

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

Appellant's Excerpt of Record
Volume 2 of 2

Pages 108-276

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.
Appellees.

Supreme Court No. S-13455

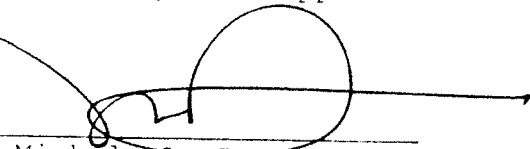
Trial Court Case No. 4BE-07-26 CI

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

APPELLANT'S EXCERPT OF RECORD
VOLUME 2 OF 2

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Clerk of the Court

By: Rob Lauriguel
Deputy Clerk

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

THOMAS J. OLSON,

Plaintiff,

vs.

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

Defendants.

JUL 14 2008

Case No. 4BE-07-26 CI

**DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT ON QUALIFIED IMMUNITY**

The predicament Hooper Bay police officers faced when Boya Olson wrapped his legs around a pole and kicked and bit at officers trying to get him to release the pole and stand up is analogous to the Village Safety Officer's use of force when arrestee Albert Lee Sheldon grabbed the handlebars of a four wheeler and refused to let go in Sheldon v. City of Ambler, 178 P.3d 459 (Alaska 2008). The Alaska Supreme Court affirmed summary judgment on qualified immunity in favor of the Sheldon officer. The Sheldon officer was protected by qualified immunity when he used pepper spray, a police baton, and ultimately a "take down" to get Sheldon to release the handlebars, even when the force resulted in Sheldon's death. The Olson case is an even stronger case for summary judgment than Sheldon since the arresting officers here only used a taser (considered "non-lethal" force), and Boya was indisputably kicking and attempting to bite officers when they tried to stand him up or pry him from the pole he'd latched

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onto. This court should follow the controlling precedent in Sheldon and grant qualified immunity to the defendants.

Granting summary judgment on qualified immunity is also consistent with Superior Court Judge Ben Esch's March 20, 2008 holding in Nickolas Page v. City of Kotzebue, where Judge Esch held that "use of the Taser on a handcuffed, but resisting Page was within the range of force a reasonable police officer in [the arresting officer's] position could decide to use," especially under the recent decision of Sheldon v. City of Ambler. See Exhibit A to Defendants' Memorandum, Page Order at page 1 and 2.

I. Sheldon v. City of Ambler Is Analogous and Controlling.

In Sheldon, two Ambler residents asked Village Police Officer Bryan Jones to "go cool off Albert [Lee Sheldon]." "He's drunk" [and] "beating on Dora [Williams]." Id., 178 P.3d at 461. VPO Jones responded within 5 minutes. He could hear shouting from a distance and found Albert Sheldon with Dora in the street. Sheldon was intoxicated, "screaming, belligerent and would not respond to any of VPO Jones'[s] orders or commands." Id. Dora was saying she wanted to go home and did not want Sheldon to follow her. Meanwhile, the two residents, who had requested that Jones respond, drove up on their four-wheeler, offering to give Dora a ride home. When Dora climbed onto the driver's four-wheeler, Sheldon grabbed hold of the handlebars and wouldn't let go, despite VPO Jones' commands to do so. Id. After Sheldon tried to grab the driver's key and threatened the driver when she brushed his hand aside, VPO Jones used pepper spray on Sheldon which caused Sheldon to scream even louder. But Sheldon would not let go of the handlebars or follow any other of the officer's commands, despite the

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pepper spray. Id. VPO Jones then used his police baton to strike Sheldon on his hands and the back of his knees. Despite the baton blows, Sheldon still would not comply and release the handlebars. Id. at 461-462. Jones then struck Sheldon on the back of the head with the baton, but this also had no effect on Sheldon. Id. at 461. When Sheldon would still not let go of the handlebars, VPO Jones put Sheldon in a "bear hug," wrapping his arms around Sheldon's arms and shoving him. When Sheldon still would not let go, Jones continuing using the bear hug, shoved again, and performed a "take down" in which both Jones and Sheldon fell to the ground. Id. at 462. During the fall, Sheldon landed on the ground under Jones, striking his head. Jones then handcuffed Sheldon who continued yelling and struggling. Along the way to the jail, Sheldon collapsed. While getting care from a Health Aide, Sheldon stopped breathing and a little more than an hour after the incident in the street, Sheldon was declared dead. For purposes of the qualified immunity analysis, the Supreme Court assumed that Sheldon died from a blow to the head caused from hitting the ground after Jones' bear hug and "take down."

In analyzing these facts and concluding that Jones was entitled to qualified immunity, the Sheldon Court did not resolve the "further question" of "whether there is a genuine issue of material fact over whether [Jones'] behavior was "objectively reasonable." Id. at 467. Instead, the Court simply affirmed the summary judgment in favor of the arresting officer because VPO Jones "could have reasonably believed that his use of force was lawful" since Jones had no clear notice "that a bear hug and a take down are excessive uses of force when applied to an intoxicated and assaultive arrestee." See id.

The facts in this case are even stronger than in Sheldon. While Sheldon involved the use

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of pepper spray, as well as impact blows from a police baton to hands, knees, and head, and a fatal "bear hug" and "take down," this case involves the use of a taser, a non-lethal weapon, considered less harmful than either pepper spray or a baton. See Exhibit L to Defendants' Memorandum, General Order 2-6 at page 3 (characterizing the taser as a "non-lethal weapon" in the force continuum which will not "cause injury or long lasting effect on the person").

Just like Albert Sheldon, Thomas "Boya" Olson was yelling, belligerent, and apparently intoxicated. While Sheldon was alleged to have been "beating on" Dora prior to the Village Officer's arrival at the scene, Olson indisputably bit at Officer Simon and repeatedly kicked at the officers, succeeding in kicking the officers who attempted to control him. See Exhibit K, Simon's deposition at 20, 27, 54-55 (biting); Exhibit L, Joseph's deposition at 30 and 31 (kicking); Exhibit K at 20 and 27 (kicking); Exhibit M, Oaks' deposition at 23, 63-64 and 74 (kicking).

Like Sheldon, Olson would not listen to officers' instructions and actively resisted arrest by wrapping his legs around a pole and refused to let go. Olson was only tased after he painfully kicked two officers, threatened further kicking which could have resulted in even more serious injury, bit at an officer several times, twisted to kick at officers no matter what direction they approached, and refused to unwrap his legs so he could be stood up and escorted outside. Exhibit K at 20, 29 and 42; Exhibit L at 32; Exhibit M at 64.

As in Sheldon, this Court does not need to be embroiled over a supposed dispute over whether the arresting officers' engaged in "excessive force." There is sufficient reason to grant summary judgment in defendants' favor because the arresting officers in this case had no "clear

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notice" that their use of tasers to protect themselves against bites and kicks and to get Olson to release his grip on the pole was "unlawful." Exhibit K at 47 and 58; Exhibit L at 37 and 38.

II. Judge Ben Esch's March 20, 2008 Qualified Immunity Order in Page v. City of Kotzebue Is Persuasive Authority.

In Page, a handcuffed Nickolas Page struggled with multiple officers who were attempting to subdue Page by pressing him into a chair. See Exhibit N at page 5. Page reacted by wrapping his legs around one of the officers' legs and then shifting his grip to the officer's upper body, pulling the officer towards him with his legs. Id. The officer reacted by drive stunning Page in the stomach. The contact was sufficient to cause Page to release his legs' grip on the officer. As the officer pulled away from Page, the taser cartridge deployed, and the probes stuck in Page's stomach, although no current was deployed. Id. Thus, Judge Esch evaluated the summary judgment dispute in the context of multiple officers grappling with a suspect which resulted in the seated, handcuffed suspect getting tased one or more times in the stomach. Instead of gripping a pole and refusing to let go, Nickolas Page resisted efforts to restrain him by wrapping his legs around an officers legs and then his torso.

Judge Esch found that Page's lawsuit was barred by qualified immunity: "[W]hile the actions of defendant Hughes [the deploying officer] may have been objectively unreasonable the use of the Taser on the handcuffed, but resisting Page was within the range of force a reasonable police officer in Hughes' position could decide to use." See Exhibit I to Defendants'

Memorandum at page 1. Moreover, Judge Esch refused to withhold summary judgment based on arguments that the City of Kotzebue's written policies or some "model policy" were violated.

Judge Esch explained:

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The plaintiff argues that the City of Kotzebue policy regarding the use of force should have placed Hughes on notice that use of the Taser was improper. However, the policy is very general and as unhelpful as the existing state statute AS 12.25.070. Likewise the plaintiff suggests the Model Policy on use of Electronic Control Weapons is an appropriate standard to measure Hughes' conduct. However, the plaintiff has offered no evidence such model policy has been adopted by any police agency within Alaska. Even if the policy had been adopted, it limits the use of electronic weapons to individuals who are actively resisting, which the defendant was. . . . [U]nder the recent decision in Sheldon v. City of Ambler . . . the Court will find that a grant of qualified immunity is appropriate.

