Thomas Olson v City of Hooper Bay, et al, Case No. S-13455

Appellant's Opening Brief

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IN THE SUPREME COURT OF THE STATE OF ALASKA

THOMAS OLSON,

Appellant,

vs.

CITY OF HOOPER BAY,
OFFICER DIMITRI OAKS,
OFFICER CHARLES SIMON, and
OFFICER NATHAN JOSEPH,

Appellees.

Supreme Court No. S-13455

Trial Court Case No. **4BE-07-26 CI**

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE LEONARD R. DEVANEY PRESIDING

BRIEF OF APPELLANT THOMAS OLSON

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Clerk of the Court

By: Rob Sauriquel
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AUTHORITIES PRINCIPALLY RELIED UPON

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Saucier v. Katz, 533 U.S. 194 (2001)

Sheldon v. City of Ambler, 178 P.3d 459 (Alaska 2008)

Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1993)

Orem v. Rephann, 523 F.3d 442 (4th Cir. 2008)

I. JURISDICTIONAL STATEMENT

The superior court granted summary judgment to Defendants/Appellees (hereinafter referred to collectively as "Hooper Bay" or "the officers") on September 1, 2008. Final judgment dismissing Plaintiff Thomas J. Olson's claims against Hooper Bay was entered pursuant to Civil Rule 56(c). Thus, the Supreme Court has jurisdiction to hear this appeal under Alaska Rule of Appellate Procedure 202(a) and AS 22.05.010.

II. ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err by granting the Motion for Summary Judgment?

2. Did the Superior Court err by finding that Officers Joseph and Simon were not on notice that the amount of force they used on Mr. Olson was excessive?

3. Did the Superior Court err by applying a summary judgment standard that placed the burden of proof on Mr. Olson, the non-movant, to show that Officers Joseph and Simon had clear notice that the force applied was excessive?

4. Did the Superior Court err by finding that notice of conduct constituting excessive force cannot come from reported cases in which courts found that force used by officers was *excessive but* that those officers were entitled to qualified immunity?

5. Did the Superior Court err by finding that notice of excessive force cannot come from unreported court decisions?

6. Did the Superior Court err by not consulting reported decisions interpreting the use of pepper spray or police dogs to determine when the application of a taser constitutes excessive force?

7. Did the Superior Court err in finding that Alaska law in the field of qualified immunity is identical to federal law as codified in *Saucier* and its progeny?

8. Did the Superior Court err by failing to find that repeated tases are inherently painful and dangerous?

9. Did the Superior Court err in failing to find that repeated tases constitute excessive force when a suspect is not resisting?

10. Did the Superior Court err by failing to find that repeated tases are excessive when the suspect does not pose an immediate danger to an officer or a third party?

11. Did the Superior Court err by applying a standard which required Mr. Olson to prove that the officers were "plainly incompetent"?

12. Did the Superior Court err by finding that multiple tasings of a suspect in a prone position, on his stomach with his hands handcuffed behind his back, is not excessive?

III. STATEMENT OF THE CASE

A. Introduction

This case presents facts that come perilously close to torture.[1] The events giving rise to the case originated on Christmas day in 2006. [Exc. 72]. They concluded a few hours after Christmas had passed into the early morning of the next day, in a dimly-lit apartment, with three government officials repeatedly sending 50,000 volts of electricity arcing through the body of Thomas J. Olson while his four young children watched in horror. [Exc. 42]

While this case presents multiple assignments of error, the essential question it asks the Court to decide is this: Can a reasonable law enforcement official, enforcing laws in rural Alaska, reasonably believe that it is lawful to repeatedly shock a restrained, disoriented, and scared father with such force that his body suffered 25 deep burn wounds in the immediate aftermath of the attack?[2]

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[1] Counsel does not use this term lightly. Yet, after reviewing the facts, it is difficult not to conclude that the number and placement of the electrical shocks the government applied to Mr. Olson were designed to cause him significant and lasting pain - that is, to torture him into compliance. The government had numerous other options, of course, to gain compliance, but chose not to pursue those.

[2] The application of force was so great in this case that six months afterward, Mr. Olson showed the permanent scarring that he will live with for the rest of his life from the multiple electric shocks. [Exc. 200, 207].

This appeal asks the Court to decide whether the authorities should have realized that they were acting unlawfully when they repeatedly applied this level of force to the back of a citizen lying face down on the floor of his home, his hands cuffed behind his back, and who in that position was incapable of harming anyone or anything. [Exc. 136 at 37:14-17]. This appeal asks the Court to decide whether an officer should have realized that he was acting unlawfully when he leaned over the head of a seated, handcuffed resident of Hooper Bay, and shocked that resident near his genitals. [Exc. 106 at ¶23].

This appeal asks the Court to decide whether the conduct just described was designed simply to punish -- that it was undertaken in anger and out of a desire for retribution.

The Hooper Bay officers who tased Mr. Olson between 15 and 18 times while he was restrained and on the ground may well have been frustrated with him in the early morning hours the day after Christmas, but they are not permitted, under our system of laws, to act as bailiff, judge, jury, and hangman. [Exc. 354]. Their job was to investigate, and if warranted, secure Mr. Olson and remove him from the home. They were not authorized, under our state and federal law, to convict him of whatever crime they thought he might have committed or whatever slight they might have felt they suffered in his presence; and they certainly were

not authorized to punish him according to their own sense of cattle-prod frontier justice.

Hooper Bay argued in the trial court, and would have this Court believe, that such applications of force are reasonable; and that the men who decided to apply this level of force had a reasonable belief that their actions were not improper or illegal -- were, in fact, lawful. [Exc. 11]

Nothing could be further from the truth. This case, at its core, is about whether the authorities are permitted to burst into a home, rouse a sleeping citizen, interpret his confusion as non-compliance inviting an electric shock, shoot two prongs into his body which, when both arrive simultaneously, form a circuit that delivers a debilitating, and intensely painful, electric shock, and then, when the citizen objects to this treatment, and when this treatment does not have the desired affect, "drive stun" -- that is, apply something akin to an electric cattle prod to the most sensitive areas of his body again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again . . . and again.

No officer working in rural Alaska could reasonably believe that this level of force was lawful, and thus, the officers in this case are not entitled to qualified immunity.

B. Factual Background

Thomas Olson and live in Hooper Bay and are the parents of six children. [Exc.103 at ¶3]. On Christmas, 2006, Mr. Olson and his brother, , celebrated by drinking "a couple cups of homebrew." [Exc.104 at ¶9]. In the evening, nursed their youngest child, and then she and Mr. Olson put their four youngest children to bed.[3] [Exc. 104 at ¶10]. decided to visit her mother. [Exc. 104 at ¶10]. She left the sleeping children in Mr. Olson's care. [Exc.104 at ¶10]. Mr. Olson was not intoxicated, but he was tired, and he eventually went to bed. [Exc. 104-105 at ¶¶11-12]. spent the night at his brother's house, and fell asleep on the couch. [Exc. 104 at ¶11].

Around 4 a.m., Hooper Bay officers Dimitri Oaks and Nathan Joseph responded to a request for a welfare check at Mr. Olson's home. [Exc. 112 at 11:9-12]. Mr. Olson's home is configured with an arctic entry, a storage area on the ground floor, and stairs leading to a second-floor living area. [Exc. 104 at ¶5]. When the officers arrived, they saw that the door to the arctic

[3] The two oldest children were spending the night with their grandparents. [Exc. 104 at ¶10].

entry had popped open.[4] [Exc. 112 at 11:12-13 & Exc. 131 at 15:22-23]. The officers entered into the ground floor storage area and knocked on the door at the base of the stairs. [Exc. 112 at 11:14 & 11:21-24]. Officer Joseph testified that a child heard the knocking and allowed the officers to come in.[5] [Exc. 112 at 11:14-16]. The officers climbed the stairs and entered the living area. [Exc. 112 at 11:16 & 12:3-5].

