

# Would Tom Swift Approve the Use of the “TASER” Today?

By Dr. Matthew Stiehm



## Introduction

One of the current trends in police work is the use of

less-than-lethal force. Specifically discussing Electronic Control Weapons (ECW) commonly referred to as the Taser is one such weapon and is being used more frequently to avoid the problems arising from recent court decisions regarding the use of force. If one looks at most of the decision that impact law enforcement come from the Ninth Circuit.

There are other platforms or weapons systems such as Springer (aka Karbon Arms) and Karbon Arms. It should be noted that Taser International® and Karbon Arms are in a pending civil litigation. The weapons systems are ECW, the platforms, delivery methods are similar in a variety of ways, and different in other ways. It is argued and maintained that Taser has a larger market share, much like PC and Apple

Regardless of the weapons system or platform your police agency is using, proficiency with the weapon, understanding maintenance, recommendation specifications, and other criteria due not negate the fact that officers need to know when to deploy the weapons system following constitutional law, state law and local policy. There is a very intense and heated dialogue amongst law enforcement educators, trainers, policy makers and chief executives on the appropriate deployment of the weapons system.

In understanding the deployment one should look at the guiding factors of the 4th, 8th, and 14th Amendments and cases that have provided judicial review, specifically *Garner v. Tennessee*, *Scott v. Harris* and *Graham v. Connor*. As any weapons system can cause death, the intended use of an ECW is to be considered a less than lethal weapons system. There has been some modification from Taser International in how the weapons system should be deployed since it's reintroduction into law enforcement. Death resulting in the deployment of an ECW are rare, and generally there are some other contributing factor, narcotics, poor or failing health, or excited delirium. At this time there is limited research and sample size which would indicated that the Taser weapons system was the proximate cause of death. Another concern as noted by retired Capt. G. Meyer of

the LAPD at the April 2013 AELE Conference is weapon confusion. Officers thinking they are grabbing an ECW when in fact they gaining access to a firearm. This can most notably be seen in the BART Shooting with suspect/victim Oscar Grant and Officer J. Mershle as portrayed in the movie *Fruitville Station*. To understand the deployment and development rationale of the ECW one must first be concerned with laws surrounding lethal and less lethal force.

Prior to the wide acceptance of ECW's officers were getting hurt on a regular basis as a result of fighting with suspects. Prior weapons systems such as chemical aerosol, batons, nunchucks, straight batons, bean bag rounds and whatever else is out there, officers had to get within relatively close contact with the suspect. The ideal range for chemical spray is within feet, batons are developed in inches, and nunchucks are up close and personal. With the advent of the ECW's officers now can operate in a safer space in relation to the suspects. But knowing when to use the ECW or for that matter any force is important to understand the foundation in law. Additionally the ECW does have some limitations based upon where the interaction occurs, for example an ECW deployment in January in Minnesota might be less effective than an ECW deployment in Florida during spring break.

## Objectively Reasonable Force

### Introduction

Most police officer understand that use of force is contained within the confines of the 4th Amendment, but prior to the *Graham* Decision in 1989, officers were having use of force cases reviewed under the 8th and 14th Amendments. The Supreme Court provided guidance to lower courts on how to view and apply force in providing enumeration in *Graham* (Marker, J, 2013). This is important because street level application of force does not need to be as in step within the confines of a courtroom analysis. To better understand this think of the course standards set forth in *Graham* -the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of defendants or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. These factors can be rearranged in any order and are not all inclusive. The safety of the officer, citizens, and suspects are arguably the

# Would Tom Swift Approve..., cont.

most important factor. If the officer is going to get hurt by something the suspect is doing, then this raises the ability for a reasonably trained officer to use force.



As noted in a St. Paul Police Department, Minnesota in the civil case of *Carter v. Baily and Weinzettle* (Civil No: 10-3081)- the court ruled to decline a motion of summary judgment by the defense and what follows is the rational of importance as to;

The Fourth Amendment right to be free from unreasonable seizure protects against the use of excessive force in the apprehension or detention of a person. See *Graham*, 490 U.S. at 395. "To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009) (citations omitted). [T]he 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." *Cook v. City of Bella Villa*, 582 F.3d 840, 849 (8th Cir. 2009) (quoting *Graham*, 490 U.S. at 396).