Exhibit I at 1-2, attached to Defendants' Memorandum.

In Page, it did not matter that the suspect was handcuffed or tased in the stomach while being pressed down into a chair by multiple officers. The use of the taser while Page tried to grip an officer by his legs was objectively reasonable. The Olson case is even stronger than Page since Boya was kicking and biting at officers while refusing to let go of a pole. Boya successfully kicked the officers. It is reasonable to assume Boya could have kicked the officers still further if they'd continued to grapple with him on the dangerous, slippery floor. See Exhibit K at 20, 33 and 34 (Simon fell because Boya was kicking and the floor was slippery); Exhibit L at 9-10 (floor was so slippery Joseph had trouble keeping his balance while standing); Exhibit M at 24 (floor slippery).

III. Plaintiff's Expert Admits that the Officers Were Justified in Pepper Spraying Olson, a Level of Force equivalent to Tasering

Plaintiff's expert, Michael Lyman, does not have any experience with tasers. Exhibit P at 24. However, Lyman was assigned pepper spray as a police officer. Id. Significantly, Lyman admitted that the arresting officers in this case would have been justified in using pepper spray on Olson. Lyman testified:

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- Q: [W]ould pepper spray in your opinion been appropriate?
A: Yes.
Q: Why is that?
A: Because that's a low level of a control weapon.
Q: And that would be appropriate to gain compliance, to use to gain compliance, pepper spray?
A: Yes.

Id. at 97. This is a very significant admission on the part of plaintiff's expert because the taser and pepper spray were on the same low level of force. See Exhibit G, General Order 2-6 at page 3 ("The Taser or OC weapons are generally the first non-lethal weapons used in the continuum") If plaintiff's own expert approved the use of pepper spray on Boya, this expert has no principled reason to contest the use of a taser.

IV. Plaintiff Misstates the Record Relevant to the Qualified Immunity Analysis

Plaintiff tries to toss around as many arguments as he can—whether they are supported by the record or not—in an effort to create some sort of “disputed material fact” as to qualified immunity. While plaintiff tries to raise all sorts of red herrings, Plaintiff's arguments are easily disposed of.

A. This Court Can Decide “Qualified Immunity” Without Reaching the Question of Whether the Force Was “Objectively Reasonable”

Plaintiff's Opposition asserts at page 9, that defendants have “misunderstood” the issues, reasoning that “only if excessive force is found, [does] the court proceed to . . . the qualified immunity prong.” Plaintiff does not actually explain why this court must logically proceed in that order. In fact, the Sheldon court “did not need to reach” the factual dispute over whether VPO Jones' behavior was “objectively reasonable,” since it affirmed the summary judgment in Jones' favor on qualified immunity grounds. Sheldon, 187 P.3d at 467. Likewise, in Saucier,

the U. S. Supreme Court merely “presumed” that excessive force had occurred, proceeded directly to address the question whether the degree of force was clearly established to be “unlawful,” and reversed the lower court on qualified immunity grounds alone. Despite Saucier’s reference to deciding excessive force issues “first,” the United States Supreme Court did not decide excessive force “had occurred.” In fact, the Supreme Court observed it was “doubtful that the force used was excessive,” but nevertheless addressed and resolved the case on qualified immunity grounds. See Saucier v. Katz, 533 U.S. 194 at 207-208, 121 S.Ct. 2151, 2159 (2001).

Both the Alaska Supreme Court and the United States Supreme Court acknowledge that the qualified immunity and excessive force issues are analytically distinct. See, e.g., Sheldon, 178 P.3d at 463 (since an officer is entitled to qualified immunity if he had a reasonable belief his conduct was reasonable, even if it was not, the implication is that the immunity analysis does not turn on a mere finding of “objective unreasonableness”); Saucier, 533 U.S. at 200, 121 S.Ct. at 2155 and 2156 (analysis for qualified immunity is not the same as whether unreasonable force was used and the lower court couldn’t just “leave it all for the jury” to decide since that would defeat the purpose of qualified immunity which is an entitlement not to stand trial or face the burden of litigation). Since the “clear notice” and “reasonable mistake” issues can be decided separate from whether the trial court makes a threshold finding of “excessive force,” there is no good reason to complicate the basic qualified immunity analysis.

B. Plaintiff Does Not Take into Account the Fact that Qualified Immunity Allows for Reasonable Mistakes

Plaintiff asserts that qualified immunity only applies if the officers’ conduct was

"subjectively" reasonable." See Plaintiff's Opposition at page 12. That is not a helpful articulation of the standard. The standard is not merely what the officer "felt" was the right conduct, but whether the officer was "reasonable in believing his conduct was legal." Sheldon, 178 P.3d at 465. Even in a case of "mistake," acceptable mistakes include the ones a reasonable officer under the circumstances would have made, even if the conduct was later determined to be objectively unreasonable. Id. at 463. Thus, if a reasonable officer under the circumstances could have made a mistake, the conduct is "immune" even if the conduct was later determined to be objectively unreasonable.

The reasonable "mistake" doctrine is relevant in this case to disregard Boya's effort in his affidavit to dispute "the facts." For example, Boya admits that he and [redacted] were drinking home brew that evening, but he disputes he was "intoxicated." Such an assertion is utterly irrelevant. When [redacted] asked police to check on the welfare of her young children, she told police that Boya was alone with the kids and "intoxicated." See, e.g., Exhibit O, dispatch record. Moreover, there was objectively reasonable evidence of intoxication. The officers smelled alcohol when they entered the main living space and saw Boya and Peter. See, e.g., Exhibit L at 17 and 23; Exhibit M at 21. Simon observed Boya staggering consistent with Boya being intoxicated. See Exhibit K at 24. The arrest tape demonstrates the officers had trouble waking [redacted], consistent with [redacted] being passed out from alcohol. See also Exhibit L at 18 and 22. The arrest tape evidences Boya was screaming, yelling and uncooperative, consistent with someone being intoxicated. Thus, there was sufficient evidence that Boya and [redacted] were intoxicated even if this was a supposed "mistake."

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C. The Alaska Statutes Plaintiff Cites Do Not Establish the Standards for "Objectively Reasonable" Force

Plaintiff cites to AS 11.81.370 and AS 12.25.070 as somehow controlling the "qualified immunity" standard. See Opposition at page 8. However, the Alaska Supreme Court has expressly rejected this notion. The Sheldon Court clearly explained:

In their brief, the appellants [the estate of Albert Sheldon] contend that [VPO] Jones was "on notice" that his conduct was excessive because AS 11.81.370 and 12.25.070 gave him that notice. But these statutes are only general statutes which set out when deadly force is appropriate Such statutes cannot purport to give notice to officers that specific actions taken in specific circumstances may or may not be reasonable.

Sheldon, 178 P.3d at 466. See also Exhibit I to Defendants' Memorandum, Page order at page 1 ("[T]he [City of Kozebue] policy is very general and as unhelpful as the existing state statute AS 12.25.070.").

D. Plaintiff's "Expert" Does Not Articulate the Controlling "Standards"

1. Lyman Has No Actual Experience with Tasers

In an attempt to raise some sort of fact dispute, plaintiff produces the report of Michael Lyman a purported "expert." See Exhibit 9 to Plaintiff's Opposition. However, Mr. Lyman has no actual experience whatsoever with tasers. For example, Lyman retired from the Kansas and Oklahoma law enforcement entities he worked for well before tasers were regularly issued weapons for police departments. Exhibit P, Lyman deposition at 23. Lyman never carried a taser nor was a taser ever assigned to him when he was a law enforcement officer. Id. at 23 and 41. Lyman has never been tased himself and does not consider himself a person with personal knowledge or expertise on the use or effect of tasers. Id. at 41 and 144. Lyman has never personally witnessed a suspect getting tased. Id. at 50. Lyman has no personal experience or

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expertise in judging whether a taser deployment could cause a person's death. Id. at 45 and 102. Thus, plaintiff's "taser" expert has no expertise or experience with tasers.

2. Lyman Is Not an Expert on Alaska Law and His Opinions Directly Contradict the Supreme Court's Conclusions in Sheldon v. City of Ambler

Not only has Lyman absolutely no personal experience as a police officer qualified to use a taser, he also admits "I make no claim to be an expert in constitutional law." See Plaintiff's Exhibit 9 at paragraph 38. Moreover, Lyman knows nothing about Alaska law. See, e.g., Exhibit P at 72 and 74-75.

For example, when Lyman was asked hypothetically whether the force used under the facts in Sheldon v. City of Ambler was "unreasonable" and "excessive," Lyman disagreed "absolutely" with the Alaska Supreme Court. For example, the Sheldon officer responded to the suspect gripping the handlebars and refusing to let go, by first deploying pepper spray, an option on the same "level of force" as a taser. See Exhibit G, Hooper Bay General Order 2-6 at page 3 and the force continuum. The Alaska Supreme Court did not criticize the use of pepper spray in Sheldon. In contrast, Lyman believed that it would be "inappropriate" for an officer to pepper spray a suspect who refused to let go of handlebars. See Exhibit P at 107-109.

