



michigan municipal league

Law Enforcement Action Forum Newsletter



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Warning – The Courts Scrutinize An Officer’s Response To Encounters With At Risk Subjects!



By Gene King, LEAF Coordinator

This edition of the LEAF Newsletter will discuss what officers need to know should they observe a person who is at risk of sudden death during arrest. It will also discuss the decisions of the courts’ that evaluate police officers’ actions after they encounter a person whom they believe is at risk and in need of medical treatment.

The topic of sudden death caused by excited delirium has been a controversy in law enforcement for some time. The LEAF Newsletter first addressed the topic in the March 1999 issue titled *Sudden Death In-Custody*. At that time, the use of aerosol spray and positional asphyxia drove the controversy. Eleven year later, the controversy still rages, now focusing on the use of Tasers.

LEAF decided it was time to discuss the issue once again. Reports from the field reveal that the closing of prisons, the reduction of jail beds, the lack of mental health care, and the continued proliferation of drug and alcohol abuse increases the probability that a law enforcement officer will encounter individuals displaying symptoms of excited delirium. Additionally, LEAF has discovered that law enforcement and emergency medical personnel are not fully aware that a subject’s bizarre behaviors should prompt them to

determine whether the subject may be at risk for sudden death and evaluate what action they should take in an attempt to lessen the risk both to the subject and themselves.

LEAF’s belief is that officers need to go home safely. To do that, they must be aware that a high percentage of the subjects with whom they have contact are under the influence of drugs or alcohol and/or have a mental or physical illness. When encountering these types of subjects, officers must recognize it and be prepared to make tough and rapid decisions to maintain or gain control.

We all know that bad things can happen in situations involving unpredictable and unstable subjects. There may be a time where the threat is so great that officers must apply deadly force. One of the MCOLES Firearms Standard’s purposes is to educate officers about the specific requirements of *Garner* and *Graham* concerning use of force and the courts’ methods of evaluating an officer’s actions. The most important message to take from the following discussion is that the courts consider a subject’s mental state as part of the totality of circumstances when determining the reasonableness of an officer’s actions.

What Are We Talking About

Before discussing what to do if confronted with a subject exhibiting unusual and bizarre behavior, officers need to understand that there are some typical behaviors that a person who is at risk of unexpected arrest related death exhibit. While the discussion focuses on excited delirium, officers should also be aware that sudden death might have other causes: various heart diseases, drug induced irregular heartbeat, psychiatric condition related irregular heartbeat, severe coronary artery disease or even epilepsy and sickle cell. These usually do not involve bizarre behavior.

Departments need to ensure that yearly training for officers includes the recognition and handling of individuals who may have mental problems and/or are substance abusers. Officers need training so they recognize when a subject's behavior is abnormal, potentially destructive, or dangerous. They should also understand that if a subject is violent or combative, high on drugs or alcohol, or exhibits signs of mental illness, they may be in a state of excited delirium and at a high risk for unexpected arrest related death.

exciteddelirium.org defines excited delirium as a brain disorder that is usually the result of drug use but sometimes is not.

Officers should expect the subject to have a sudden onset of symptoms such as bizarre and/or aggressive behavior, attacking shiny objects especially glass, shouting, paranoia, panic, violence toward others, unexpected physical strength, and hyperthermia (unusually high body temperature) which is why they are often naked. Subjects will often be constantly in motion and hyperactive. They will fight until there is nothing left to give. When they reach this point, the subject will quit breathing and his or her heart will stop.

There are numerous medical reasons why this happens, often when the person is in this downward spiral, there is little that officers can do to stop it.

Excited delirium occurs with an acute agitation psychosis due to illicit stimulant intoxication. The continued mental illness, drug and alcohol abuse, along with the on and off use of psych drugs

- 🚑 Causes a kindling affect in the brain.
- 🚑 Causes an adrenaline dump that makes the heart susceptible to abnormal activity or heart attack. This creates dopamine transporter abnormalities and damages the brain center at the top of the brain.
- 🚑 Causes disruption of the natural stop mechanism that causes a person to quit fighting.
- 🚑 Causes an adrenaline dump which makes heart susceptible to abnormal activity or heart attack.
- 🚑 Causes a subject to move suddenly from combativeness to tranquility.

The outcome: **DEATH!**

Legal Advisor Cites The Law

The U. S. Sixth Circuit Court of Appeals ruling in *Griffith v. Coburn*, 473 F.3d 650 (Sixth Cir. 2007) (LEAF Newsletter, *Bits and Pieces of News*, March 2007) is one reason why there is a need to identify key behaviors and physiological indicators that a person may be in crisis.