When evaluating the reasonableness of an officer's use of force, a court considers "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of defendants or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). The "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97; see *Brown*, 574 F.3d at 496. In short, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Cook*, 582 F.3d at 849 (8th Cir. 2009) (quoting *Graham*, 490 U.S. at 396).

## Key Court Cases – To use of force

### *Graham - Factors*

The United States Supreme Court has established guidelines for officers when using force. The two landmark decisions are

*Graham v. Connor* and *Tennessee v. Garner*. In the first case, *Graham* was a diabetic who was in a car with his friend. *Graham* and his friend were attempting to get some orange juice for *Graham* who was having a diabetic reaction. *Graham* entered a store, but due to long lines, left without purchasing anything. *Graham* told his friend to hurry to another store. An officer observed *Graham's* quick entry and exit from the store, and stopped them to conduct an investigation. During the course of the investigation *Graham* got upset, he was then handcuffed. While being handcuffed, *Graham* sustained injuries. *Graham* filed suit against the department and the officer for excessive force. The Supreme Court found that officers are liable when any level of force is deemed excessive.

However, the definition for what is 'excessive' is determined after each situation and is lacking an objective guideline. The Supreme Court has further defined that every application of force must be deemed justifiable on its own merits. The situation or application of force needs to be reasonable and not judged in hind sight.

"The reasonableness of the situation and force used is determined on the spot, considering all the circumstances" (*Champion*, 1997, pp. 196-197). So what does this mean for officers? It sets up a standard that officers cannot be judged for their use of force, without looking at the context of the situation in which the force was used.

As noted in the Ninth District Federal Court in *Bryan V. McPherson*

[2] Allegations of excessive force are examined under the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001). We ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham*, 490 U.S. at 397. We must balance " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)); see also *Scott v. Harris*, 550 U.S. 372, 383 (2007). Stated another way, we must "balance the amount of force applied against the need for that force." *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003).

And

[7] Under *Graham v. Connor*, we evaluate the government's interest in the use of force by examining three core factors, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (emphasis added) 490 U.S. at 396; see also *Deorle*, 272 F.3d at 1280.

# Would Tom Swift Approve..., cont.

These factors, however, are not exclusive. Rather, we examine the totality of the circumstances and consider “whatever specific factors may be appropriate in a particular case, whether or not listed in Graham.”

## Tennessee v. Garner- Lethal Force

The second case, Tennessee V. Garner, deals with the use of deadly force. This case involves a 15-year-old suspect who was in a house committing a burglary. Officers arrived on the scene and the suspect fled, on foot, out running the officers. One officer shot the suspect in the back of the head as he was fleeing. In this case, the United States Supreme Court ruled that the use of deadly force is not allowed to stop a suspect from fleeing the scene if they do not present a threat to the public. The only time deadly force may be used is if “...they pose a threat to the lives of officers or...they pose a threat to the lives of others” (Champion, 1997, p. 286). Prior to this, police officers were allowed to use deadly force to stop a fleeing felon. With an understanding of these two cases, it becomes apparent that force options need to be updated to allow officers the ability to control a suspect with less-than-lethal force. However, before the use of the taser is discussed, a use of force method and one policy governing the use of the taser will be introduced.

“The need for LTL (less-than-lethal) weapons derives from the fact that law enforcement officers regularly encounter situations that require some type of coercive action or force, but not deadly force” (McEwen, 1997, ¶ 5). The taser controls the whole body, as opposed to chemical agents where the spray is administered to the face and does not incapacitate the body. also have limited areas of control (Safety every officer deserves, 2003,). The use of batons is only to control large body part and large muscle groups (Siddle, 1989). Taser technology uses electric pulses to control a suspect. There are two barbs, which can shoot 15-21 feet away, and at least one of the barbs needs to make contact with the suspect in order to deliver the electric pulse, to get an effective application both barbs should be deployed for the traditional Taser model.