The Alaska Supreme Court did not criticize the Sheldon officer's use of a baton as an impact weapon to strike at Sheldon's hands, knees and head in effort to get Sheldon to release the handlebars so he could be escorted away. When asked his opinion, Lyman opined that an officer hitting a suspect with a baton under the Sheldon facts would be "absolutely inappropriate." Exhibit P at 108.

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While the Sheldon Court concluded that the arresting officer had "no clear notice" that escalating to a "bear hug" and "take down" was "excessive use of force when applied to an intoxicated and assaultive arrestee," Lyman opined that wrestling a person to the ground under the facts in Sheldon would be "deadly force" and "absolutely inappropriate." See Exhibit P at page 108.

These examples show that Lyman has no understanding of Alaska law and he cannot reconcile his premise of "objectively reasonable force" with the Alaska Supreme Court's analysis of the controlling Alaska's standards in Sheldon.

Clearly, Lyman never bothered to consider Sheldon v. City of Ambler when he analyzed the applicable standards in this case. Since Lyman reaches the opposite conclusion than the Alaska Supreme Court on the reasonable "use of force," as illustrated by the Sheldon case, Lyman is no "authority" on what is objectively reasonable use of force in Alaska.

3. The Relevant Standard Is Not the "Least Amount of Force"

In a perversion of the applicable standards, Lyman further argues at paragraph 40 of his report that he believes the "implication" of the LACP model policy is that "all lower level means to accomplish control of a subject must be used before resorting to a higher level." See Plaintiff's Exhibit 9 at page 5, paragraph 40.

However, Lyman is simply wrong to assume that "lower level alternatives" are the standard for judging whether force was "reasonable" or "unlawful." Just because an officer uses more than the minimum amount of force necessary does not mean a jury will find that the officer acted "unreasonably." Courts soundly reject Lyman's notion that the applicable standard is the

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"lesser alternative" since this is not the same thing as a "reasonable" response. See, e.g., Chamberlin v. City of Albuquerque, 2005 U. S. District LEXIS 21910 (D. N.M. 2005) (Court granted motion in limine excluding evidence that a less intrusive means of force could have been employed in lieu of using a police dog to apprehend a suspect, because the "lesser alternative" was not appropriate standard); United States v. Melendez-Garcia, 28 F.3d 1046, 1052 (10th Cir. 1994) (Fourth Amendment "does not require [police officers] to use the least intrusive means in the course of detention, only reasonable ones"); Taylor v. Hudson, 2003 U.S. Dist. LEXIS 26736 (D. N.M. 2003) (evidence of less intrusive alternatives was irrelevant to the Fourth Amendment reasonableness inquiry and thus was inadmissible).

Thus, it simply does not matter to the qualified immunity or the "excessive force" analysis that an officer "could have done something different" or "could have employed a less forceful alternative."

4. Lyman's Reference to an U.S. Supreme Court "Standard" Does Not Salvage His Opinions

Attempting to suggest a legal gloss on his opinions, Lyman cites to Graham v. Connor, 490 U.S. 396, 109 S.Ct. 1865 (1989) as if he is tapping the relevant constitutional standards. See Plaintiff's Exhibit 9, Lyman's report at page 4, paragraph 36. Likewise, plaintiff's Opposition assumes that Graham "established the 'objectively reasonable' standard for judging excessive force" and placed the Hooper Bay officers "on notice" that their use of force was "excessive." See page 10 and 14 of Plaintiff's Opposition.

Plaintiff and Lyman over-claim Graham and what constitutes "notice" of unlawful use of force, especially concerning tasers. Graham was not a taser case. Graham did not involve an

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arrestee who bit or kicked at officers. In Graham, the police officers mistook a suspect's diabetic reaction and unconsciousness as a sign of intoxication and refused the suspect orange juice. See Graham, 490 U.S. at 389, 109 S.Ct. at 1868. Graham simply does not reasonably resemble the facts of this case. Moreover, in a more recent case, the U. S. Supreme Court remarked that "Graham does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts." Saucier, 533 U.S. at 205, 121 S.Ct. at 2158. Thus, the Graham case does not help either Lyman or the plaintiff argue that the arresting officers in this case were on "notice" their conduct was unlawful.

5. Lyman's Reliance on the Recommendations of the International Association of Chiefs of Police Is Misplaced

Lyman asserts in his report that a "professional policing organization"—the "IACP"—has a "center" to "assist law enforcement administrators" to "develop law enforcement policies" that "reflect nationally recognized professional practices." See Plaintiff's Exhibit 9 page 5 at paragraphs 40 and 41. However, Lyman does not actually provide a shred of evidence that any law enforcement organization in Alaska has adopted any IACP standards. For this reason, Judge Ben Esch refused to consider supposed "model policies" relied on in Page. Judge Esch concluded that without evidence an Alaska police department adopted such standards, they were not dispositive of the qualified immunity analysis. Judge Esch explained:

[T]he plaintiff suggests the Model Policy on use of Electronic Control Weapons is an appropriate standard to measure [the arresting officer's] conduct. However, the plaintiff had offered no evidence such model policy has been adopted by any police agency within Alaska.

Page Order at page 1 attached to Defendants' Memorandum at Exhibit I.

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Even if this Court considers the IACP "recommendations" on the use of "electronic control devices," those recommendations raise more questions than they answer and are, therefore "unhelpful" to the jury under Alaska Evid. R. 703. For example, Lyman admits that "electronic control devices" are not just tasers, but include other devices which Lyman neither lists nor explains. See Exhibit P at 41-42. Thus, plaintiff asks the court to consider a recommendation without understanding the full range and nature of the devices it refers to.

Second, it is clear that the supposed "model policy" isn't a firm or discrete "rule." For example, in the IACP policy language Lyman relies on the prerequisites of "overt intention to use violence" and "unavailable alternatives" are mere "cautions." See Plaintiff's Exhibit 9 at paragraph 43. The IACP says with these "cautions in mind" "ECW's may be deployed consistent with a professionally recognized philosophy of use of force." This is not helpful standard since the IACP does not clarify a single, mandatory standard other than the "reasonably necessary" rule. See *id.* If the point of the IACP's "model policy" is that a police department should adopt a professional standard consistent with the "reasonableness" rule, such a position is too general to be a helpful standard in a civil case. Indeed, courts routinely exclude evidence of police department standard operating procedures as the proper standard for evaluating violations of constitutional rights. See, e.g., Davis v. Scherer, 468 U.S. 183, 194-195, 104 S. Ct. 3012, 3019 (1984) (officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some administrative provision); Whren v. United States, 517 U.S. 806, 815, 116 S. Ct. 1769, 1775 (1996) (Court rejects the use of local police regulations that required an "immediate threat" as the standard for evaluating constitutionality of

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police conduct); Tanberg v. Sholtis, 401 F.3d 1151, 1163-1164 (10th Cir. 2005) (“That an arrest violated police department procedures does not make it more or less likely that the arrest implicated the Fourth Amendment, and the evidence of the violation is therefore irrelevant.”).

Even if the so-called model policy is worth considering, it was satisfied in this case. First, the model policy prohibits use of an “electronic control device” “unless the person demonstrates an overt intention to use violence or force against the officer.” Those requirements were met in this case. Boya was kicking at the officers and ignored verbal warnings to stop before the first taser was deployed. See Exhibit A to Defendants’ Memorandum at 20:28 (“Stop trying to kick; stop trying to bite and comply!” on arrest tape); Simon’s Affidavit at 20 et seq. Even Lyman admits the tasing happened after Boya kicked the officers and after Boya refused to comply with officers commands to stop kicking. See Exhibit P at 80, 120 and 137. Also, while Lyman ignores the biting issue, Boya was tased after he ignored Simon’s command to stop trying to bite. See Exhibit K at 29; Exhibit A, arrest tape at 20:28; Exhibit M at 29 and 30. The biting and kicking were “overt” intentions to use “violence and force” against the officers. Therefore, even if the so-called model policy applied, it was satisfied.

Second, the model policy says that an electronic control device can be used when a person “resists” “and other alternatives for controlling them are not reasonable or available under the circumstances.” See Plaintiff’s Exhibit 9 at paragraph 43. Boya was clearly not cooperating with officers’ verbal instructions. See, e.g., Exhibit A, arrest tape at 23:09 – 23:04 (“Boya, if you don’t comply I’m going to drive stun you. Let go of the pole”); id. at 20:28

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("Stop trying to kick; stop trying to bite and comply!"); *id.* at 18:37 ("Stop. Boya, stop. Stop resisting. Stop resisting. Cooperate. Stop resisting. Are you going to comply? Are you going to comply? Are you going to comply? Stand up. Stand up, Boya."). See also *id.* at 16:32 and 15:34 (more instructions to "Stand up and comply" with no sign Boya is cooperating).