The living area in Mr. Olson's house is essentially one large room with no dividing walls. [Exc. 104 at ¶6]. A dim light was on in the living area. [Exc. 112 at 12:21]. Thus, the officers had a clear view of the entire room when they entered. [Exc. 104 at ¶6]. With the exception of the child awakened by the officers' knocking, all of the children in the home were asleep for the night. [Exc. 132 at 19:11-14]. Mr. Olson was asleep on a bed;[6] was asleep on the couch. [Exc. 132 at 18:5-6]. The officers woke up Mr. Olson by shining a flashlight in his face and immediately restrained him by rolling him over, placing his hands behind his back, and handcuffing him. [Exc. 105 at ¶12 & Exc. 106 at ¶26].

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[4] Mr. Olson testified that the door sometimes would pop open on its own and that they eventually had to replace the door. [Exc. 104 at ¶7].

[5] Contrary to the officers' testimony, Mr. Olson was not "passed out." [Exc. 104-105 at ¶12]. He was asleep at 4 a.m., like most everyone else in the village, and he readily awoke in response to the officers' presence in his home. [Exc. 104-105 at ¶12].

Mr. Olson was understandably confused by the sudden appearance of the officers in his home. [Exc. 105-106 at ¶21]. He asked the officers what they were doing, and then he asked them to leave. [Exc. 105 at ¶13]. He informed them that they were trespassing and protested that he had done nothing wrong. [Exc. 105 at ¶13]. Nevertheless, he did *not* resist when they handcuffed him. [Exc. 105 at ¶13].

Instead, after his initial verbal protest, Mr. Olson allowed Officer Nathan Joseph to handcuff him. [Exc. 133 at 22:15-17 & 23:19-23]. Mr. Olson then stood compliantly for *three to five minutes* while the officers waited for a third officer, Charles Simon, to arrive. [Exc. 134 at 27:5-9 & 28:1-3]. While Officer Joseph testified that during this time Mr. Olson was making known his displeasure with being awakened and handcuffed at four in the morning [Exc. 114 at 21:13-19], Officer Oaks' testimony clearly establishes that Mr. Olson was not a threat. [Exc. 134 at 27:18-25]. Officer Oaks testified that during this period, Officer Joseph returned to on the couch [Exc. 134 at 27:1-4]; and he (Officer Oaks) "just [stood] there" next to Mr. Olson watching him. [Exc. 134 at 27:18-23]. Officer Oaks did not feel the need to talk to Mr. Olson and did not restrain him beyond the handcuffs. [Exc. 134 at 27:24-25].

eventually woke up, and Officer Joseph handcuffed him, as well. [Exc. 115 at 22:25; 23:7-10 & Exc. 116 at 28:12-14]. Officer Joseph remained with on the couch. [Exc. 134 at 27:20-21]. Officer Simon arrived three to five minutes after Mr. Olson was cuffed, and he and Officer Oaks then began to walk Mr. Olson out of the house. [Exc. 134 at 28:1-3 & 28:11-15]. Officer Oaks escorted Mr. Olson on one side and Officer Simon escorted him on his other side. [Exc. 134 at 28:11-13]. Mr. Olson was not struggling. [Exc. 105 at ¶20]. As they neared the stairway leading downstairs, one of the officers slipped on a trash bag (or some item on the floor) and all three men fell to the floor. [Exc. 134 at 28:14-25; 29:1-8 & Exc. 116 at 29:8-22].

Mr. Olson landed in a sitting position. [Exc. 133 at 23:16-18]. The officers stood back up. [Exc. 134 at 29:19-20]. Mr. Olson testified that he "didn't know what was going on" but that he tried to stand up with the officers again. [Exc. 105-106 at ¶21]. However, because his hands were cuffed behind his back, he could not get his feet under him or regain his balance. [Exc. 105-106 at ¶21]. The officers testified that Mr. Olson began struggling with them. [Exc. 134 at 29:20-23 & Exc. 117 at 30:3-6; 22-24]. Mr. Olson's testimony is very different, however. He testified that he was scared and did not understand what was happening to him. [Exc. 106 at ¶¶24-25]. Far from

trying to kick the officers, Mr. Olson was simply trying to get his feet under him to stand up. [Exc. 105-106 at ¶¶21-22].

Even if Mr. Olson did kick out at the officers, his actions were clearly ineffectual. [Exc. 180 at ¶55]. Officer Simon claims that Mr. Olson kicked him in the chest while they were still walking toward the stairway -- a dubious claim given the fact that Mr. Olson was handcuffed and walking *between* two police officers (one would have to be a world-class contortionist to bend one's leg sideways while raising it above one's waist -- while handcuffed). [Exc. 156 at 33:1-3 & Exc. 157 at 34:9-11]. In any event, Officer Simon testified that the supposed kick to his chest did not hurt. [Exc. 156 at 33:4-6; 23-24]. Even Officer Oaks' testimony that Mr. Olson's supposed kicks to Officer Oaks' shin were painful leaves the defendants with nothing to support the allegation that they were in danger of suffering significant bodily injury. [Exc. 146 at 74:3-6]. Absolutely no evidence was introduced that Officer Oaks suffered any injury as a result of the supposed "kicks." [Exc. 180 at ¶55].

During this time, Officer Joseph remained with across the room on the couch. [Exc. 134 at 27:20]. Because Officer Joseph interpreted what he was witnessing from across the dimly-lit room as a struggle between Mr. Olson and the other officers, he took aim at Mr. Olson with his taser and deployed

the cartridge.[6] [Exc. 118 at 36:6-22 & Exc. 123 at 47:20 & Exc. 135 at 33:20-24]. Mr. Olson testified that he was simply trying to stand up when he was tased from across the room by Officer Joseph. [Exc. 106 at ¶22].

A taser functions by sending an "electric pulse through the body of the victim causing immobilization, disorientation, loss of balance, and weakness."[7] Tased individuals are rendered incapacitated, disoriented, and unable to move.[8]

Officer Joseph's first cartridge tase[9] did not, apparently, form a circuit and thus did not have the intended, debilitating effect on Mr. Olson. [Exc. 123 at 49:3-14]. Officer Joseph then "ran a second cycle" in an effort to tase him a second time. [Exc. 123 at 49:6]. Meanwhile, Officer Simon began "drive stunning"[10] Mr. Olson on his back. [Exc. 106 at ¶23].

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[6] There is some evidence that Officer Simon actually was the first officer to tase Mr. Olson. [Exc. 136 at 34:18-25; 35:1-3]

[7] *Matta-Ballesteros v. Henman*, 896 F.2d 255, 256 n.2 (7th Cir. 1990).

[8] *Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993) (a taser will "temporarily incapacitate a threatening person" so that the officers involved have a "momentary advantage and a chance to neutralize the threat").

[9] A cartridge tase fires two probes attached to the taser by wires. *Neal Lomax v. Las Vegas Metro. Police Dept.*, 574 F. Supp. 2d 1170, 1176 (D. Nevada 2008). If both probes contact the person and the taser is activated, the taser sends 50,000 volts of electricity through the wires and delivers an incapacitating electric shock. *Id.*

[10] A taser operates in two modes: the cartridge mode, described in note 9, *supra*, and the "drive stun" mode. *Id.* In the drive

Mr. Olson testified that Officer Simon's drive stuns were "much more severe than" Officer Joseph's cartridge tases and were extremely painful. [Exc. 106 at ¶23]. Officer Joseph then joined Officer Simon and drive stunned Mr. Olson at least five or six additional times. [Exc. 124 at 50:4-7; 20-23].

Mr. Olson was terrified and in excruciating pain. He wrapped his legs around a near-by pole. [Exc. 106 at ¶24]. Then, in an act that can only be described as gratuitous abuse, Officer Simon drive stunned Mr. Olson on his upper inner-thigh, very near his genitals. [Exc. 106 at ¶23].

Mr. Olson eventually let go of the pole, the officers turned him over onto his stomach, and continued to tase him on his back even though he was still handcuffed. [Exc. 124 at 50:24-25; 51:1-13].

During this entire period, Mr. Olson remained cuffed with his hands behind his back. [Exc. 136 at 37:14-17]. He remained either seated on the ground or lying on the ground. [Exc. 136 at 37:18-22]. Despite the fact that he was restrained and not in a position to harm the officers, Officers Joseph and Simon tased Mr. Olson between 15 and 18 times[11] on his back, chest, and

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stun mode, the taser device itself is placed in contact with the person's body and discharged. *Id.*

[11] Estimates of the precise number of separate tasings differed during the proceedings in the Superior Court. [Exc. 354 at n.3]. For purposes of summary judgment, Judge Devaney found that Mr. Olson had been tased 15-18 times "while he was

groin. [Exc. 180 at ¶55]. The officers delivered this punishment over the course of a few minutes.[12] With each tasing, the muscles in Mr. Olson's body contracted, and he experienced excruciating pain. [Exc. 107 at ¶¶31-32].