LEAF's Legal Advisor, Audrey Forbush of Plunkett Cooney, suggests that this case is very important because the Sixth Circuit said that a relevant factor in the case was that the record established that the officers knew before arriving at the house that the subject was having some mental or emotional difficulty that had alarmed his mother.

The Court quoted their findings in *Champion v Outlook Nashville Inc.*, 380 F.3d 893,904 (Sixth Cir, 2004), a case similar to *Griffith v. Coburn*. The Court noted, "It cannot be forgotten that the police

were confronting an individual whom they knew to be mentally ill or retarded, even though the officers may not have known the full extent of (his) autism and his unresponsiveness. **The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.**" (Emphasis added) The Court referred to *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir.2003) in that the handcuffing of a mentally ill subject behind the back and the officers' use of their entire weight on his upper torso to hold him down to apply hobbles violated clearly established rights. The Drummond court went on to say, "Any reasonable officer should have known that such conduct constituted the use of excessive force."

Forbush said the Court is being very specific that officers must receive training on how to recognize mentally ill or emotionally distressed subjects. Officers must also learn how to handle them without escalating the situation unnecessarily. Even though the Michigan Mental Health Code at MCL 300.1427a allows officers to take reasonable steps to protect themselves when taking a subject in to custody for evaluation, the permissible force is that which an officer would use when arresting an individual for a warrantless misdemeanor. See the June 2003 LEAF Newsletter, *Encounters with the Mentally Ill -- Managing the Process*.

Griffith puts the focus on the officers' actions. In this particular case, these actions may have increased the subject's resistance. Even though the court may have not specifically said so, its expectations appear to be that officers involved in taking a subject believed to be having mental or emotional difficulty in to custody need skills to recognize the situation and refrain from unnecessarily escalating it. Officers need to have training in how to decompress the situation, if possible, to avoid requiring a high level of force response to take the person into custody.

Landis v Baker, 2008 WL 4613547 (CA 6, MICH) is another Sixth Circuit case of substance involving a subject who exhibited unusual and bizarre behavior (LEAF Newsletter December 2008,

Knowing When to Say, "Hold It!") In this case, the officers held the suspect down in water while he they tased him and delivered stun applications while they grappled with him. Looking at Landis, the court ruled that gratuitous, repeated applications of the Taser over a short period could amount to excessive force. **The court evaluated the circumstances of the police encounter and ruled that the troubling use of force that they applied to a suspect who was, at most, guilty of a "minor and non-violent crime" even when the suspect was "surrounded," "unarmed," and "no longer a threat," might significantly heighten the perception that the actions constituted a constitutional violation.** (Emphasis added)

In Forbush's opinion, the common thread in the cases under discussion is the courts' analysis of whether the force officers used is justified by the factors outlined in *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989). The factors for evaluating the reasonableness of use of force "requires careful attention to the facts and circumstances of each particular case, including 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."

In the September 2010 edition of the LEAF Newsletter, *The Liar's List, When Is a Cop, Not a Cop?, The Supreme Court Rule Employers Can Still Search*, we discussed a U.S. Sixth Circuit Court of Appeals case, *McKenna v. Edgell*, 2010 WL 3220018, C.A. 6 (Mich). In this case, the court denied qualified immunity to the officers dispatched to a home on a medical emergency, during which they searched the home and conducted an investigation without any reasonable suspicion or probable cause.

The Sixth Circuit Court of Appeals ruled that the facts undoubtedly supported the jury's finding that the officers acted in a law-enforcement capacity, and it, furthermore, said that the fact that the episode began with a 911 call from the patient's daughter and ended with firefighters taking the

patient to the hospital – rather than an arrest – was not paramount. The court said they expect that outcome in a medical emergency involving a patient who has not committed a crime. Moreover, this fact applies mostly to the conduct of others, not of the defendant officers. The meat of the inquiry should focus not on the actions of non-law enforcement personnel but rather on what the officers did between the very beginning and the very end of the incident.

Forbush cautions officers to remember what their role is when answering a call for service – whether law enforcement, EMS or fire. A service call that starts as an EMS or fire incident is an assist unless it becomes a matter of law enforcement because of an observed illegal activity or because of the behavior of the person receiving assistance. What is essential to remember is that officers must conduct themselves according to the standards that *Graham* establishes and must remain sensitive to the fact that courts consider a subject’s mental state as part of the totality of circumstances when determining the reasonableness of an officer’s actions. Furthermore, the courts can only make its decision based only upon the reasonableness and conscious thought specifically articulated in the incident report.

