



Washington State Legislature

September 16, 2021

The Honorable Robert Ferguson
Attorney General of the State of Washington
PO Box 40100
Olympia, Washington 98504-0100

Dear Attorney General Ferguson:

We write to request a formal Attorney General Opinion addressing multiple issues arising from the passage of Engrossed Second Substitute House Bill (E2SHB) 1310 and Engrossed Substitute House Bill (ESHB) 1054 during the 2021 Regular Session.

(1) Use of Force by Peace Officers under E2SHB 1310.

The first category of questions pertains to the restrictions on the use of physical force by peace officers established in E2SHB 1310, which was primarily codified in chapter 10.120 RCW.

In *Graham v. Connor*, 490 U.S. 386 (1989), the US Supreme Court held that the Fourth Amendment requires use of force by a peace officer to be "objectively reasonable." The Court acknowledged, "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." And the Court further provided, "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." Whether a peace officer's actions are considered reasonable depends upon several factors. These factors may include, for example, the severity of the crime, the threat to the safety of the peace officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The holding in *Graham v. Connor* has become foundational to law enforcement training and policies across the nation.

Peace officers have historically used physical force, subject to the "objectively reasonable" standard in *Graham v. Connor*, to detain persons for various purposes. In *Terry v. Ohio*, 392 U.S. 1 (1968), and other successive cases, the U.S. Supreme Court held that peace officers may detain persons based on reasonable suspicion of criminal activity. Further, several state statutes authorize peace officers to detain persons in civil matters, including, for example, detaining a person in mental health crisis under chapter 71.05 RCW. The court also has authority to direct a peace officer to take a person into custody in different contexts. Notably, the state criminal code protects officers from prosecution for using force pursuant to their duties. See chapter 9A.16 RCW.

The passage of E2SHB 1310 established a new statutory framework for use of physical force and deadly force by peace officers. See RCW 10.120.020. RCW 10.120.020 delineates four circumstances in which physical force may be used, including when necessary to: (1) "protect against criminal conduct where there is probable cause to make an arrest;" (2) "effect an arrest;" (3) "prevent an escape as defined under chapter 9A.76 RCW;" or (4) "protect against an imminent threat of bodily injury to the peace officer, another person, or the person against whom force is being used." RCW 10.120.020 establishes additional restrictions on the use of deadly force in certain circumstances and additional requirements for officers to exercise reasonable care in all circumstances. However, the legislation amended neither the provisions providing the authority to detain persons nor the protections for officers in the criminal code. Further, RCW 10.120.020 does not expressly prohibit investigatory detentions. For these reasons, some law enforcement agencies have recently informed legislators and the public that their peace officers do not appear to have the authority to use physical force to exercise otherwise lawful detentions. Peace officers are grappling with conflicting authorities and responsibilities. This is creating significant safety concerns for officers and the public. Therefore, in addition to addressing those questions that have already been submitted to you through other parties, we ask that you issue a formal opinion on the following:

- A. Do RCW 71.05.150 and RCW 71.05.153 establish a legal duty for peace officers? And would the decision to not respond pursuant to these provisions constitute a breach of a legal duty?
- B. If a peace officer is not authorized to use physical force to conduct an investigatory detention where there is reasonable suspicion, but not probable cause as required by RCW 10.120.020(1), that the person is involved in criminal activity, then can the person lawfully evade or flee the officer attempting to conduct the investigation? In the absence of the circumstances delineated in RCW 10.120.020(1), under what authority, if any, could the officer pursue a fleeing suspect? Can the officer use physical force to stop or detain a fleeing suspect?
- C. Does RCW 10.120.020(2)(a) require peace officers to leave the scene where there is a high likelihood of the use of physical force and where there is no threat of imminent harm and no reasonable suspicion of criminal activity? If a peace officer is required to leave a scene under such circumstances, would it be reasonable for a peace officer to not respond to a scene because information known to the peace officer indicates that there is a high likelihood of the use of physical force and that there is no threat of imminent harm and no reasonable suspicion of criminal activity? Would the refusal to respond to such a scene breach a legal duty? And would that constitute an exception to the Public Duty Doctrine?
- D. How should RCW 10.120.020(1)(b) be read together with RCW 9A.16.040?
- E. How should RCW 10.120.020 be read in context of the Court's ruling in *Graham v. Connor*?
- F. Is RCW 10.120.020 consistent with the Court's "objectively reasonable" standard in *Graham v. Connor*?
- G. Is a peace officer's use of force lawful if it is consistent with the Court's ruling in *Graham v. Connor* but is not consistent with RCW 10.120.020?