Officer Simon and Oaks both testified that they each tried to pin down Boya's legs to stop Boya from kicking, but this just caused Boya to kick at Simon some more. See Exhibit K at 50; Exhibit M at 61. The arresting officers also testified that it was hard to gain control of Boya because he was twisting and pivoting on the floor to avoid officers' efforts to restrain him from whatever direction they approached. See Exhibit K at 20, 29 and 50; Exhibit L at 32; Exhibit M at 64. When Simon tried to lift Boya up, Boya bit at Simon more than once. See Exhibit K at 20, 27, 54 and 55; Exhibit M at 29 and 30. Moreover, Boya's twisting and turning while alternatively grasping the pole and kicking at officers occurred in a particularly dangerous location near the top of the stairs and where the floor was so slippery Officers Simon and Oaks had already fallen. Under these facts, and in the heat of the struggle, a reasonable police officer would not have had "clear notice" that the use of a taser was unlawful, even under the supposed model policy.

6. Even if it Was Relevant, the Officers Complied with the Hooper Bay General Order 2-6 and its Force Continuum

The Hooper Bay General Order is not intended to articulate a standard of conduct in civil actions. See General Order 2-6 at page 1, attached to Defendants' Memorandum as Exhibit G. General Order 2-6's intent is that it is not practical to "define the levels of force appropriate in any given situation." See *id.* at page 2. "Nothing in this order requires an officer to start at

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the bottom of the force continuum. Officers must use a level of force that they feel will be effective and is objectively reasonable." *Id.*

Plaintiff's Opposition assumes that the only instance when an officer could tase a handcuffed suspect under General Order 2-6 is if the suspects conduct "present[ed] an immediate threat of death or great bodily harm or substantial physical injury." Opposition at page 13. In actuality, plaintiff's Opposition misquotes the Hooper Bay general order by deleting and changing words. The actual general order reads:

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 person including the deploying officer.

Exhibit G, General Order 2-6 at page 8 (emphasis added). In misquoting the general order, plaintiff fails to comprehend that a "substantial physical struggle that could result in injury" to the deploying officer or others was also an allowed use of a taser.

Moreover, the Hooper Bay force continuum provided that when a suspect was "pulling away . . . struggling and not complying on physical contact" use of a taser was a "reasonable officer response" even "where injury is not expected." See Exhibit G, Hooper Bay force continuum. In fact, to the extent Boya's biting and kicking constituted an "attack on [an] officer, strikes, wrestling and undirected strikes with injury potential" the Hooper Bay force continuum gave officers' notice that "impact weapons strikes and empty hand strikes" were a "reasonable officer response." See *id.* This means that under Hooper Bay internal guidelines, the officers could have responded with even greater force than a taser, including use of a baton or hand strikes.

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There is no reasonable dispute that under the express terms of the Hooper Bay force continuum, use of a taser was a "reasonable officer response" to Boya's biting and kicking at officers, especially when Boya succeeded in kicking the officers. In addition, Boya's degree of resistance involved a "substantial physical struggle" and Boya's kicking and biting posed a risk that the officers could be injured. For example, if the officers had continued to try to pry Boya's legs from around the pole, their faces could have been positioned directly in front of Boya's kicking legs, posing a danger for the officers. Even Lyman grudgingly admits Boya kicking the officers in the face was a "reasonable fear." Lyman testified:

Q: And it's true, is it not, that by wrestling . . . when you have someone's who's already kicked you, trying to pry his legs off, that one of the fears when you pry his legs off is that he'll kick you? That's a fear, a reasonable fear, right?

A: It's a fear.

Q: And it's a reasonable fear, right?

A: Well, it's a reasonable fear. . . .

Q: Let me talk about that a little bit. First of all, if they're going to pry his legs off the pole, what are they going to use to pry them off?

A: They would use their arms, their strength.

Q: And to use their arms to pry off the legs, they're going to have to end down and grab a hold of the foot or ankle or something, right?

A: That's right.

Q: [M]y question was, if they go down and grab at his foot, their face is in close proximity to his foot, right?

A: Right.

Q: And . . . as they're pulling and he releases the pressure and kicks up at them in the face, they could easily knock out a tooth, break their nose, it doesn't take much to do that with a foot, does it?

A: Well, you said it he was able to do that. And if he was able to do that, I think that would be a consequence of that. . .

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Exhibit P at 85-87.

Lyman also testified that a single individual can present "a challenge" to 2 or 3 officers. Id. at 28. And the ability of multiple officers to subdue a resisting suspect depends on the capacity of the arrestee to "deliver a strike with their fist or their feet." Id. Lyman admits that even a handcuffed suspect could cause injury to a police officer "[p]rovided they are in a tactical position to do so." Id. at 30.

The arrest tape confirms that the officers were in a "substantial struggle" to restrain Boya, avoid his kicks and get him to stand up. See Exhibit A, arrest tape at 24:40 through 15:04. Even when Joseph succeeded in subduing and joined Simon and Oaks' effort to restrain Boya, it took all three officers several minutes to get Boya to comply. See id. at 19:30 to 15:04. There is no dispute that Boya admits he was "fighting." In fact, during the walk to the police station, Boya is heard in the arrest tape saying: "I want a drink from fighting with you guys." Id. at 12:34 and 12:25. Boya also admits on the tape: "I was resisting." Id. at 10:13 to 9:47.

Since it took three police officers several minutes to subdue Boya, the incident with Boya was a "substantial struggle." During that struggle, Boya himself admits he was "fighting" and "resisting." Given these facts, there is no reasonable dispute that the arresting officers complied with Hooper Bay department policy and tased in the midst of a "substantial physical struggle that could result in injury to themselves or any person including the deploying officer."

See General Order 2-6 at page 8.

E. Plaintiff Misstates Lyman's Opinion on Whether Boya's Kicking Was Intentional

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Mischaracterizing Lyman's opinions, plaintiff counsel cites to Lyman as his authority for the notion that while "plaintiff may have made [movements] that could have resembled kicks, [they] must be interpreted as muscle twitches resulting from taser applications." See Plaintiff's Opposition at page 11 n.78.

However, when defendants deposed Lyman, plaintiff's expert denied that he believed the Taser caused any involuntary kicking. Lyman testified:

Q: You're not of the opinion, are you, that the use of the Taser, that was causing Boya to kick? Let me ask that in a different way. It's not your opinion that Boya wasn't actually kicking, but his muscles were twitching because he was being Tased?

A: I think that would be a clinical determination beyond my expertise.

Q: In fact, that with the Taser, you're not aware of anything from [what] you read that Taser would cause you to voluntarily kick or punch or something like that?

A: Right. It relaxes the muscle groups.

Q: Right. Okay. So in your paragraph earlier, where you said after being drive stunned several time Boya—I think you clarified—continued kicking . . . your belief is that those were intentional, voluntary kicks by Boya?

A: . . . [B]ased on my understanding of the use of the Taser, I think its safe to say that they didn't result from the electrical charge from the Taser.

Exhibit P at 142-143.

Given Lyman's actual testimony, it is flat-out wrong for plaintiff's counsel to argue in the Opposition at page 17 and 18 that "[p]laintiff's expert opines the 'kicks' could only reasonably be interpreted as reactions to the taser," as if Boya was kicks were mere muscle "twitches." Lyman actual testimony is that "it is safe to say" the kicks were not a result of the taser's electrical charge. See Exhibit P at 143. Thus, as the record stands, plaintiff has absolutely no admissible evidence that a reasonable officer would have perceived that Boya's kicking was other than intentional, voluntary kicks by Boya directed to the police officers

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attempting to get him to stand. This conclusion is also consistent with Boya's admission on the arrest tape that he was "fighting" with the officers. See Exhibit A, arrest tape at 12:34 and 12:25.

V. Defendants Are Entitled to Qualified Immunity Because the Officers Had No "Clear Notice" their Conduct Was "Unlawful"

A. As a Threshold Matter, Oaks Is Entitled to Qualified Immunity

Plaintiff's Opposition does not explain why Officer Oaks should not be immediately entitled to qualified immunity since it is undisputed he didn't use a taser and was not even armed with a taser. Similarly, the City is entitled to partial summary judgment to the extent plaintiff has made a claim against the City based on Oaks' conduct.

B. Qualified Immunity Focuses on Whether the Officers Had "Clear Notice" their Use of Force Was Unlawful

Plaintiff concedes that "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." Opposition at page 9 (quoting Sheldon, 178 P.3d at 463 and citing Saucier, 533 U.S. at 202). "Clearly unlawful" is the operative phrase. The standard assumes "a reasonable officer in the situation he confronted" not simply "the officer." See Saucier, 533 U.S. at 202, 121 S.Ct. at 2156 (the issue is whether it "would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). Thus, it is error to deny summary judgment on qualified immunity "any time a material question of facts remains on the excessive force claims." Id. "If the law did not put the officer on notice that his conduct would be clearly unlawful," the defendant is entitled to immunity. Id.