## Taser Deployment

Numerous studies have been conducted in support of ECW’s. One study of note was completed by Taser International had 2050 field deployments of the Advanced Taser M26. Taser International states that they had a 94.4% success rate with the use of the weapon to control a suspect. Taser International defined ‘success’ as when no other force option was used after the Taser. There have been advanced in design, deployment, and length which only make the ECW (Taser) are more desirable weapons platform to have in officers tool box for less than lethal

encounters.

Taser International stated that this force option did not work on a total of 112 individuals. The information states that most of the time the weapon failed because the suspect was under the influence of a chemical or drug that affected the body. The most common drug was alcohol, resulting in the weapon failing a total of 37 times. The second most common type of failure reported dealt with clothing worn by the suspect, which accounted for 29 incidents. The study also concluded that there were less severe injuries during the deployment of this less-than-lethal weapon option. Of the 2050 deployments the Taser was used a total of 1888 times. Two percent of those Tasered had moderate to severe injuries as a result (Advanced Taser, 2002). The data also suggests injuries were not described as being a result of the ECW deployment, or related to the ECW deployment (i.e.-fall or something as a result of loss of motor function control)

There has been continued advancement of the Taser International weapons platforms there is a need for continued research on the weapons system as well as those of competitors coming into the preverbal sandbox. It is posited the weapons systems and manufactures’ disagree, the weapon regardless of design or platform, provides for a lower level reasonable force option, where a suspect is presented with a deliver system, electric current, and hopefully containment.

It is posited in two specific areas, the effectiveness of the weapons system to maintain operational specifications after purchase to ensure that the weapon system does not have any mechanical flaws and more importantly weapons deployments documenting when the weapons system was deployment (painted/arched/threaten) as appropriate to diffuse the situation. The first would demonstrate the mechanics of the Taser in a valid manner, the second and more important would be the deployments of the weapons systems solve, saved, or prevented an increased objectively reasonable application of force from occurring.

A related 2-year study was conducted by Martin Luther King Drew Hospital in South Central Los Angeles, which is part of the Los Angeles County medical system and is second to University of Southern California for trauma seen in and around the Los Angeles/South Bay Region. The hospital serves Los Angeles Police Department and Los Angeles Sheriff’s Office as well as other smaller police agencies in the area. A total of 218 tasered suspects were taken to the hospital, 70% had PCP in their blood stream. Three of these individuals died after admittance into

# Would Tom Swift Approve..., cont.

the hospital emergency room. At the autopsies it was learned that the three had lethal amounts of PCP in their bodies. The remaining 215, that were seen in the emergency room, did not have "...any lasting after-effect from being tasered" (Murray, 1992, p50). On the other hand, during this same period, 22 people were brought to the hospital with gunshot wounds resulting from police related violence; eleven died and the other half suffered some form of permanent disability. No tasered suspects were retained at the hospital for treatment, where as gunshot victims stayed an average of 42 days (Murray, 1992, p50).

## **Similar Research in the United Kingdom (dated)**

This weapon was also tested in the United Kingdom, and The Home Office found some problems with the taser. These problems dealt with the mechanical elements, but still could have caused complications during the use of the weapon. The Home Office found that using different batteries in the same model of taser could greatly affect the life and output of voltage needed to contain a suspect. Also, the batteries can have problems in extreme cold temperatures. Both of these battery related problems cause lower voltage to hit the suspect, thus the weapon is not being used in the design parameters. With these variations in use, it becomes less likely that the suspect will be incapacitated.

The same report stated that the use of higher voltage tasers interferes with the entire central nervous system, making it harder for a suspect to fight the police. The lower voltage systems only blocked communication within the body and suspects were able to fight back and have some resistance (Donnelly, 2001). The Home Office notes that recently some American Police Departments did research with officers armed with duty weapons, which had blanks in the magazines. The officers under contact with the higher voltage taser barbs, were able to fire rounds. In summary, The Home Office recognizes the following as possible limitations on the use of the taser in the field: extreme cold, clothing, low battery charge, one or both barbs miss the intended target, subject's ability to fight through the electrical impulses, cartridge failure, and operator error (Donnelly, 2001, pp. 26-29).