Mr. Olson suffered 25 taser burn wounds.[13] [Exc. 200]. Photographs taken of Mr. Olson while he was still incarcerated at the Yukon Kuskokwim Correctional Center show the burns caused by the tasering. [Exc. 170-171]. After his release from custody, Mr. Olson sought medical treatment for the burns and for numbness to his wrists caused by the handcuffs. [Exc. 198-200]. Mr. Olson obtained additional photographs of his injuries on January 2, 2007. [Exc. 202]. Photographs taken on January 26, 2007 and on July 17, 2007, a half-year after the tasings, show permanent scarring and reveal the severity of the burns. [Exc. 204-205 & Exc. 207].

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handcuffed, with most occurring when [Mr. Olson] was seated with [his] legs wrapped around a ceiling to floor pole in the house and at least some while he was prone on the ground on his stomach." [Exc. 354].

[12] The officers themselves conceded that only five minutes elapsed between the first and last taser deployments. [Exc. 20].

[13] Mr. Olson's health care providers found 25 separate burn wounds. [Exc. 200]. Mr. Olson affied that he suffered 22 burn wounds. [Exc. 107 at ¶33]. The discrepancy is not material, but in any event is likely explained by the fact that some of the burn wounds were on Mr. Olson's back—a location obviously difficult for him to view.

C. Proceedings Below

Because of the gratuitously abusive and punitive nature of the officers' conduct, Mr. Olson brought claims against them and the City of Hooper Bay. [Exc. 1-5]. The officers and Hooper Bay moved for summary judgment, arguing that the officers were entitled to qualified immunity. [Exc. 9-74 & Exc. 208-347]. Mr. Olson opposed the motion, arguing that the officers' use of force was objectively unreasonable and that no reasonable officer could reasonably believe that the force used was lawful. [Exc. 75-207]. A hearing was held before Judge Devaney on July 31, 2008. [Tr. 1-63]. Judge Devaney granted the officers' motion for summary judgment, terminating the case. [Exc. 349-358].

IV. STANDARD OF REVIEW

The Supreme Court of Alaska reviews a grant of summary judgment using its independent judgment.[14] The Court will affirm a lower court's grant of summary judgment only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.[15] In considering whether a grant of

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[14] *Huffman v. State*, 204 P.3d 339, 342 (Alaska 2009).

[15] *Classified Empls. Ass'n v. Matanuska-Susitna Borough Sch. Dist.*, 204 P.3d 347, 352 (Alaska 2009).

summary judgment should be overturned, the Court draws all reasonable inferences in favor of the non-moving party.[16]

V. ARGUMENT

A. Legal Standards

1. Summary Judgment Standard

The officers moved for summary judgment. Thus, they bore the burden of showing that no genuine issues of material fact existed with respect to the question of qualified immunity and that they were entitled to judgment as a matter of law.[17] The superior court was required to draw all reasonable inferences in Mr. Olson's favor.[18] Mr. Olson should have been held to a very low evidentiary threshold to avoid summary judgment.[19] To avoid summary judgment, Mr. Olson was not required to show that he would prevail at trial.[20] A finding of *any* genuine issue of material fact requires courts to deny summary judgment,[21] and the superior court was required to view the facts in a light most

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[16] *Id.*

[17] *Valdez Fisheries Dev. V. Alyeska Pipeline*, 45 P.3d 657, 664 (Alaska 2002).

[18] *Id.*

[19] *Crawford v. Kemp*, 149 P.3d 1049, 1053 (Alaska 2006).

[20] *Gablick v. Wolfe*, 469 P.2d 391, 395 (Alaska 1970).

[21] *Moore v. State*, 553 P.2d 8, 15 (Alaska 1976).

favorable to Mr. Olson.[22] Where reasonable minds could differ as to the facts of the case, the superior court must allow the jury to decide the contested issues.[23] An unresolved question of material fact precludes summary judgment.[24]

With respect to summary judgment in excessive force cases, the Ninth Circuit Court of Appeals has observed:

> "Because [the balancing test employed in excessive force cases] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly. *See, e.g., Liston v. County of Riverside*, 120 F.3d 965, 976 n.10 [(9th Cir. 1997)] (citing several cases). This is because police misconduct cases almost always turn on a jury's credibility determinations."[25]

This observation is echoed by other Ninth Circuit district courts and commentators.[26] With respect to a qualified immunity determination in the context of an excessive force case

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[22] *Beck v. Haines Terminal & Highway Co.*, 843 P.2d 1229, 1230 (Alaska 1992).

[23] *Tush v. Pharr*, 68 P.3d 1239, 1249 (Alaska 2003).

[24] *Id. See also Trembly v. Starr-Wood Cardiac Group, P.C.*, 3 P.3d 916, 920 (Alaska 2000).

[25] *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003) (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) (second alteration in original)).

[26] *Compare, e.g., Beaver v. City of Federal Way*, No. CV05-1938MJP, 2006 WL 3203729 (W.D. Wash. Nov. 3, 2006) (denying summary judgment because issues of material fact existed), *with Beaver v. City of Federal Way*, 507 F. Supp. 2d 1137 (W.D. Wash. 2007) (finder of fact's resolution of factual issues at trial permitted court to grant qualified immunity); Karen M. Blum, *The*

> "[W]here the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability."[27]

While the superior court set forth the familiar description of the summary judgment standard in its Order Granting Motion for Summary Judgment on Qualified Immunity [Exc.349-350] it did not apply the standard to the case. Thus, it erred when it granted the officers and Hooper Bay summary judgment.

2. Burden of Proof

Since the officers sought summary judgment on the question of their entitlement to qualified immunity, they bore the burden of proof, and that burden required them to introduce evidence requiring Mr. Olson to "go beyond his or her pleadings."[28] In addition, the officers bore the burden of demonstrating the absence of any genuine issue of material fact.[29] Because Mr. Olson introduced evidence contradicting the evidence introduced by the officers, and because the officers failed to demonstrate the absence of any material facts bearing on the question of their entitlement to qualified immunity, the superior court erred in granting summary judgment to them.

Qualified Immunity Defense: What's 'Clearly Established' and What's Not, Touro L. Rev. 501, 522 (2008).

[28] *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900 (6th Cir. 2004) (quoting *Pouillon v. City of Owosso*, 206 F.3d 711, 715 (6th Cir. 2000)).

[29] *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).

[30] *Id.*

3. Qualified Immunity

The Alaska Legislature has both limited the amount of force police officers are permitted to use in making an arrest and granted discretionary function immunity to municipal employees.[30] Thus, a police officer may be found to have used excessive force, but still be entitled to qualified immunity if certain exacting conditions are met.[31] In the recently-decided *Sheldon v. City of Ambler* case, the Alaska Supreme Court had occasion to set forth the scope and contours of the qualified immunity defense under state law.[32]

The superior court correctly stated the general principle underlying the qualified immunity defense:

> Qualified immunity is a defense at law available to government officials who can prove that their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[33]

The Alaska Supreme Court in *Sheldon* adopted a standard that "closely conforms" with federal qualified immunity law.[34]

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[30] AS 12.25.070 (limitation of force); AS 09.65.070 (discretionary function immunity).

[31] *See generally Sheldon v. City of Ambler*, 178 P.3d 459 (Alaska 2008).

[32] *Id.*

[33] [Exc. 350] (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[34] *Sheldon*, 178 P.3d at 463.