(2) Restrictions on the Acquisition and Use of Certain Equipment under ESHB 1054.

The second category of questions pertains to the restrictions on military equipment established in ESHB 1054, which was primarily codified in chapter 10.116 RCW.

RCW 10.116.040 provides, "A law enforcement agency may not acquire or use any military equipment." "Military equipment" is defined as including, among other items, "firearms and ammunition of .50 caliber or greater." Caliber is a unit of measurement used to differentiate between various sizes of pistols and rifles. However, some law enforcement agencies are interpreting this provision to apply to any firearm or ammunition with a diameter of .50 inches or greater, regardless of whether the particular type of firearm or ammunition is typically measured by caliber. This would effectively prohibit the acquisition and use of shotguns and 37mm and 40mm launchers, as well as any projectiles that can be deployed from these devices. Notably, while some of these devices can be used to fire conventional bullets and projectiles, many are designed or otherwise used for deploying less lethal alternatives, including rubber bullets, beanbag rounds, tear gas rounds, flash bang rounds, baton rounds, and others.

A broad interpretation of the term "caliber" would indicate that RCW 10.116.040 prohibits the acquisition and use of any firearm or ammunition exceeding .50 inches in diameter, including both lethal and less lethal varieties. However, the state also enacted RCW 10.120.020 with the passage of E2SHB 1310, which requires a peace officer to "[w]hen possible, use available and appropriate less lethal alternatives before using deadly force." See RCW 10.120.020(2)(d). "Less lethal alternatives" is defined as including "verbal warnings, de-escalation tactics, conducted energy weapons, devices that deploy oleoresin capsicum, batons, and beanbag rounds." See RCW 10.120.010(2). Some of these alternatives may technically measure at .50 inches or greater. As a result, some law enforcement agencies are taking a different approach and instead interpreting the prohibition of "firearms and ammunition of .50 caliber or greater" to *not* apply to less lethal alternatives and any device used to deploy such alternatives. Further, some law enforcement agencies are interpreting the prohibition to apply only to pistols, rifles, and conventional ammunition that are typically measured by caliber.

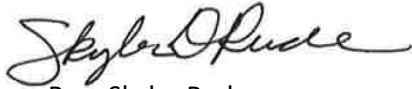
The competing directives in these statutes are creating significant confusion. Less lethal alternatives are used to safely resolve dangerous interactions without using deadly force, and foregoing their use would have a profoundly negative impact on public safety. Therefore, we ask that you issue a formal opinion on the following questions:

- A. Do the restrictions on the acquisition and use of "firearms and ammunition of .50 caliber or greater" in RCW 10.116.040 apply *only* to pistols, rifles, and conventional ammunition typically measured by caliber? Put another way, does the same provision prohibit the acquisition and use of a firearm or conventional ammunition measuring at .50 inches or greater even if the particular firearm or conventional ammunition is not typically measured by caliber, including, for example, shotguns and shotgun slugs?
- B. Does RCW 10.116.040 prohibit law enforcement agencies from acquiring and/or using any firearm with a barrel diameter of .50 inches or greater even if the device is being acquired and/or used for the purpose of deploying less lethal alternatives?

- C. Does RCW 10.116.040 prohibit law enforcement agencies from acquiring and/or using less lethal alternatives (i.e. rubber bullets, beanbag rounds, tear gas rounds, flash bang rounds, baton rounds, and other less lethal projectiles) with a diameter of .50 inches or greater?

Thank you for your guidance on these important questions. Law enforcement agencies are facing significant challenges with implementing this recent legislation. Therefore, providing greater clarity for the public, law enforcement agencies, and the Legislature is critical at this time.

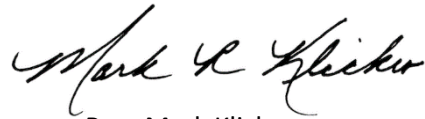
Sincerely,



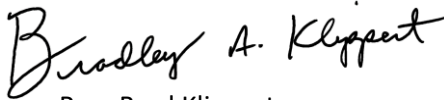
Rep. Skyler Rude
16th Legislative District



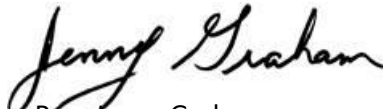
Sen. Perry Dozier
16th Legislative District



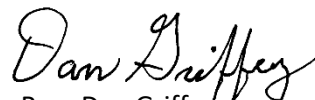
Rep. Mark Klicker
16th Legislative District



Rep. Brad Klippert
8th Legislative District



Rep. Jenny Graham
6th Legislative District



Rep. Dan Griffey
35th Legislative Di