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"Twenty/twenty" hindsight does not apply to the qualified immunity analysis. Saucier, 533 U.S. at 205, 121 S.Ct. at 2158. The only relevant perspective is that of "reasonable officers on the scene." Id. Moreover, qualified immunity protects against reasonable mistakes. Thus, "if an officer reasonably, but mistakenly believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." Id. See also Sheldon, 178 P.3d at 463 ("[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense. In other words, a reasonable but mistaken believe can confer immunity on an officer even after it has been established that the officer . . . behave[ed] unreasonably.").

The U. S. Supreme Court continues:

It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

* * * *

Qualified immunity operates, then . . . to protect officers from the sometimes "hazy border between excessive and acceptable force."

Saucier, 533 U.S. at 206, 121 S.Ct. at 2158.

Finally, the standard is "reasonableness at the moment." Id. at 206, 121 S.Ct. at 2159.

This recognizes the "reality that 'police officers, in pursuit of their dangerous and important jobs, are often forced to make difficult decisions regarding the use of force.'" Sheldon, 178

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P 3d at 467. See also Graham, 490 U.S. at 396-397, 109 S.Ct. at 1872 (“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”).

C. Plaintiff Fails to Establish the Officers Had “Clear Notice” their Conduct Was Unlawful

1. Number of Deployments

Plaintiff’s arguments for why the use of the taser was unlawful must fail. First, plaintiff asserts he was tased “12 to 15 times.” Opposition at page 17. However, just because the taser was deployed numerous times does not mean it was effective each time it deployed. Plaintiff’s expert admits that when Joseph first deployed the taser using the probes, the cartridge had no effect. See Exhibit P at 48. Next, plaintiff’s expert admits that when Simon deployed his taser in a drive stun mode and Olson responded: “Is that the best you got, bitch? Feels like a vibrator!”, this was evidence that Olson’s drive stun did not work. See id. at 49.

As for the rest of the taser deployments, Lyman is of no assistance to plaintiff, because he is not an “expert” on the effect of the taser and he “couldn’t say” when or how many times the taser made sufficient contact with Olson to cause either pain or muscle effects. See id. at 23 and 52. As for the defense argument that the sound of the taser on the arrest tape evidenced the taser was shorting out, Lyman could not refute this point. Lyman admitted that while he understood the Taser manual talked about “Silence is Golden,” Lyman “could not recall” what this meant. See id. at 141-142.

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Thus, the mere fact there were multiple taser deployments does not prove one way or the other than the taser was working or causing Boya pain. A reasonable officer on the scene, in the heat of Boya's struggling, would have realized according to his training that Boya's struggling could prevent the taser from making sufficient contact with Boya, as evidenced by the sounds the taser was shorting out. See also Exhibit Q, Hoelscher deposition at page 10-11 (the sound of the taser is evidence there is insufficient contact with the suspect; a person would only feel a "tap" of electricity rather than the effect intended).

2. Tased "on the ground"

Boya asserts he was tased while "handcuffed on the ground." Opposition at 17. The handcuffing did not prevent Boya from kicking and attempting to bite officers. See, e.g., Exhibit M at 63; Oaks Affidavit at 4; Simon Affidavit at 6; Joseph Affidavit at 14; Exhibit A, arrest tape at 20:28 ("Stop trying to kick; stop trying to bite and comply!") The fact Boya was "on the ground" isn't a fair characterization since Boya was struggling, twisting and turning on a slippery floor near the top of some stairs. When Simon or Oaks tried to approach Boya he'd turn or twist towards whomever was nearest and try to kick them. See Exhibit K at 20 and 29; Exhibit L at 32; Exhibit M at 31, 37 and 40. That is the opposite of someone passively sitting on the ground. Even Lyman admits that a person can "become aggressive and violent after being handcuffed." See Exhibit P at 30. Lyman also admits that when they are in a position to do so, even a handcuffed person "can cause injury to a police officer." Id.

Sheldon is the best evidence that Alaska does not prohibit even the use of a baton when a suspect threatens injury to others and grabs onto an obstacle, refusing commands to let go.

Given Sheldon, cases outside Alaska are of marginal interest. See Sheldon, 178 P.3d at 466 (questioning whether a reasonable police officer should be informed of cases from Idaho in regards to the "clear notice" issue).

However, even if the court considers outside cases, there is no "clear notice" that a "handcuffed" suspect can not be lawfully tased, particularly when he is kicking and biting at officers and refusing to let go of a pole and stand. See, e.g., Devoe v. Rebant, 2006 WL 334297 *7 (E.D.Mich. 2006) (drive-stun to lower right back of handcuffed suspect who refused to get into police car was objectively reasonable and did not constitute excessive force where arrestee was resisting officers' commands to enter the police car and was arguing with officers); Willkomm v. Mayer, 2006 WL 582044 *3 and *4 (W.D. Wis. 2006) (three drive stuns on handcuffed arrest who failed to comply with officers' orders were objectively reasonable); Carroll v. County of Trumbull, 2006 WL 1134206 at *10-11 and 12-13 (N.D. Ohio 2006) (multiple tasers on a violent, thrashing, resisting handcuffed arrestee were reasonable).

In contrast, the cases cited by plaintiff are readily distinguishable because the suspect was not struggling or refusing to comply at the time the person was tased. See, e.g., Harris v. Co. of King, 2006 WL 2711769 at *1 and 3 (W.D. Wa. 2006) (defendant had his hands in the air in surrender when he was tased); Beaver v. City of Federal Way, 2006 WL 3203729 at *1-2 (W.D. Wa. 2006) (defendant's movements on floor were so ambiguous there was a dispute whether he was resisting or just in pain); Rios v. City of Fresno, 2006 WL 3300452 at *9-10 (E.D. Cal 2006) (disputed fact whether the arrestee resisted in any way); Hudson v. City of San Jose, 2006 WL 1128038 at *4 (N.D. Cal. 2006) (baton and taser used when officer completely pinned

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suspect); Muro v. Simpson, 2006 WL 2536609 at *5 (E.D. Cal. 2006) (suspect tased while standing still; no evidence suspect was kicking or overtly attempting to strike officers). Thus, even if a reasonable police officer should have had "notice" of unpublished cases from other jurisdictions, these cases were not clear notice a taser was unlawful in this instance since Boya was biting and kicking at officers.

3. Speculating the "Kicks" Didn't "Hurt"

Plaintiff contests whether Boya's kicks actually posed a threat to the officers. See Opposition at page 17. Plaintiff counsel reasons that if Officer Simon was able to aim a taser at Boya's thigh, then Simon must have felt relatively "safe" from Boya's kicking. As a threshold matter, the relevant standard is not whether Boya had actually caused a life threatening injury. It was sufficient that Boya's kicking (or biting) posed a reasonable risk of injury to the police officer as perceived by a reasonable police officer under the circumstances. Even Lyman admits that the use of force is not limited to "self-defense. Exhibit P at 37. Lyman does not even think that an officer must first be injured" before a taser can be deployed. Id. at 135. Furthermore, gaining "compliance" can be a circumstance where the use of force is appropriate. Id. at 36-37.

Thus, plaintiff's quibbling over whether Boya's kicks "hurt" or whether Simon felt threatened the precise instant he tased Boya's thigh are all red herrings. Even if the court wants to consider the issue, however, the officers testified that Boya's kicks "hurt". See, e.g., Simon Affidavit at paragraph 6; Oaks' Affidavit at paragraph 5 and Exhibit M at 23, 63-64 and 74; Josephs' Affidavit at paragraph 14.

4. The Supposed "Alternative" that the Officers Could Have Stood Boya Up

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Plaintiff asserts that Boya did not pose a threat because the "officer could have stood him up if they wanted." Opposition at 17. But this completely ignores Simon's testimony that Olson tried to bite Simon more than once when Simon held Boya's arm and tried to lift him up. See Exhibit K at 20, 27, 54 and 55. Also Officer Oaks testified that whenever he or Simon tried to get behind or around Boya, Boya would kick at whoever got closest. See Exhibit M at 31, 37, 40 and 64. Moreover, this issue is a red herring since "lesser alternatives" are not the test for whether the force was "reasonable." See part III.D.3.

5. The Supposed Deployments When Boya Was on His Stomach

Plaintiff tries to argue that some tasing occurred "while plaintiff was lying face down on his stomach" when plaintiff was "clearly not a threat." Opposition at 17. Plaintiff is utterly speculating here. The arrest tape does not evidence tasing during any calm moments; Boya is actively fighting on the arrest tape. See Exhibit A, arrest tape at 21:59 to 15:04. There is nothing on the arrest tape to suggest that Boya is passively laying on his stomach when any of the tasers are deployed. In fact, Lyman admits that any of the supposed taser marks on Boya's back could have just as easily been "consistent" with Boya was getting tased as he was sitting up and kicking at the officers. See Exhibit P at 115.