In *Sheldon*, the Court relied on a relatively-recent U.S. Supreme Court case which established a two-prong test for determining whether an excessive force claim can proceed to trial.[35] The first prong of the test asks whether the police officers' application of force was objectively reasonable.[36] The second prong asks whether a "reasonable officer . . . [would] have been 'on notice' that his particular use of force would be unlawful."[37]

The *Sheldon* Court emphasized that an officer's subjective belief about the reasonableness of his or her use of force is *not* sufficient to meet the second prong of the test.[38] Rather,

> the beliefs must also be ones a reasonable officer could have had about the legality of his actions.[39]

Thus, "even a good faith defense must have an 'objective component' . . . ."[40]

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[35] *Id.* (discussing *Saucier v. Katz*, 533 U.S. 194, 205 (2001)). *See also Estate of Logusak ex rel. Logusak v. City of Togiak*, 185 P.3d 103, 109 (Alaska 2008) (following the two-prong test announced in *Sheldon*).

[36] In the instant case, the superior court found that the officers' use of force against Mr. Olson was objectively unreasonable, [Exc. 352] and Mr. Olson is, as would be expected, not challenging that finding on appeal. Thus, he will focus his discussion on the second prong of the qualified immunity test.

[37] *Sheldon*, 178 P.3d at 463.

[38] *Id.* at 465.

[39] *Id.*

[40] *Id.* (citations to quoted material omitted).

The Alaska Court expressed concern with the framework for determining what facts would be sufficient to place a police officer "on notice" that his or her application of forces was excessive. On the one hand, it noted that general statutes such as AS 12.25.070

> cannot purport to give notice to officers that specific actions taken in specific circumstances may or may not be reasonable.[41]

On the other hand, the Court cautioned that courts

> run the risk of error in going too far in the other direction - that each situation, in its particularity, could not have been anticipated by any law or regulation, so an officer could never be on notice that this use of force in this set of circumstances could be unlawful.[42]

The Court directed trial courts to strike a balance "between these two extremes."[43]

The Court further directed trial courts to strike this balance by

> look[ing] to our own jurisdiction and other jurisdictions to see if there are any cases, laws, or regulations which would suggest that the type of action taken by the officer is considered unlawful.[44]

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[41] *Id.* at 466.

[42] *Id.* *See also Blueford v. Prunty*, 108 F.3d 251, 254 (9th Cir. 1997) (plaintiff need not establish that a court previously had declared defendant's conduct unconstitutional if it would be clear from prior precedent that conduct was unlawful).

[43] *Sheldon*, 178 P.3d at 466.

[44] *Id.* (citing *Brosseau v. Haugen*, 543 U.S. 194, 199-201 (2004)).

The Court explained that the existence of such laws or cases would serve as probative evidence that an officer was on notice about the legality of his or her actions.[45] Federal courts also look to case law for guidance in determining whether an officer was on notice that his or her conduct would be unlawful:

> "In the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established" for qualified immunity purposes, "including decisions of state courts, other circuits, and district courts."[46]

Even "unpublished decisions of district courts may inform our qualified immunity analysis."[47]

The *Sheldon* Court's formulation clearly does not condition an officer's "notice" on the existence of prior cases with substantially similar facts. As the U.S. Supreme Court in *Hope v. Pelzer*, a case upon which the *Sheldon* Court relied, observed:

> [O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. . . . [T]he salient question . . . is whether the state of the law [at the time of the police conduct] gave [the officers] fair warning that their alleged treatment of [the suspect] was unconstitutional.[48]

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[45] *Id.*

[46] *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995) (internal citations and quotation marks omitted).

[47] *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

[48] *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Ninth Circuit Court of Appeals has explained:

The *Sheldon* Court applied these principles to the facts of the case before it, and found that an absence of evidence from other jurisdictions that the officer's conduct[49] was unlawful "was telling."[50] Because the Court found only one other case involving a "bear hug take down," because that case found the conduct not to be excessive, and most importantly, because the Court could find no clear case law or regulation from Alaska "or from anywhere else" that would have given the officer notice that his conduct was excessive, the Court concluded that the

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> [I]t is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness was apparent in light of existing law. *Anderson v. Creighton*, 483 U.S. 635, 640 . . . (1987); *see also Deorle* [*v. Rutherford*, 272 F.3d 1272, 1285-86 (9th Cir. 2001)] ("Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle [the defendant] to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.") (internal citation omitted).

Drummond v. City of Anaheim, 343 F.3d 1052, 1060-61 (9th Cir. Cal. 2003).

[49] The specific conduct alleged to be unlawful was a "bear hug take down" that resulted in the death of the person being placed under arrest. *Sheldon*, 178 P.3d at 466-67.

[50] *Id.* at 466.

officer could have reasonably believed his conduct was lawful.[51] As described below, the same is *not* true in the instant case: guidelines for the use of tasers, as well as several cases decided prior to December 2006, should have placed the Hooper Bay officers on notice that multiple-tasings of a restrained person (particularly when that person is lying on his stomach and posed no threat) is excessive.

The *Sheldon* Court noted one additional ground on which courts can find that a reasonable officer would have reasonably known that his or her conduct was unlawful. Where conduct is "so egregious, so excessive" that the officer "should have known it was unlawful," then the "nature of the act" provides sufficient warning that it is excessive and unlawful.[52] As the Court observed:

> One should not let the lack of explicit law in an area be a substitute for the reasonable officer's common sense.[53]

Because the Court found that the *Sheldon* officer's bear hug and take down was not shocking, it refused to find that the conduct was egregious enough that the officer should have known it was unlawful.[54]

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[51] *Id.* at 466-67.

[52] *Id.* at 467 (citing *Hope v. Pelzer*, 536 U.S. 730, 745 (2002)).

[53] *Id.*

[54] *Id.*

As described below, the opposite is true here. No reasonable officer could reasonably believe that tasing a restrained person 15-18 times within a five-minute period on the back, chest, and near his genitals, and doing so while the person was either seated or lying on his stomach, was lawful. The officers' conduct in this case was shocking. They failed to exercise any restraint or common sense, and thus are not entitled to qualified immunity.

B. The Officers are Not Entitled to Qualified Immunity

1. The superior court failed to interpret the evidence in a light most favorable to Mr. Olson.

In granting summary judgment, the superior court erred by not interpreting, in a light most favorable to Mr. Olson, the evidence demonstrating the plain cruelty of the officer's conduct and the officers' notice of the unlawfulness of their actions.

The parties introduced evidence during the summary judgment proceedings that differed -- at times significantly. The superior court's duty was to interpret that conflicting evidence in a light most-favorable to Mr. Olson, the non movant. The court clearly failed to do so.[11] Had the court viewed the

[11] The superior court appears to have sacrificed the time-honored summary judgment standard in order to achieve the goal of dismissing claims against police officers early in the proceedings. [Exc. 356]. (rejecting the *Beaver* court's approach of first determining whether there exist genuine issues

evidence in a light most favorable to Mr. Olson, it would have, by necessity, found that:

- Mr. Olson was tased 15-18 times while restrained with his hands behind his back and while either sitting on the ground or lying on his stomach on the ground;[56]
- The tasings caused Mr. Olson's muscles to spontaneously contract, giving the appearance that he was kicking and causing him to scream at the officers in pain;[57]
- Even if Mr. Olson did intentionally kick out at the officers, the officers (who were standing over Mr. Olson) were always in a position to easily move away from the range of his feet;[58] and moreover, because there were three officers in the room, and because Officer Simon was behind Mr. Olson while he was on the ground, there was ample opportunity for at least one of the officers to safely approach Mr. Olson and restrain him through a means less forceful than the application of 15 to 18 tasings;[59]

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of material fact necessitating a trial on the issue of officers' notice of unlawfulness of their actions, and instead, deciding the qualified immunity question on the basis of clearly contested facts).

[56] *See* factual description and citation to the record in Section III, above.

[57] *Id.*

[58] *Id.*

[59] *Id.*

- Mr. Olson's supposed kicks at Officer Simon came no where close to causing substantial bodily injury;
- The officers tased Mr. Olson several times after ordering him to "comply," thus clearly indicating that they were using their tasers to gain compliance with their directive for him to unwrap his legs from the pole, and not to control a dangerous person;[60]
- Mr. Olson was not a threat when he was lying on his stomach with his hands cuffed behind his back; yet the officers still tased him at least twice in this position;[61]
- The national guidelines for use of tasers and the Hooper Bay regulations for using tasers do not permit use merely to gain compliance, but rather, require at the least the threat of bodily harm to the officers;
- The officers used their tasers even when they were not in danger of suffering any bodily harm.