Forbush suggests that in many cases involving subjects exhibiting unusual, bizarre behavior or extreme excited delirium symptoms, people call law enforcement to ask for help in rendering aid to a person who is exhibiting threatening behavior because of a mental health emergency and, incidentally, violating public order or destruction of property crimes. This is not an arrest situation.

Even though the incident may be fluid and rapidly evolving, Forbush warns officers to not overreact and escalate the situation unnecessarily. These types of incidents require level heads and as much coordination as conditions allow to accomplish the goal of getting the subject help without officers being at too much risk.

TASER® International Gives Notice

Taser®, in Training Bulletin 15.0, Version 2.0 (September 30, 2009) issued a new targeting guide in the use of their products. We discussed this subject in the LEAF Newsletter, *Don’t Wait Until The Gear Fails When Regular Maintenance Can Prevent It! Plus: Taser Training Changes And What LEAF Thinks About It!* (December 2009).

In the current discussion, LEAF points to the section titled *TASER® X3™, X26™, and M26™ ECD Warnings, Instructions, and Information: Law Enforcement* in which the company issues the following warnings:

⚠ WARNING

“The signal word WARNING indicates a hazardous situation which, if not avoided or heeded, could result in death or serious injury. It is intended to direct the User’s attention to hazards that may not be obvious, but may be reasonably mitigated by heeding training and instructions, or avoiding certain actions, circumstances, or behaviors, thereby improving the safety of the ECD. WARNINGS may be followed by instructions and information integral to the WARNING.”

⚠ WARNING

Avoid Misuse. Use an ECD only for its intended purpose, in legally justifiable situations, and in accordance with the User’s Agency Guidance. (Emphasis added)

⚠ WARNING

Minimize Repeated, Continuous, or Simultaneous* Exposures. Reasonable efforts should be made to minimize the number of ECD exposures. ECD Users should use the lowest number of ECD exposures that are objectively reasonable to accomplish lawful objectives and should reassess the subject’s resistance level before initiating or continuing the exposure. (Emphasis added)

*'Simultaneous' means delivery to the body of electrical charge by multiple ECDs or multiple completed circuits at the same time.

⚠ WARNING

Always follow and comply with all instructions, warnings, information, and current TASER® training materials to reasonably minimize the risks associated with possible Use and side effects listed below.

Physiologic or Metabolic Effects.

The ECD can produce physiologic or metabolic effects which include, but are not limited to, changes in: acidosis; adrenergic states; blood pressure; calcium, creatine kinase ("CK"); electrolytes (including potassium), heart rate and rhythm; lactic acid; myoglobin; pH; respiration; stress hormones or other biochemical neuromodulators (e.g., catecholamines). **Reasonable effort should be made to minimize the number of ECD exposures and resulting physiologic and metabolic effects. In human studies of electrical discharge from a single ECD of up to 15 seconds, these effects on acidosis, CK, electrolytes, stress hormones, and vital signs have been comparable to or less than changes expected from physical exertion similar to struggling, resistance, fighting, fleeing, or from the application of some other force tools or techniques. Adverse physiologic or metabolic effects may increase risk of death or serious injury.**

(Emphasis added)

Physiologically or Metabolically Compromised Persons.

Law enforcement personnel are called upon to deal with individuals in crises







that are often physiologically or metabolically compromised and may be susceptible to arrest-related death ("ARD"). The factors that may increase susceptibility for an ARD have not been fully characterized but may include: a hypersympathetic state, autonomic dysregulation, capture myopathy, hyperthermia, altered electrolytes, severe acidosis, cardiac arrest, drug or alcohol effects (toxic withdrawal, sensitization to arrhythmias, etc), alterations in brain function (agitated or excited delirium), cardiac disease, pulmonary disease, sickle cell disease, and other pathologic conditions. These risks may exist prior to, during, or after law enforcement intervention or ECD Use, and the subject may already be at risk of death or serious injury as a result of pre-existing conditions, individual susceptibility, or other factors. In a physiologically or metabolically compromised person any physiologic or metabolic change may cause or contribute to death or serious injury. **Follow your agency's Guidance when dealing with physiologically or metabolically compromised persons.** (Emphasis added)

TASER®, in issuing these warnings and advisories, is giving fair warning and notice that if officers use a Taser®, they need to do so sparingly, reasonably, and in accordance with their *agency's guidance* when confronting subjects, especially those who are physiologically or metabolically compromised persons.