This was a rapidly involving struggle in which police officers were grappling with a heavy set man on a slippery floor. Two officers were not enough to control and restrain Boya, so eventually Joseph had to join in. If a taser deployment occurred while Boya was "on his stomach" it could have easily been a momentary state with Boya "twisting" and "turning" away, as the officers described in their depositions. See Exhibit K at 20 and 29; Exhibit L at 32;

Exhibit M at 64. The inference plaintiff wants the Court to make is that the officers continued to tase Boya even after he was compliant. But the arrest tape does not support this. In fact, the arrest tape supports the opposite inference. On the arrest tape, Boya refuses to stand up for several minutes well after the last taser deployment. Nevertheless, the tasing does not occur during this time frame. Instead, the officers try to simply talk to Boya in an effort to “de-escalate” the situation. Over and over again, the officers calmly ask Boya if he is going to standup and “comply.” See, e.g., Exhibit A, arrest tape at 15:04 to 13:47. When Boya eventually does stand it is not because he is being tased on his stomach, it is because he finally chose to listen to the officers’ instructions.

6. “Tasing for Compliance”

Plaintiff tries to argue that since the officers told Boya to “comply” before tasing him, then some of the tasings “were done for compliance purposes,” and this is somehow prohibited. The Supreme Court’s analysis in Sheldon undermines the premise of plaintiff’s argument. The Sheldon Court explained the officer’s use of pepper spray, strikes by a police baton, and other escalating levels of force all occurred because Sheldon “would not let go of the handlebars despite VPO Jones’[s] commands that he do so.” Thus, the Sheldon Court perceived no trouble justifying the officer’s use of force to gain Sheldon’s compliance in letting go of the handlebars.

If the Alaska Supreme Court in Sheldon had no trouble with lethal use of force to gain “compliance,” this court should have no difficulty with officers using non-lethal force for compliance.

7. Boya’s Criminal Record

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Plaintiff argues, without citing to the record, that the arresting officers had no "knowledge" of Boya's prior criminal record. See Opposition at page 18. This misrepresents the officers' depositions. For example, Officer Joseph confirmed his understanding before responding to the welfare call, that Boya had a history of assaultive, uncooperative and combative behavior with police. See Exhibit L at 9, 13-15. Officer Oaks also remembered Boya's previous disorderly conduct. See Exhibit M at 59.

Even if the officers hadn't recalled the specific details of Boya's run-ins with police, there was sufficient evidence of Boya's active resistance on the arrest tape to impress a reasonable police officer at the scene that Boya posed a risk of injury to the officers. Not only was Boya kicking and biting at the officers, but one of the officers is expressly telling Boya to stop kicking and biting. See Exhibit A at 20:28. Thus, the defendants do not have to depend on their prior knowledge of Boya's criminal record to justify their use of force, although it is "relevant."

8. The Supposed "Punitive" Intent

Plaintiff argues that a taser aimed at the inside of Boya's thigh "intended" to strike Boya's genitals and was "meant to be punitive." Opposition at page 19. Plaintiff wildly asserts "such tases can have no legitimate purpose and are clearly malicious." Id. On the contrary, Lyman admits that the taser training instructs officers to tase a suspect on the inside of their thigh since this is an effective target. See Exhibit P at 116. Lyman also admits that aiming a taser at someone's thigh would be a logical response to an officer attempting to get a suspect to release his grip on the pole. Id. at 116-117.

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Plaintiffs do not point to any part of the arrest tape documenting when the tasing officer supposedly aimed the taser for a "punitive" effect. Indeed, the arrest tape is striking in that the officers' voices are quiet, calm and respectful when talking to Olson. Lyman also remarked on how polite and respectful the officers sounded with Boya. See Exhibit P at 130-131. In fact, it is when the officers are talking to each other or the dispatch that their anxiety level is more apparent. See, e.g., Exhibit A, arrest tape at 17:31-23.

9. "Continuous" tasing

Plaintiff argues that the tasings were "continuous" and could not have been "legitimate." However, the only reason plaintiff is complaining of "continuous" tasing is the sound on the tape and the sound on the tape is evidence the taser was shorting out and not having the proper effect. Exhibit Q, Hoelscher deposition at 10-11.

Also, the actual record shows that the officers trying to minimize the tasing by deploying for 2 seconds bursts, rather than 5 seconds. See Exhibit K at 42. In addition, the last tasing occurred around 18:30 on the arrest tape. Even after 18:30, the last of the taser deployments, it took almost five minutes to convince Boya to cooperate with officers' requests that he stand up. This isn't evidence of "continuous tasing." The five minutes after the last tasing is evidence of officers' efforts to de-escalate the situation because they wanted to minimize the tasing.

In short, this lengthy "part V." details how the factual arguments asserted by the plaintiff do not accurately characterize the actual record. Even if plaintiff had properly represented the

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facts, none of the nine reasons plaintiffs give for opposing qualified immunity gave the Hooper Bay officers "clear notice" that their use of a taser was improper.

D. The Officers Acted Reasonably in Deploying their Tasers under the Objective Reasonableness Standard

As detailed in Defendants' Memorandum, a reasonable officer under the circumstances would have believed the use of tasers were lawful and not excessive. To summarize:

- The officers were instructed under General Order 2-6 that the taser would not "harm the human body" or "cause injury." This training was confirmed when Boya yelled out: "Is that all you got, bitch? Feels like a vibrator!"
- Boya was putting up a "substantial physical struggle" evidenced by the fact that two officers could not restrain or control Boya on a slippery floor. Boya admits on the arrest tape on his way to the police station that he was "fighting" and "resisting."
- Boya succeeded in kicking the officers, either in the chest, knee or thigh, causing them pain.
- When the officers tried to lift Boya up by the arm, Boya bit at Officer Simon more than once, as confirmed on the arrest tape when Boya was told to "stop trying to bite"
- When Officer Oaks tried to unwrap Boya's legs from around the pole, Boya kicked Oaks in the knee and leg, causing Oaks' pain.
- Officer Joseph deployed his taser when he saw Boya move aggressively toward Oaks who had fallen on the ground.

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- Officer Simon deployed his taser after verbal commands failed and he was kicked in the chest and left thigh by Boya.
- When Joseph joined the struggle with Simons and Oaks to subdue Boya, Joseph was kicked in the chest by Boya, consistent with Boya posing a challenge to all three officers. Joseph deployed his taser after getting kicked in the chest by Boya.
- Boya smelled and acted like a person who was intoxicated. Listening to the arrest tape, Boya is difficult to reason with, his anger is hard to predict, he was actively struggling with officers, and his escalation is sudden and erratic. It is a fast-evolving, dangerous situation, occurring on a slippery floor, close to stairs and with officers who have fallen to the ground alongside Boya.
- posed a sufficient risk of kicking that he took up much of Joseph's attention and efforts at the same time Boya was fighting with Simon and Oaks.
- Despite multiple tasing, it took roughly 5 minutes, 7 seconds to subdue Boya so that he stopped kicking. See Exhibit A at 23:37 through 18:30. That is a long and dangerous time frame for officers to be grappling with a suspect on a slippery floor and at the top of stairs.

These facts and others set forth in defendants' Memorandum evidence that the arresting officers had no "clear notice" that their conduct was "unlawful" or "excessive."

CONCLUSION

Plaintiff's Opposition (and their expert witness) utterly failed to reconcile the facts of this

case with Sheldon. In Sheldon, far greater force than a taser was used when a suspect failed to release his grip on some handlebars so that he could be taken into custody. The Alaska Supreme Court did not think the Sheldon's officer's conduct was "shocking" or objectively "unlawful" even when the escalating use of force resulted in Sheldon's death. The Alaska Supreme Court was "cognizant of the reality that officers must often make quick judgments which might have unanticipated consequences" and advised courts to "resist the urge to second guess those actions when things turn out badly." Plaintiff tries to make hay over the fact there were numerous taser deployments in this case. But the reality is that the officers were in the midst of a substantial struggle with Olson. The taser deployments were not having their expected effect because Olson was struggling. The officers were in a dangerous position since they'd lost control of the situation by falling onto the floor alongside Olson. Olson succeeded in kicking all three officers either in the chest or the knee or the leg. If the tasers hadn't been deployed the injuries could have been greater like a kick in the face, one of Boya's bites, or additional kicks to the officers' bodies. The use of the taser was an objectively reasonable response to Boya's active resistance and kicking and biting at officers.

Defendants ask the Court to grant summary judgment on the grounds of qualified immunity.

DATED this 14 day of July, 2008, at Bethel, Alaska.

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INGALDSON, MAASSEN, & FITZGERALD
Attorneys for Defendant City

By: Matthew Widmer for
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Bar No. 8406030

CERTIFICATE OF SERVICE

This is to certify that on July 14, 2008,
a true copy of the foregoing document was
placed in the court mailbox of:

hand-delivered to
Michele Power
Power and Brown, LLC

By: Matthew Widmer

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Exc. 242

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

THOMAS J. OLSON,)

)

Plaintiff,)

)

v.)