These facts, which the superior court was required to take as true for purposes of summary judgment, unequivocally establish that the officers' conduct was egregious enough that they should have known it was unlawful. These facts further establish that the officers had notice, pursuant to national guidelines, local regulations, and case law, that use of the

[60] *Id.*

[61] *Id.*

tasers on Mr. Olson while he was restrained and on the ground (and particularly while he was lying on his stomach) was unlawful. Because the evidence presented to the superior court establishes, at the very least, a genuine issue of material fact with respect to the officers' notice, Mr. Olson asks this Court to overturn the trial court's grant of summary judgment.

2. The officers' conduct was so egregious that they should have known it was unlawful.

The *Sheldon* Court emphasized that where conduct is "so egregious, so excessive" that the officer "should have known it was unlawful," then the "nature of the act" provides sufficient warning that it is excessive and unlawful.[62] As the Court observed:

> One should not let the lack of explicit law in an area be a substitute for the reasonable officer's common sense.[63]

This rule finds ample support in federal excessive force cases.[64]

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[62] *Sheldon*, 178 P.3d at 467.

[63] *Id.*

[64] *See Lee v. Ferraro*, 284 F.3d 1188, 1198-99 (11th Cir. 2002) (denying qualified immunity where conduct "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law") (citation and internal quotation omitted); *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (denying qualified immunity for "obvious cruelty" despite lack of factually similar prior precedent); *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000) ("'It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so

A Fourth Circuit Court of Appeals case, *Orem v. Rephann*,[65] the circuit court found that an officer's use of the taser to control a resisting arrestee was so wanton and cruel that he was not entitled to qualified immunity. In *Orem*, an officer tased the arrestee twice: once on her inner thigh and once below her breast. The court's description of the facts evidence someone creating far more havoc and danger to the arresting officers than Mr. Olson:

> Under the influence of prescription drugs, marijuana, and alcohol, Orem quickly became enraged and, in her words, started "flipping out" when she discovered that she would not be allowed to see her son for six months. She drove back to the house, at a high-rate of speed, skidded into a ditch, left her car and charged at a police officer. Three officers restrained Orem, placed her in handcuffs, a foot restraint device ("hobbling device"), and put her in a police car. . . . .
>
> While being transported to the Eastern Regional Jail ("ERJ"), Orem yelled, cursed and banged her head against the police car window three or four times. Her jumping and banging around in the back seat was so intense that the vehicle rocked, loosening the hobbling device and requiring Deputy T.E. Boyles, the transporting officer, to pull the vehicle over. . . .
>
> Deputy Rephann exited his vehicle and approached Deputy Boyles' car with his taser gun drawn. Deputy Boyles got out of his car, opened the front passenger door of the car, unlocked the rear door and attempted to tighten the hobbling device. Deputy Rephann opened the rear door and the following exchange occurred between him and Orem:

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egregious that no like case is on the books.'") (quoting McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992)).

[65] 523 F.3d 442 (4th Cir. 2008).

> Deputy Rephann: Unlock your door. She's got a hobble on her. You need to calm down, Nikki.
>
> Orem: No, they're taking my son. [My husband] beat the fuck out of me! And this is what I--fucking me. John hit me! Look at my back. Look at (inaudible)--
>
> Deputy Rephann: Well, calm down, and take care of it somewhere else.
>
> Orem: I can't. I'm going to jail. They took my son.
>
> Deputy Rephann: Stop it.
>
> Orem: Fuck you!
>
> Deputy Rephann: I'm telling you, you'd better stop it. [taser gun clicking]
>
> Orem: (Scream.) Don't hit me.
>
> Deputy Rephann: Calm down now.
>
> Orem: I'm suing everybody, you mother fucker.
>
> Deputy Rephann: You need to respect us. Right now you're not.
>
> Orem: (Cries.)
>
> During this exchange, Deputy Rephann shocked Orem twice with a taser gun--underneath her left breast and on her left inner thigh. Orem then became compliant and was transported to the ERJ without further incident. However, a permanent sunburn-like scar was left where the taser had been applied to her thigh.[11]

Orem made good on her promise and sued Deputy Rephann for violating her constitutional rights. The district court denied Deputy Rephann's motion for summary judgment on the question of

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[11] *Id.* at 444-45 (internal citations and footnotes omitted).

his entitlement to qualified immunity. The Fourth Circuit affirmed the district court.

The appellate court wrote:

> From the facts as we must view them, a reasonable jury could infer Deputy Rephann's actions were not a "good faith effort to restore order" but, rather, wanton and unnecessary.[7] . . .

The court explained its finding:

> When Deputy Boyles pulled his vehicle over and exited, it was clear that some action was necessary to calm Orem and safely transport her to EJR. Deputy Boyle immediately began to resecure the hobbling device. Deputy Rephann, on the other hand, began talking with Orem, whom he knew because her husband was a former sheriff deputy. Deputy Rephann did not attempt to assist Deputy Boyles in tightening the hobbling device. Instead, he began telling Orem she needed to calm down and refrain from moving in the vehicle. While Deputy Rephann makes much of his verbal attempts to secure order, they do not lessen the unreasonableness of his subsequent actions.
>
> When it appeared to Orem that Deputy Rephann was not concerned with her husband's alleged abuse or the loss of her son, Orem forcefully stated "fuck you" to Deputy Rephann. To which he responded, "stop it" and tased her. Although Deputy Rephann testified that "stop it" referred to Orem moving her feet around, it is not clear that him stating "stop it" and subsequently tasering Orem was not in fact a response to her stating "fuck you," considering that after

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[7] *Id.* at 446. The Court analyzed the case under the 14th Amendment's Due Process clause because it found that the arrestee was already in detention at the time of the tasings. The 14th Amendment prohibits the infliction of "unnecessary and wanton pain and suffering." *Id.* This standard is, in essence, the same as the 4th Amendment's right to be free from seizures using excessive force. Moreover, the court applied the *Saucier* two-prong test to determine whether Deputy Rephann was entitled to qualified immunity. Thus, the analysis undertaken by the Fourth Circuit applies to the instant case.

> shocking Orem, Deputy Rephann commanded that she respect the officers. . . .
>
> Deputy Rephann placed the taser under Orem's left breast and inner thigh. Considering his reach was closer to her right side and other parts of her body, a reasonable juror could also infer that Deputy Rephann's application of force in these areas was done for the very purpose of harming and embarrassing Orem--motives that are relevant factors, despite Deputy Rephann's contentions, to determining whether the use of force was excessive . . . .[68]

The court found that Deputy Rephann's use of the taser was done for the purpose of punishing Orem, and ruled that though "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law,'" Deputy Rephann's conduct was not simply the product of a mistaken judgment.[69]

As described in Section III.B, above, the Hooper Bay officers' use of force was similarly gratuitous, undertaken for the purpose of inflicting corporal punishment, and so disproportionate under the circumstances that no reasonable officer would have believed such conduct was legal. Like Deputy Rephann, their repeated tasings, and the placement of at least one tase near Mr. Olson's genitals, would permit a jury to infer that they were not simply trying to "restore order," but rather,

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[68] *Id.* at 446-47.

