unexpected arrest-related deaths include, but are not limited to: SUDEP^{1, 2} (sudden unexpected death in epilepsy), sickle cell sudden death,³ various cardiomyopathies,⁴ drug induced arrhythmias (including those caused by alcohol^{5, 6} and marijuana⁷⁻¹⁰), psychiatric arrhythmias (whether due to schizophrenia¹¹ or medications¹²), and severe coronary artery disease.

Present?	Criterion
911 Call – Emergency Contact for Assistance	
	1. Critical call phrases include, "He just freaked out," "just snapped," "flipped out," or a person is "running around naked." ¹³
Law Enforcement	
	2. Agitation, screaming, extreme fear response or panic ¹⁴⁻¹⁸
	3. Violence, assault, or aggression towards others ¹⁸⁻²¹
	4. Suspicion of impending death. Typical comments include, "I'm dying," "Please save me," or "Don't kill me" ²²
	5. Incoherence or disorganized speech. Grunting or animal sounds ^{21, 23}
	6. Clothing removal inappropriate for ambient temperature or complete nudity. ^{18, 24-26}
	7. Disorientation or hallucinations ^{18, 27-30}
	8. Mania, paranoia, anxiety, or avoidance behavior ^{14, 18, 31-34}
	9. Constant motion or hyperactivity ^{14, 30, 35-37}
Capture, Control and Restraint of Subject	
	10. Extreme or "super human" strength ^{21, 33}
	11. High threshold of or imperviousness to pain ^{23, 26}
	12. Extreme stamina ^{18, 23}
	13. Brief quiet period before collapse likely corresponding with respiratory arrest ^{14, 17, 23, 39}

Emergency Medical Services Contact and Intervention	
	14. Presenting rhythm of PEA (pulseless electrical activity) or asystole. ^{38, 40-43} Also documented by "No shock advised" with automatic external defibrillator ⁴²
Emergency Department	
	15. High core body temperature. ^{15, 16, 21, 31, 44, 45}
	16. Acidosis (acidic blood) ^{23, 46, 47}
	17. Rhabdomyolysis (if suspect is resuscitated). ^{15, 45, 48}
Law Enforcement/Forensic Investigator Death Investigation	
	18. History of chronic stimulant abuse or mental illness. ^{14, 19, 27, 32, 37, 40, 49-52} History of violence or drug related arrests, mental health histories and treatments, and drug rehabilitation interventions, etc.
	19. Damage to shiny objects such as glass, mirrors and lights. ²³ Reported behaviors may include attacking a squad car light bar or charging oncoming traffic at night. Occasionally generalized vandalism.
Pathologist – Medical Examiner Investigation	
	20. Minor injuries from fighting against restraints (e.g. handcuffs, hobbles).
	21. Positive Mash (central nervous system biomarkers) test for dopamine transporter assay and heat shock protein. ^{15, 31, 32, 53-57}
	22. Positive brain and hair toxicology screen for chronic stimulant abuse. ^{53, 58} ⁶² Post-incident drug levels may be low to negative.

Contributors: Mark Kroll, PhD; Charles Wetli, MD; Deborah Mash, PhD; Steven Karch, MD; Michael Graham, MD, Jeffrey Ho, MD.

Notes:

A syndrome is an aggregate of signs and symptoms that define a medical condition. Not all persons with a certain syndrome have all the same signs and symptoms. Not all cases of a syndrome result from the same cause. For example, some persons with carpal tunnel syndrome will have numbness and tingling, while others will have weakness and pain. Also, some persons with carpal tunnel syndrome will have it because of trauma, while others will have the syndrome because of pregnancy, diabetes, rheumatoid arthritis or thyroid disease.