)

CITY OF HOOPER BAY,)

OFFICER DIMITRI OAKS,)

OFFICER CHARLES SIMON and)

OFFICER NATHAN JOSEPH,)

)

Defendants.)

)

No. 4BE-07-00026 CI

VIDEOTAPED DEPOSITION OF CHARLES SIMON

Pages 2 through 62, inclusive

April 23, 2008

Hooper Bay, Alaska

Exhibit K

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

3 THOMAS J. OLSON,)
4)
5 Plaintiff,)
6)
7 v.)
8)
9 CITY OF HOOPER BAY,)
10 OFFICER DIMITRI OAKS,)
11 OFFICER CHARLES SIMON and)
12 OFFICER NATHAN JOSEPH,)
13)
14 Defendants.)

17 No. 4BE-07-00026 CI

VIDEOTAPED DEPOSITION OF CHARLES SIMON

21 taken on behalf of the Plaintiff, pursuant to notice, at the
22 Sea Lion Corporation Boardroom, Hooper Bay, Alaska, before
23 Sean E. Brown, a Notary Public for the State of Alaska.
24
25

A P P E A R A N C E S

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24

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1 Hooper Bay, Alaska, April 23, 2008

2
3 MR. BROWN: All right. Here you are. Here, so just
4 kind of keeping your pitcher over there. Just raise that up a
5 little bit more maybe.
6 MR. SIMON: That's a nice little camera.
7 MR. BROWN: You know, after we got it though, they
8 came out with a whole digital thing so we need to get, you
9 know.....
10 MR. SIMON: Oh, that's not digital?
11 MR. BROWN: It's not so.....
12 MR. SIMON: Digital's nice.
13 MR. BROWN: Technology updated the day after. Thank
14 you. But we can send that into Anchorage and they turn into
15 digital right away so that's what we do. All right. We all
16 know who each other is here by now. We've done several
17 introductions but I still have to swear you in and, just for
18 the recording, I am a notary for the State of Alaska and if
19 you could, raise your right hand and take an oath.
20 (Oath administered)
21 MR. SIMON: Yes.
22 MR. BROWN: Okay. Thank you. And I'm Sean Brown,
23 plaintiff's attorney. We want to introduce or.....
24 MR. WIDMER: My name is Matthew Widmer. I work with
25 Angstman Law Office. I represent Sergeant Simon as well as

Officer Oaks and Sergeant Joseph who are also parties in this case.

MR. INGALDSON: Bill Ingaldson representing the City of Hooper Bay and Chief Hoelscher is also here.

MR. BROWN: And I guess I should also note for the record that Sergeant Joseph is also present at this deposition.

MR. SIMON: And Donna Fullerton.

CHARLES SIMON

called as a witness herein on behalf of the Plaintiff, having been duly sworn upon oath by Mr. Brown, Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. BROWN:

- Q Could you please give your address, please?
A P. O. Box , Hooper Bay, Alaska, 99614.
Q All right. And how long have you lived here in Hooper Bay?
A Since 1980.
Q All right. And what's your job or occupation here?
A Police officer.
Q How many hours a week do you work?

- 1 - one of the things was wrong -- wrong -- wrongful use of force.
2 of force.
3 Q But -- and they were accusing you of using wrongful use of force?
4 of force?
5 A Yes.
6 Q Okay. And who was that against?
7 A James Smith.
8 Q And was James Smith handcuffed at the time the wrongful use of force was used?
9 use of force was used?
10 MR. WIDMER: Objection, it's foundation and it's a
11 crucial statement, assumes that force was actually applied
12 wrongfully and all those other little things. You can answer
13 the question.
14 A Yes.
15 Q Okay. And how long have you been on the police force?
16 A Little over eight years.
17 Q And do you recall the date of that in -- of the incident
18 regarding Mr. Smith? When did that occur?
19 A That'd be a few years ago.
20 Q Okay. So before this occurred?
21 A Yeah.
22 Q And when I'm talking about this, I'm talking about before
23 Mr. Olson was tasered.
24 A Yes.
25 Q Okay. So -- and that plaintiff's name was James Smith,

- 1 A At least 40.
2 Q Okay. Sometimes more?
3 A Yeah.
4 Q All right. Okay. So I just want to go over a few things with you. Have you ever given a deposition before?
5 with you. Have you ever given a deposition before?
6 A Yeah.
7 Q And what kind of case was that?
8 A As in civil, criminal?
9 Q Let's start -- well, yeah, have you ever given a deposition in a criminal case before?
10 deposition in a criminal case before?
11 A I'm not quite sure if it was called a deposition or not.
12 Q It was a criminal case?
13 A No.
14 Q Okay. So in a criminal case, you don't think you've given a deposition before?
15 given a deposition before?
16 A No.
17 Q Okay. Then let's go on to a civil case. Have you given a deposition in a civil case before?
18 a deposition in a civil case before?
19 A Yes.
20 Q And what type of case was that?
21 A The only way I can think of to answer it is civil.
22 Q Okay. And were you a party or a defendant in that case?
23 A Defendant.
24 Q Okay. And what were you accused of in that case?
25 A Oh. I don't remember the exact way it was put but it was

- 1 is that right?
2 A Yes.
3 Q And you may not recall this but you may, case number 4BE-06-364 Civil, does that sound correct? Pretty much so?
4 06-364 Civil, does that sound correct? Pretty much so?
5 You may not have any memory. Is that right?
6 A I don't know. I don't remember the case number.
7 Q Oh, okay. So this is the second lawsuit that you've had against you?
8 against you?
9 A I don't know. I'm not quite sure of the number.
10 Q So at least two?
11 A That one and this one, yeah.
12 Q Okay. And after that case -- did you review the standard for tasering after that case? I'm sorry, after you were -- let's start that question -- I'll start that question.
13 for tasering after that case? I'm sorry, after you were
14 -- let's start that question -- I'll start that question.
15 After you were sued in that case, did you go back and review the tasering policy?
16 review the tasering policy?
17 A Yeah.
18 Q And when you reviewed that tasering policy, what did it say about administering the tasers when he was handcuffed?
19 say about administering the tasers when he was
20 handcuffed?
21 A Oh, I don't remember it word for word or exactly how it's worded. Is that okay?
22 worded. Is that okay?
23 Q Sure, just what you remember.
24 A A person who is handcuffed can't be tased unless there's
25 a possibility of them hurting themselves or somebody

else, causing injury, harm or even death.

Q And what level of injury?

A I don't know. I don't remember the exact level of injury but if they were capable of hurting someone bad enough, then you could use a taser.

Q Bad enough, what does that mean?

A If they could cause bodily harm bad enough to cause permanent injury or prolonged injury, that's - that's what it means.

Q Oh. Now, in the Smith case, he grabbed your scrotum, is that right?

A Yes.

Q Not your testicle but your scrotum, is that right?

A Yes.

Q So that's the type of injury you are talking about when you think you have authority to taser someone, is that right?

A That's....

MR. INGALDSON: Object to the form.

Q So when a person grabs your scrotum, you can administer a taser on them, is that correct?

A That would be one of the instances in which - yeah.

Q Even if they were handcuffed?

A Yes.

Q And so even if a person is handcuffed and on the floor

kicking, you can also administer a taser.

A Yes.

Q Do you think since you were sued in the Smith case that you became very aware of the policy involving what was legal to do when using a taser?

A Excuse me?

Q Do you believe as a result of being sued in the Smith case -- okay. You were sued in the Smith case, right?

A Okay.

Q Okay? And then you testified earlier after you were sued, you went back and you reviewed the policy regarding the taser administration, is that right?

A Yes.

Q Do you believe that that helped refresh your memory so that you knew better how to legally use a taser?

A I do -- had already known.

Q So on a scale of one to 10, you feel that you're -- you were already a 10 and you remained a 10 afterwards, is that right?

A Regarding what?

Q Yeah, I'm not -- that was a bad question. I'll strike that. On a scale of one to 10 regarding your knowledge of taser use, how do you rate yourself?

MR. INGALDSON: Object to the form.

A Is there a different way that you could phrase the

question?

Q Would you say that -- regarding your knowledge of taser use, would you rate yourself as having a poor level of knowledge?

A No.

Q A good level of knowledge or a very good level of knowledge?

MR. INGALDSON: Object to the form.

A Very good.

Q So a very good level of knowledge regarding the legal use of a taser, is that correct?

A Yes.

Q And you have been an officer for how long?

A Eight years.

Q So is your position then that if a person is resisting arrest, kicking and screaming, resisting to go in somewhere, that a taser can be used?

A That would depend on the circumstances.

Q Okay. What about when -- were you an officer in 1994?

A No.

Q Oh, I thought you said you've been one for eight years. Since 2004, I'm sorry. Were you an officer in 2004?

A Yeah.

Q If you were an officer and you went to a hotel and you saw an intoxicated man rolling around in the parking lot

and crying, what would be your first action?