[69] *Id.* at 449 (citations to quoted material omitted).

were abusing him because they were angry at his refusal to immediately comply with their directive to unwrap his legs from the pole. The fact that the officers were talking to Mr. Olson does "not lessen the unreasonableness of [their] subsequent actions."[70] The fact that Officer Simon reached over Mr. Olson's head in order to tase him near his genitals would permit "a reasonable juror [to] infer that [Officer Simon's] application of force . . . was done for the very purpose of harming and embarrassing [Mr. Olson] -- motives that are relevant factors . . . to determining whether the use of force was excessive."[71]

Certainly by the time the officers turned Mr. Olson over onto his stomach, he was no longer a threat and had ceased struggling. Tasing a person at least twice (and possibly more) under these circumstances is so excessive that any reasonable officer would know that it was illegal:

> In a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of [force] or a refusal without cause to alleviate its harmful effects constitutes excessive force.[72]

Whether or not the officers' first electric shocks to Mr. Olson were excessive, there simply can be no debate that their

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[70] *Id.*

[71] *Id.*

[72] *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. Cal. 2000).

repeated tasings of Mr. Olson became excessive.[73] The application of 15 to 18 shocks to his body over a 5-minute period maximized the level of pain he experienced. Tasing Mr. Olson while he had his legs wrapped around the pole had no purpose other than simply to gain compliance through the application of an excruciating level of pain. Tasing Mr. Olson while he was handcuffed and lying on his stomach had no purpose other than the gratuitous infliction of pain and corporal punishment. By this point in time in the course of Mr. Olson's arrest, the officer's use of force was so grossly disproportionate to the need for force that no reasonable officer would have believed such conduct was legal. The officers' actions "lie[] so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was [or should have been] readily apparent to the official[s] . . . ."[74]

Even if the Court were to find that existing regulations, guidelines, and case law did not put the officers on notice of the unlawfulness of their actions, the officers' own common sense and society's common standards of decency should have caused the officers to realize their application of force was

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[73] Indeed, the superior court ruled that the officers' later shocks could be found by a jury to be excessive. [Exc. 355].

[74] *Lee*, 284 F.3d at 1198-99.

excessive. Thus, the superior court erred in finding that the officers were entitled to qualified immunity as a matter of law.

3. The officers were "on notice" that tasing Mr. Olson 15-18 times was unlawful.

a. *Existing regulations and guidelines put the officers on notice that their conduct was unlawful.*

Regulations and guidelines governing the use of force "demonstrate, or at least serve as probative evidence, that there was some kind of 'notice'" concerning the legality of an officer's actions.[75] Here, Mr. Olson introduced a significant amount of evidence that the regulations and guidelines governing police use of tasers, including Hooper Bay's regulations as well as national guidelines, prohibit the repeated and continual tasing of a restrained suspect who has ceased resisting arrest and who poses no threat of causing substantial bodily injury.

Mr. Olson introduced the report of former policeman, police instructor, author, professor, and use-of-force expert Michael D. Lyman.[76] [Exc. 172-194]. Dr. Lyman noted that one of the

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[75] *Sheldon*, 178 P.3d at 466. The Court specifically referenced "laws or cases" as providing such probative evidence; but in the preceding sentence, the Court made clear that regulations would also serve as probative evidence. *Id.* *See also Drummond*, 343 F.3d at 1062.

[76] Courts look to police practices experts to inform a fact finder's excessive force determinations. *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. Cal. 2005). Dr. Lyman's curriculum vitae demonstrates his extensive knowledge of the use of force and of training materials and guidelines governing the use of force. [Exc. 173-174]. Dr. Lyman possesses both a real-world

most authoritative guidelines addressing the use of tasers was published in January of 2005 by the International Association of Chiefs of Police ("IACP") (originally published in 1996). [Exc. 177 at ¶41]. The IACP is the "nation's largest professional policing organization" and in conjunction with the Department of Justice operates a National Law Enforcement Policy Center. [Exc. 177 at ¶40]. The Center assists police administrators across the country to develop law enforcement policies that reflect nationally recognized professional practices. [Exc. 177 at ¶40]. The IACP guidance provides:

> The model policy prohibits [taser] use against anyone unless the person demonstrates an overt intention to use violence or force against the officer or others or resists detention and arrest *and other alternatives for controlling them are not reasonable or available under the circumstances.*

[Exc. 177-178 at ¶43] (emphasis added). On the basis of this guidance, and after reviewing other literature concerning the use of tasers, Dr. Lyman concluded that the taser "is designed to stop 'focused' aggressors," to "protect the officer," and not to "coerce compliance." [Exc. 178 at ¶44]. Thus, Dr. Lyman concluded that

> the use of the Taser to coerce, intimidate or gain control of a person who has been handcuffed and who is basically incapacitated is improper.

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understanding of the nature of police work and the use of force from his years as a police officer, as well as a deep understanding of the training police officers must go through from his years as a police instructor. [Exc. 173].

[Exc. 178 at ¶44].

Dr. Lyman also noted that the officers' use of the taser against Mr. Olson violated the Hooper Bay Police Department General Order. The General Order provides:

> The Advanced Taser shall not be used on a restrained or controlled subject unless the actions of the subject present an immediate threat of death or great bodily harm or substantial physical struggle that could result in injury to themselves or any other person including the deploying officer.

[Exc. 63 at No. 2]. After reviewing the facts and applying them to the General Order, Dr. Lyman concluded:

> It is patently unreasonable to infer that [Mr. Olson]'s actions came anywhere near life threatening or that given his physical position on the floor he could inflict "great bodily harm[.]" Even if it is to be believed that [Mr. Olson] did kick the officers as described by them, there is no evidence that his actions rose to this level. As such, defendant officers violated their own policy and the use of the Taser against [Mr. Olson] was improper, excessive and unreasonable.

[Exc. 178 at ¶45].

Viewing the facts in a light most favorable to Mr. Olson, the officers clearly violated Hooper Bay's policies for the use of tasers and national guidelines used to train police at all major police academies in the United States. Viewing the facts in Mr. Olson's favor requires a finding that he ceased being any kind of threat at all, let alone a threat to cause bodily injury, when he was tased while lying on his stomach with his

hands cuffed behind his back. Again, viewing the facts in Mr. Olson's favor, he had ceased posing a threat of causing bodily injury when he was seated with his legs wrapped around the pole, and was tased by an officer standing behind him (well out of range of any possibility of being kicked) on his back, chest, and near his genitals. Arguably, he *never* posed any threat of bodily injury, even before he wrapped his legs around the pole, since, viewing the facts in Mr. Olson's favor requires the common-sense finding that (1) after everyone fell, the officers immediately stood up while Mr. Olson remained on the ground, restrained; (2) the officers enjoyed unfettered mobility, while Mr. Olson was not a threat to charge at the officers or flee; (3) to the extent that Mr. Olson was kicking, the officers could easily avoid injury by taking a step backwards; (4) Officer Simon remained behind Mr. Olson throughout the episode and was able, without any danger of being kicked, to tase Mr. Olson on his back, chest, and inner thigh; and (5) the officers used their tasers to gain compliance from a restrained, seated and later prone arrestee, and not to neutralize a threat to their safety.

These facts clearly establish that the officers violated their own regulations -- regulations of which they were well-aware. Thus, for summary judgment purposes, the superior court should have found that the officers had notice that their

conduct was unlawful, and consequently, the court should not have found that the officers were entitled, as a matter of law, to qualified immunity.

b. Existing case law put the officers on notice that their conduct was unlawful.

The *Sheldon* Court, and nearly every court considering qualified immunity in excessive force cases, look to case law existing at the time of the application of force to provide an indication of whether the officers were "on notice" that their conduct was unlawful.[77]

In granting the officers' motion for summary judgment, the superior court discussed each party's main "notice" authority. [Exc. 355-358]. It explicitly refused to rely on *any* of the authority it discussed. [Exc. 355-358]. Instead, after considering, and rejecting each party's primary authority, it reached the conclusory "finding" that:

> [A]t the time of the arrest here, the contours of Fourth Amendment jurisprudence on the claims of excessive force involving Tasers was not sufficiently clear such that a reasonable law enforcement officer in the officers' position under these circumstances would have known that the multiple tasings of the Plaintiff violated his Fourth Amendment right to be free of excessive use of force.

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[77] *See, e.g., Sheldon*, 178 P.3d at 466 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199-201 (2004)).

[Exc. 358]. The court never identifies which cases, regulations, laws, or other sources it relied on in reaching that conclusion.