Another potential problem with the tasers, addressed by the Home Office, is the distance that an officer has to use the weapon. According to Donnelly the greatest distance for effectiveness is 21 feet. Outside of this distance there is a great chance that the suspect may not get hit with at least one of the

barbs. According to The Home Office report, the use of the taser should be considered a close quarters weapon (Donnelly, 2001, p. 30). Taser International has only a total of 40 incidents in their research with the use of the taser at the range of 15-21 feet. Taser International stated that they had 37 successful contacts at this distance, with only 3 people being able to defeat the system (Advanced taser, 2002). There is not enough research at longer distances to show that the weapon is effective in controlling a suspect.

## **Problems with ECW's**

There must be a discussion in regard to the use of ECWs, specifically there has been an apparent trend or over use of the "Taser" for lower level non-violent offenses. Also as is noted in City of Portland Consent Decree, the use of the ECW on emotionally disturbed people and the DOJ Special Litigation focus on the City of Portland.

Additionally noted by Taser, and Force Science, and Captain (ret) Meyer, weapons placement appears to be a problem. Many of the cases of Captain Meyer's reviewed that result in death, the resulting problem appeared to be weapon confusion.

## **Conclusion**

Police officers' "use of force ranges from 0.8% to 58.1% of police-suspect encounters" (Garner et. al., 2002, p. 705). So police use force in a large range of contacts with people in the community; this is often not recognized. Based on the information provided by the United States Supreme Court it appears that the use of a Taser or similar ECWs is within legal guidelines. Research on the use of force seems to cover two different avenues. First, the use of force is authorized in law enforcement field and secondly, the use of excessive force does occur (Morabito & Doerner, 1997). Considering both of these areas, the use of Tasers is well within most departmental policy for deployment and use. The Taser appears to be a weapon that causes limited injury to suspects, thus being within the 'reasonableness standard' of Graham V. Connor. The use of the Taser/ECW's have some shortcomings so to say that the kinks are still being worked out. The problem because the weapons platform is a great tool for law enforcement, some of the kinks are our own fault- failure to train, failure to document use of force which end in Federal Consent Decrees and reporting language which are now being used by experts in the field to determine appropriate field deployment. In looking at the 4th Amendment at Graham standard it is posited that the objectively reasonable standard is appropriate and should be the guiding force, but unfortunately

# Would Tom Swift Approve..., cont.

it is not, policy makers, experts, and lawyers are taking and discussing when and how to use ECW's. The profession has created many of its own problems. For example not using the weapons systems soon enough or using the weapons system inappropriately. Notwithstanding any claims of outright torture, pain or retribution the ECW is a great tool for law enforcement. But it needs to be control, documented, and prepare for. To this end training curriculum, standards, bench-marking, and agency review of federal documents, federal holdings and arrangements should be reviewed to provide clarity and direction to law enforcement professionals, and chief executives. **ILEETA**

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## About the Author

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*He has worked as a curriculum expert creating a variety of classes in all types of arenas to include, online, hybrid (blended), traditional classroom, professional development/continuing education and single source presentations. Most notably Dr. Stiehm has presented at the American Correctional Conference, (2009), International Law Enforcement Educators and Trainers Conference (2009, 2011 and 2012), MN IACLEA Conference (2011), and the International Association of Chiefs of Police (2011). He has also presented at local conferences to include the Minnesota Career College Association (2008, 2010, and 2011), and a local conference of the Park Law Enforcement Association sponsored by Three Rivers Park District Police Department. Finally he has chaired a panel at the 2011 Midwestern Criminal Justice Association. He is currently scheduled to appear and speak at the 2013 Park Law Enforcement Association conference in January. He has completed conference proposals for the following conferences in 2013- IADLEST, IACLEA, ILEETA, MN IACLEA, Northeast IACLEA, National Sheriffs Association Conference, and MN Chiefs of Police Conference. He has been accepted to present at the 2013 GOV Sec and the 2013 Mid-America IACLEA Conference.*



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