Persons with the excited delirium syndrome will have various combinations of some of the signs and symptoms listed above. The cause (etiology) of the excited delirium syndrome in any individual may be due to one or more of a number of conditions. The most common conditions are mental illness and illegal stimulant abuse (especially cocaine and methamphetamine).⁴⁰

Because the term "excited delirium syndrome" has not been widely used until recent years, many physicians do not recognize the term even though they may be very familiar with agitation and deaths due to drugs and other conditions.⁶³ It is important to avoid the distraction of the various terms that have been applied to this syndrome. For example, what is now referred to as excited delirium^{14-16, 26, 32, 33, 36, 38-40, 45-48, 51, 54, 55, 64-71} or agitated delirium^{41, 57, 72-117} has also been called: Bell's mania,³⁰ acute exhaustive mania,¹¹⁸ acute delirious mania,³⁰ delirium grave,³⁰ typhoma,³⁰ acute delirium,³⁰ manic-depressive exhaustion,²⁴ excited catatonia,⁹¹ lethal catatonia,¹¹⁹ and neuroleptic malignant syndrome.^{19, 26, 44, 74, 119}

Statistical Confidence:

There must be at least 5 positive criteria to diagnose excite delirium syndrome. For 12 or more positive criteria the confidence level is at least 99.9%. For less than 12 positive criteria the confidence depends on the number of criteria for which information is available.

For example, the brain and hair tests are, unfortunately, typically not done. Often the blood tests for rhabdomyolysis is not done. In this case there will only be information on 19 criteria. If 8 of these 19 criteria were positive then the confidence in the diagnosis would be 93%.

		Number of Positive Criteria						
		5	6	7	8	9	10	11
Number of Criteria With Information	↓							
	10		64%	82%	93%	98%	99%	99.9%
11		62%	81%	91%	97%	99%	99.8%	99.9%
12		61%	79%	90%	96%	99%	99.6%	99.9%
13		60%	78%	89%	95%	98%	99.4%	99.8%
14		60%	78%	89%	95%	98%	99.2%	99.8%
15		59%	77%	88%	94%	97%	99%	99.7%
16		59%	76%	87%	94%	97%	99%	99.6%
17		58%	76%	87%	93%	97%	99%	99.5%
18		58%	75%	86%	93%	97%	98%	99%
19		57%	75%	86%	93%	96%	98%	99%
20		57%	74%	86%	92%	96%	98%	99%
21		57%	74%	85%	92%	96%	98%	99%
22		57%	74%	85%	92%	96%	94%	99%

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DRAFT POLICY LANGUAGE RE MEDIA REVIEW

It is the policy of the _____ Police Department that official statements and written reports should be prepared with a goal of factual accuracy and thoroughness. The review of existing media relating to an incident such as video and audio recordings or electronic data may correct and enhance the reliability of an officer's recollection of events and more accurately document the events in the form of reports and statements. Therefore in preparing written reports and in preparation for giving statements, officers will review evidence known to exist to achieve optimal accuracy with regard to the events and circumstances prior to giving statements and preparing reports.

Officers should keep in mind when preparing reports and giving statements that such media, while helpful in preparing reports and documenting events, is rarely a complete reproduction of the events. Furthermore, such media does not typically document important concerns such as an officer's state of mind during the events or the context in which the events were occurring.

Such review will include when available, audio or visual media of the events including such items as photographs, video or audio recordings of the actual events and the officer's own observations, and electronic data such as ECD dataport downloads. Officers will assure that the original media is maintained in a secure manner and is not altered in any manner during the review process. Officers will request assistance from supervisors in obtaining access to any existing media if the officer is unfamiliar with the safe and secure manner of retrieval of the particular media. Supervisors will assist the officer in obtaining access to such items and in maintaining the integrity of the media evidence. Note that where specific policy exists with regard to access or operation of technology or equipment, officers and supervisors shall follow the specific policy relevant thereto with regard to such technology or equipment.

A supervisor may decide to delay review of media in circumstances that raise extraordinary concerns such as potential destruction of evidence. In such circumstances a command level officer will be consulted promptly to discuss any potential concerns and will make a determination as to the appropriateness of the media review.

When an officer submits a report containing documentation of their actions or observations based on the review of available media, officers will list in their report all of the media which has been reviewed. In circumstances where an officer has previously prepared and submitted a report about the events to a supervisor prior to reviewing media that is determined to exist, the original report will be maintained and any additional or varying observations and information will be submitted in a supplemental report. During recorded interviews regarding any event, the interviewer should establish what media if any the officer being interviewed has reviewed.