Significantly, the court explicitly refused to accord any weight to the officers' argument that Hooper Bay policies gave them a reasonable belief in the lawfulness of their actions [Exc. 357], and it explicitly rejected the officer's reliance on *Sheldon* and an unpublished superior court order from Kotzebue. [Exc. 355]. Mr. Olson, on the other hand, presented ample authority to support the conclusion that the officers were "on notice" of the unlawfulness of their conduct.[78] [Exc. 88-90 (citing 5 reported cases and 5 unreported cases, none of which

[78] Because of a dearth of taser cases, Mr. Olson cited analogous cases involving non-lethal control devices featuring a similar level of force (e.g. pepper spray and police dogs). The superior court appears to have acknowledged the appropriateness of consulting these analogous cases. [Exc. 354 ("[T]his Court is in agreement with the authorities, here cited by the Plaintiff, that draw a parallel between nonlethal uses of force for purposes of constitutional analysis.")]. Nevertheless, its failure to discuss these analogous cases indicates that it may have concluded that they could not provide "notice" to the officers for purposes of qualified immunity analysis. Such a conclusion is clearly erroneous. *See, e.g., Landis v. Cardoza*, 515 F. Supp. 2d 809, 814 (E.D. Mich. 2007), *affirmed by Landis v. Baker*, 2008 U.S. App. LEXIS 21946 (6th Cir. 2008) (holding that it is "appropriate to draw a parallel" between tasers and pepper spray because "[b]oth instruments temporarily incapacitate individuals by causing pain and are intended to permit law enforcement officers to take resisting individuals into custody without having to resort to lethal force"). Indeed, the Hooper Bay officers recognized that pepper spray exists at the same location as tasers on the use-of-force continuum, and would have used pepper spray against Mr. Olson had small children not been near-by. [Exc. 135 at 32:7-9].

were discussed by the court)]. Given its rejection of the officers' authority, and given its failure to discuss or otherwise address much of Mr. Olson's authority, the court clearly erred in determining that the officers were entitled to summary judgment.

Though it may seem obvious, it is worth noting that under qualified immunity jurisprudence, it is appropriate -- indeed necessary -- to consult courts' determinations regarding the objective reasonableness of the use of force under *Saucier's* and *Sheldon's* "first-prong." In other words, in showing that the officers were "on notice" that their conduct was excessive, Mr. Olson is not limited to citing the qualified immunity determinations rendered under the "second-prong" of the excessive force analysis. The question of whether an officer is "on notice" that his or her application of force is excessive *must* be informed by other courts' determinations of what level of force is objectively reasonable (or unreasonable, as the case may be).[79] To hold otherwise would create a never-ending feedback loop where conduct that is found to be objectively excessive never penetrates into the qualified immunity analysis, and officers would become *absolutely* immune from liability for

[79] *See, e.g., Sheldon*, 178 P.3d at 466 (finding that officer could reasonably have believed bear-hug take down was lawful, and citing, in support of that conclusion, Idaho court's prior determination that similar conduct was not, objectively, excessive).

well-established illegal conduct. Thus, to the extent that the superior court based its grant of summary judgment on a finding that notice of conduct constituting excessive force cannot come from reported cases in which courts ruled that the force used by officers was unlawful *but* that those officers were entitled to qualified immunity, it erred.

(i) Reported Cases

Reported case law existing at the time of Mr. Olson's arrest and multiple tasings clearly established that the Hooper Bay officer's conduct was objectively unreasonable. Thus, the officers could not have reasonably believed that their conduct was lawful.[80]

The facts, interpreted in a light most favorable to Mr. Olson, established that, to the extent that he had engaged in a struggle with the officers in the immediate aftermath of their fall to the ground, he had ceased struggling or resisting well before the officers' ceased tasing him.[81] Thus, the question in

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[80] *See Prentzel v. State*, 169 P.3d 573, 586 (Alaska 2007) ("The law is 'clearly established' if the contours of the right are sufficiently clear that a reasonable official would understand that his actions violate that right.") (citations omitted).

[81] *See* Section III.B, *supra*. In *Beaver v. City of Federal Way*, No. CV05-1938MJP, 2006 WL 3203729 (W.D. Wash. Nov. 3, 2006), the federal district court denied summary judgment to defendant police officers because it found that the arrestee's movements on the ground could reasonably have been the result of his reactions to being tased 7 times, as opposed to an attempt to flee or injure the officers.

this case is whether the officers could have reasonably believed that their repeated tasings of Mr. Olson after he had ceased struggling was lawful.

Viewing the facts in a light most favorable to Mr. Olson requires the conclusion that by the time he had wrapped his legs around the post he was, at most, refusing to comply with the officers' order to stand up. For instance, Officer Oaks testified at his deposition that they had no way to get Mr. Olson "out of the building" if they "let him keep his feet wrapped around the" pole. [Exc. 136 at 37:11-13]. Officer Simon wrote in his affidavit that:

> Prior to attempting to drive stun Boya [Mr. Olson], I warned him: "Boya, if you don't comply, I'm going to drive stun you. Let go of the pole."

[Exc. 39 at ¶7]. While Officer Simon claims later in paragraph 7 of his affidavit that Mr. Olson "continued to fight," that claim is disputed by Mr. Olson, who affied that he wrapped his legs around the pole after being tased because he was scared, that he did not understand what was going on after being tased,[42] and that the officers kept tasing him because he was incapable of obeying their commands. [Exc. 106 107 at ¶¶23-29]. Moreover, Officer Joseph's report filed in the immediate aftermath of the incident clearly states that the officers tased

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[42] Tasings render a subject dazed for up to several minutes and can make it so that the subject is incapable of responding to an officer's commands. [Exc. 54].

Mr. Olson after he wrapped his legs around the pole because he would not comply:

> Boya then used his wrapped legs around the beam and wouldn't let go . . . . Cpl. Simon then *continued to instruct Boya to let go of the beam* but Boya would not listen to the instructions that Cpl. Simon was giving him. *Cpl. Simon then threatened to use his taser to drive stun Boya if he continued not to comply. I heard Cpl. Simon's taser go off* . . . .

[Exc. 99] (emphasis added).[41]

An 8th Circuit court of appeals case from 1993 clearly holds that such use is unlawful. The 8th Circuit's recitation of the facts from the case, *Hickey v. Reeder*, is remarkably similar to the Hooper Bay officers' recitation of the facts in the instant case:

> Hickey had been convicted of a crime, sentenced to a term in the state penitentiary, and was awaiting transfer. The incident began when Officer King ordered him to clean or to sweep his cell. Hickey, who was locked in the cell, refused. Officer King testified that he was "kind of belligerent" and "kind of stirred up," asserting that he did not have to listen to Officer King anymore because he had just been sentenced to the Arkansas Department of Corrections. Hickey said he would "whip [Officer King's] ass" if Officer King put the cleaning materials in his cell. Officer King summoned Corporal Carlton, hoping she could persuade Hickey to sweep the cell. She arrived with another officer and entered Hickey's cell to talk to him. Hickey told Corporal Carlton that his neck hurt and that sweeping his cell was not his job anyway. Hickey remained steadfast in his refusal to sweep, using profanity and waving his hands as he

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[41] Officer Joseph's description in his report, written contemporaneously with the incident, carries more weight than any contrary account contained in his affidavit, especially since his attorneys wrote his affidavit. [Exc. 118 at 34:9-13].

> spoke. Deputy Martens then joined Corporal Carlton in Hickey's cell and attempted to persuade Hickey to sweep the cell. Corporal Carlton warned Hickey that if he did not voluntarily sweep his cell, the officers would make him do it. Hickey still refused to sweep. Deputy Martens also warned Hickey about the consequences of not sweeping his cell.
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> Corporal Carlton then summoned Sergeant Reeder, who testified that he knew Hickey to be a difficult inmate. Sergeant Reeder arrived with three other officers and the stun gun. Hickey continued his refusal despite Sergeant Reeder's order to sweep his cell, and despite Sergeant Reeder's warning that the stun gun would be used if Hickey did not comply. Hickey told Sergeant Reeder he could beat, whip, or shoot him, but he was not going to sweep the cell. Sergeant Reeder then shot Hickey with the stun gun. Hickey slumped forward. After recovering from the shock, Hickey swept his cell. He continued carrying on, cursing, and threatening to sue the officers until the last officer left.[84]

The 8th Circuit held that the *single* use of the stun gun against Hickey to compel his compliance with the guard's order to sweep his cell was excessive force under the Eighth Amendment as a matter of law.[85]

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[84] *Hickey v. Reeder*, 12 F.3d 754, 756 (8th Cir. 1993).