Forbush vigorously emphasizes that if law enforcement agencies provide Tasers® and officers have discretion to use them, there must also be guidance provided concerning deployment and available options, when after two to three cycles they have not gained control. The department has to have a policy,

memo, order and/or training so officers recognize when they are dealing with a compromised subject and know how the agency wants them to handle the incident.

What To Do If Faced With A Subject That Is Bizarre And Super Human

-  **Call EMS** when dispatching officers, or when officers observe behavior that leads them to believe they are encountering a subject who may be exhibiting excited delirium. The faster that medical treatment is available, the higher the likelihood that the subject can survive.
-  Wait for help before engaging the subject. Officer safety is important when engaging an agitated subject because they are unpredictable.
-  If the subject is committing a serious crime and/or violently resists your attempts to take him or her into custody, use the level of force necessary to overcome the subject's resistance. Always consider why you are present and what your role in the situation is.
-  If the person does not have a weapon, try to contain the individual in a limited area and, if possible, to remove anyone else in the immediate vicinity. Refrain from escalating the incident by giving commands that the subject most likely will not follow.
-  Remain calm and try to reduce the noise in the environment. Speak to the subject with clear and direct speech asking simple questions. Only one officer should try to communicate with the subject at a time. If the subject will not communicate with one officer, another officer should try. Move deliberately, but not hurriedly, because the subject may see this as a threat or attack.
-  Be patient. The subject may be unable to communicate because of fear, anger, or confusion. Traditional methods for taking a

subject into custody may fail. Try to be creative and flexible in gaining compliance.

-  Try to determine if a person with whom the subject is familiar is available to help get the subject to follow instructions and calm him or her down.
-  Be mindful that the subject often will be hyperactive and find it very difficult to stay still or remain seated. The subject may be overheated and sweating profusely, which causes them to strip off clothing.
-  Once assistance is available – but only if it is appropriate – try to use a Taser[®] to take the subject down. Keeping the warnings from TASER[®] International about repeated exposure and at risk individuals in mind. If it is practical, use a swarm technique to take the person quickly into custody. Remember that pain compliance and control techniques are not reliable when a subject is in this condition. At-risk subjects will not tire, so move quickly, and be aware of restricting the ability of the subject to breath.
-  Monitor the subject for distress.
-  **If the subject has been combative and resistant, but suddenly becomes quiet and tranquil, this is likely a sign of an extreme medical emergency. Treatment should begin immediately.**
-  Turn the subject over to EMS as soon as it is practical.

Reporting

As with any case, it is essential that departments require officers to report in detail the circumstances of the incident, what they observed, the conclusions they drew from their observations, their resulting action and its outcome. The report should provide a plain English version of the old “who, what, when, where, how, and why” of the incident. They should describe the subject's behavior, physical activity, level of resistance

accurately and objectively. If they recall any verbal threats from the subject, they should document these. It is also important to include any subject self-inflicted injury or injury the subject inflicts on another.

Above all, the report should describe the point at which the subject's resistance ceased or relaxed. The report should always include information officers observed or sensed, including evidence of alcohol or drug use. Officers should specifically outline what techniques and tactics they used. The report should detail the use of specific forms of control and restraint equipment used, including how officers used them. Officers should also describe how they monitored the subject after the restraining the subject and when and what medical assistance they initiated. They should document the means of transport and provide a description of the subject's behavior, and, if applicable, officers' actions during transport.

Each officer involved must write his or her own report of the incident. Should the outcome of the incident be a death, an injury, and/or an accusation of the deprivation of civil rights, officers may only have their written reports as their reference and proof. Several years after the incident, when deposed or testifying in a trial, the report may be the only way an officer can clearly recall the nature of the incident and justify his or her actions.

After completing this edition of the LEAF Newsletter, I opened the International Chief's Of Police Association's, December 2010, *Police Chief Magazine* and discovered a topical article of interest in the *Chief's Counsel* section entitled *What Every Police Chief Should Know About Electronic Control Devices*.

This is the link:

http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&issue_id=122010&category_ID=3

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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1675 Green Road, Ann Arbor, MI 48106 ph - 800-653-2483
Contact information: Gene King, leaf@mml.org ph - 800-482-0626 ext. 8036*