[85] *Id.* at 757-58. The fact that the court found the conduct excessive under the 8th Amendment rather than the 4th Amendment is of no consequence since both standards prohibit the application of excessive force by police officers, and the Supreme Court has ruled that the 4th Amendment affords arrestees *greater* protection than that provided by the 8th Amendment. *Graham v. Connor*, 490 U.S. 386, 398 (1989). Thus, if a single taser shot, deployed to gain compliance from an agitated and abusive prisoner, is unlawful, then the multiple tases to Mr. Olson deployed to gain his compliance after he had ceased struggling is clearly unlawful; and the officers should have been aware of that fact given the date, clarity, and moral force of the *Hickey* decision.

In the instant case, Officer Simon attempted to force Mr. Olson to comply with the command to let go of the post and stand up by (1) tasing Mr. Olson on his back, (2) reaching over Mr. Olson's seated body and tasing him on his chest, (3) tasing Mr. Olson near his genitals, and finally (4) flipping Mr. Olson onto his stomach, with his hands still cuffed behind his back, and tasing him again.[86] Officer Joseph joined with Officer Simon, adding additional cattle-prod stuns from his taser to try and gain compliance.[87] This application of force clearly went way beyond the conduct the *Hickey* court ruled was excessive as a matter of law, and thus the officers should have been "on notice" that their conduct was illegal.[88]

There is simply no debate any longer that the 4th Amendment prohibits the infliction of gratuitous pain and injury as a means to coerce compliance.[89] Yet, that is precisely the

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[86] *See* Section III.B, *supra.*

[87] *Id.*

[88] *See also Smith v. City of Hemet*, 394 F.3d 689, 703-04 (9th Cir. 2005) (holding that jury could reasonably find officers used excessive force where, in effort to arrest non-compliant domestic violence suspect, they deployed four blasts of pepper spray, slammed arrestee down onto the porch, dragged him off the porch face down, and ordered a police canine to attack him; fact that arrestee refused to uncurl arm from beneath body could be found by jury to be a justifiable effort to protect self from police dog).

[89] *Amnesty Am. v. Town of W. Hartford*, 361 F.3d, 118, 123-24 (2nd Cir. 2004) (opinion by S. Sotomayor, J.) (concluding that protestors who resisted police directives by going limp, chaining themselves together, pouring maple syrup over their

strategy that the Hooper Bay officers employed to gain Mr. Olson's compliance. The Hooper Bay officers were clearly frustrated. Mr. Olson was not complying with their directives. Worse, he was challenging their very right to be in his home at 4 in the morning.[90] Thus, they inflicted a particularly painful form of corporal punishment on him for supposed offenses and to, in essence, teach him a lesson about the physical costs of non-compliance. Case law decided prior to the incident should have placed the officers on notice that the use of force to inflict injury as punishment is unlawful.[91]

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hands to prevent effective hand restraint, and generally making it difficult for police officers to remove them from unlawful presence on premises, presented facts sufficient to overcome officers' motion for summary judgment, since evidence established a question of fact for the jury whether officers' pain compliance techniques, including choke holds and wrist-bending, were excessive applications of force; jury could reasonably conclude that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances").

[90] In this regard, Mr. Olson had a Constitutionally-valid point. While the officers arguably had sufficient cause to enter the premises to check on the children, the evidence unequivocally establishes that the children were all just fine. [Exc. 114 at 18:24-25; 19:1-2]. Having quickly determined that the children were all okay, there was absolutely no need to arrest Mr. Olson, handcuff Mr. Olson, and then tase him between 15 and 18 times. Instead, the officers could have simply called the children's mother back to inform her the children were not harmed and asked her to return to the home.

[91] *See, e.g., Pastre v. Weber*, 717 F. Supp. 992, 994-95 (S.D.N.Y. 1989) (holding that arresting officer used excessive force, where, after high-speed chase that ended in arrestee's capture, officer lost temper, striking and kicking arrestee, who had submitted to arrest and who was laying on the ground before

Even if the Court were to conclude that the evidence, viewed in a light most favorable to Mr. Olson, supports a finding that Mr. Olson posed a threat worthy of control through tasings while he was seated with his legs wrapped around the pole, there can be no dispute that he had ceased being any threat at all once the officers had placed him on his stomach with his hands still cuffed behind his back. Any further tasings at this point were clearly unlawful, and the officers should have realized that.[92]

(ii) Unreported Cases

The superior court's ruling that notice of excessive force cannot come from unreported court decisions is contrary to

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being handcuffed); *Bibbo v. Mulhern*, 621 F. Supp. 1018, 1025 (D. Mass. 1985) (denying officer's motion for summary judgment in excessive force case, where officer repeatedly struck restrained arrestee in back of police vehicle, because jury could conclude that arrestee was "punished for showing what was, in [the officer]'s mind, too little respect for the law"); *Greene v. Barber*, 310 F.3d 889, 898 (6th Cir. 2002) (holding that employing pepper spray on suspect who was resisting arrest but "not threatening anyone's safety or attempting to evade arrest by flight" could constitute excessive force); *Champion*, 380 F.3d at 903 (holding that "it is clearly established that the Officers' use of pepper spray against Champion after he was handcuffed and hobbled was excessive").

[92] *See, e.g., Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) (finding that any reasonable officer would know that repeated use of pepper spray against protesters who had been arrested and "rendered helpless" constituted excessive force) (citing *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000)).

persuasive federal precedent.[93] [Exc. 355] To exclude unreported cases but not exclude reported cases makes little sense, unless the trial court believed that the officers were any more likely to read reported cases than unreported ones. It defies common experience to believe that officers anywhere in the country are routinely reading excessive force cases--whether published or unpublished. Thus, to the extent that reported case law from distant jurisdictions is relevant to the qualified immunity analysis, unreported case law is also relevant.

Unreported case law existing at the time of Mr. Olson's arrest and multiple tasings clearly established that the Hooper Bay officer's conduct was unlawful. All of the following cases were decided prior to December 26, 2006, and each found that the use of a taser was excessive where there was no threat to the officer or a third party:

- *Muro v. Simpson*[94] (holding that tasing a non-compliant subject who had been rendered helpless by a previous taser application is excessive force);

- *Harris v. County of King*[95] (holding that the discharge of taser against compliant suspect when officer's safety is not in jeopardy is clearly excessive);

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[93] *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002) ("[U]npublished decisions of district courts may inform our qualified immunity analysis.").

[94] 2006 WL 2536609 (E.D. Cal. Aug. 31, 2006).

• *Hudson v. City of San Jose*[96] (holding that even though suspect was resisting arrest within the definition of penal code, he was "pretty much incapacitated," and thus officers' continued use of taser and baton presented question for jury);

• *Rios v. City of Fresno*[97] (holding that taser use was excessive where plaintiff was smaller than officers, was arrested for minor offense, conflicting testimony had been presented regarding the extent of plaintiff's "resistance");

• *LeBlanc v. City of Los Angeles*[98] (holding that single most important factor in excessive force inquiry is threat posed by suspect; jury could reasonably conclude that application of taser on handcuffed, schizophrenic suspect who was overdosing on drugs was excessive);

• *Vaughn v. City of Lebanon*[99] (holding that the use of pepper spray may be unconstitutional when there is no immediate threat to the safety of officers or others).

In the *Muro*, *Harris*, *Hudson*, and *Rios* cases, not only was the force used found excessive, but the courts found the contours of the law sufficiently clear to defeat the second

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[96] 2006 WL 2711769 (W.D. Wash. Sept. 21, 2006).

[97] 2006 WL 1128038 (N.D. Cal. April 27, 2006).

[98] 2006 WL 3300452 (E.D. Cal. Nov. 14, 2006).

[99] 2006 WL 4752614 (C.D. Cal. August 16, 2006).

[100] 18 Fed. Appx. 252, 2001 WL 966279, at *12-13 (6th Cir. 2001).

prong of the *Saucier* test as well. Clearly, on December 26, 2006 when the Hooper Bay officers entered Mr. Olson's home, they had "notice" that tasing Mr. Olson while he was restrained and on his stomach (and tasing him prior to that simply to gain his compliance) was unlawful.

VI. CONCLUSION

The officers that tased Mr. Olson between 15 and 18 times while he was restrained with his hands cuffed behind his back and while he was on the ground were on notice that their conduct was unreasonable. They are not entitled to qualified immunity, and thus Mr. Olson respectfully requests that the Court overturn the lower court's grant of summary judgment.