A I'd shout (indiscernible).

Q And if you were -- the man was yelling and screaming (indiscernible) officers with officers, what would your response be?

A I'd (indiscernible).

Q And if you had to drag the person and put them into the patrol car, they were still screaming, what would you do at that point?

MR. INGALDSON: Object to the form.

A Throw them in the patrol car, just let them yell and scream.

Q And then you get to the hospital because you have to take him to the hospital because he's so drunk....

A Yeah.

Qand he refuses to get out of the patrol car, refuses to get out. What are you going to do?

A Okay. What was the purpose of taking him to the hospital again?

Q To have him checked to see how drunk he was.

A I guess what I -- what I would have done is I'd try to keep him restrained as best as I could and if we could see visually that he was okay, then we'd keep him restrained.

Q Let's say instead of going to the hospital, you would

1 have gone over to the jail and you took him to the jail.
 2 He's yelling and screaming, kicking when the door is
 3 open. What are you going to do?
 4 MR. INGALDSON: Object to the form, incomplete
 5 hypothetical.
 6 MR. BROWN: Okay.
 7 Q You arrive at the jail with a prisoner in the back of the
 8 car. Okay? You with me so far?
 9 A Yeah.
 10 Q All right. You go to get the prisoner out of the back of
 11 the car....
 12 A Okay.
 13 Qand the prisoner is kicking, yelling, will not
 14 listen to the officers, you warn him that he'll be
 15 charged with another crime if he refuses to exit the
 16 vehicle and he continues to refuse. What are you going
 17 to do?
 18 A How -- how drunk is this person?
 19 Q Drunk enough to be yelling, screaming, refusing to get
 20 out of the car, your patrol car.
 21 A Okay.
 22 Q What are you going to do?
 23 A If we -- if I could get him safely out of the patrol car,
 24 I'd just get him out and put him in a cell.
 25 Q If the person was kicking at you, would it be okay to

1 MR. BROWN: Yes.
 2 MR. INGALDSON: Someone that's drunk and obnoxious
 3 while they were....
 4 MR. BROWN: No, I'm just talking about this person
 5 has this background, is this the type of person you want
 6 working with you on the police force?
 7 MR. INGALDSON: Object to the form.
 8 A What type of background?
 9 Q A background where they were arrested for that type of
 10 action that I just described.
 11 A Okay. Could you clarify the question a little bit more?
 12 Q Yes, I just described to you an individual who had been
 13 yelling, screaming, rolling around in the parking lot,
 14 refusing to be arrested, staying in the patrol car, had
 15 to be dragged from the patrol car screaming, highly
 16 intoxicated it says here, I described that type of person
 17 to you.
 18 A Okay.
 19 Q Okay? Now, is that type of person who refuses arrest and
 20 police authority the type of person you would want
 21 working with you on your police force?
 22 MR. INGALDSON: Object to the form.
 23 A Is this person drunk or sober?
 24 Q When they did these things, they were highly intoxicated.
 25 A Okay. I guess if they were sober, they knew what they

1 tase them in the patrol car?
 2 A If he was going to hurt somebody, yes.
 3 Q Now, when a similar accident like this happened to you,
 4 they did -- they just drug you out of the police car, is
 5 that right?
 6 A I don't know if they'd drug me out of the police car.
 7 Q Okay. I -- I'm just looking at the affidavit here of a
 8 Officer Haymes and it says Simon again refusing.
 9 Officers had to drag him out of the patrol car.
 10 A Okay.
 11 Q Okay. Does that sound familiar or were you....
 12 A Yeah.
 13 Q Were you in blackout then or do you have memory?
 14 A I don't remember that night.
 15 Q Okay. If someone acting like that the type of person
 16 that you would want working beside you on the police
 17 force?
 18 A Excuse me?
 19 Q Is someone that acts in the manner I just described....
 20 MR. WIDMER: Objection, relevance.
 21 MR. INGALDSON: Object to the form.
 22 Qsomeone that you would want working with you on the
 23 police force?
 24 MR. INGALDSON: Are you talking about while they're
 25 working?

1 were doing, they realized that they were a danger to
 2 other people as well as themselves and they absolutely
 3 rejected authority, no.
 4 Q Okay. Now, you yourself have been charged with
 5 disorderly conduct in the past, is that correct?
 6 A Yeah.
 7 Q And you yourself have refused officer commands and
 8 officers have had to drag you out of patrol cars, is that
 9 correct?
 10 A Yes.
 11 Q And at that time, you were still a police officer on
 12 Hooper Bay Police Force, is that right?
 13 A Yes.
 14 Q And the City chose to keep you on board even after that,
 15 is that right?
 16 A Yes.
 17 Q Do you believe that when you were rolling in the parking
 18 lot and crying or when you were screaming in the police
 19 car, when you were refusing to get out of the car, when
 20 you had to be dragged from the police car, at any of
 21 those times, should you have been tasered?
 22 MR. INGALDSON: Objection, foundation and form.
 23 Q You can still answer and, just to make it clear, what I'm
 24 referring to is the incident which occurred on June 13th,
 25 2004 at 0074 hours in Bethel, Alaska at the Long House.

I'm referring to that incident in case there's others, that I'm referring to that incident.

MR. INGALDSON: He's already testified he doesn't remember it.

A If I was one of the police officers arresting a person that had that demeanor but they weren't a danger to themselves or anybody else that were uncooperative but not hurting anybody, no, I wouldn't -- I wouldn't have tasered them.

Q All right. Were you tased that night?

A I don't remember.

MR. BROWN: Here's one.

Q Now, when you did your deposition on July 25th, 2007, at that time -- I don't know if you remember this or not but do you remember testifying that you can't remember the exact policy regarding the taser dry stun -- drive stun?

A No.

Q Do you remember that exact policy?

A Not word for word, no.

Q Okay.

MR. BROWN: Public record I worked hard to acquire yesterday. May have it.

MR. WIDMER: Okay.

Q Did you -- okay. So we've heard from Officer Oaks and I just want to be sure that everyone's in agreement. Were

1 A There was a whole bunch of trash on the floor and I got
2 to the top -- top of the steps and first two steps that I
3 took in -- into the house in -- at the top -- first two
4 steps, I almost slipped. I had to keep my balance. Then
5 I went to go help Officer Oaks with Boya. He started to
6 not be comp -- he started to not cooperate and his legs
7 were up drawing a pole. I told him to stand up, to
8 cooperate, to just come with us. He still didn't listen
9 and tried to help him stand up but he started biting us.
10 After that first one, I tried to help him stand again but
11 he starts biting and kicking so when I got kicked on the
12 chest, I slipped on a -- I don't know exactly what I
13 slipped on but the whole rest of the floor was slippery.
14 I slipped, fell on my back and I don't remember who --
15 who fell -- who slipped and fell first, either me or
16 Oaks, but we both ended up on the floor.

Q Okay. Now, how did you get kicked on the chest?

A He turned -- he let go of the pole and turned and then (indiscernible) bent over in the hold and stand.

Q Maybe I misunderstood Oaks earlier. I thought he was on the bed when you got there.

A Yeah, I started to help Oaks bring him and he started to not cooperate with us.

Q Okay. So he stood up on the bed? I mean, stood up by the bed or what?

you one of the first three officers that arrived at the scene that night or not?

A I was one of the three.

Q Okay. And just to be sure that we're clear on this, what I'm -- I'm shifting gears here now and I'm not talking about Smith, I'm not talking about the incident that occurred to you, what I'm talking about here is the incident regarding Mr. Olson. Okay? Are you with me on that?

A Okay.

Q All right. And were you one of the three that evening?

A Yes.

Q Okay. All right. And tell me what happened when you arrived at the house.

A I don't remember everything exactly but what happened was I got called because Sergeant Joseph and Oaks needed help and they needed help bringing prisoners over to the police department so I arrived there. When I got there, there was Olson and Boya and I had already been handcuffed. There were kids in the house and I don't remember how many but I think the oldest may have been four or five.

Q What time was this?

A It was in the early morning hours.

Q Okay. Go on.

1 A Yeah.

Q Okay. And then what happened?

A Okay. He stood up. We started walking. He started to not cooperate. He wraps his leg around -- and then he wraps his leg around the pole.

Q Okay. Now, Oaks said that he was sitting down when he did that on the ground. Is that right?

A Yeah.

Q And Oaks said that was after the fall, is that right?

A I don't remember that, first of all, if there was one.

Q Do you agree it would be difficult to wrap your legs around the pole if you were standing up?

A I don't know.

Q Could you wrap your legs around a pole if you were standing up?

A I don't know.

Q Okay. All right. So you don't remember how Thomas got on the floor?

A No.

Q So when Oaks said that you, him and Thomas, all three, fell together, that was incorrect, right?

MR. WIDMER: Objection, that's a mischaracterization of the previous answer.

Q You can still answer.

A What was the question?

Q Oaks testified earlier today and you heard it – you were here also – that you, Thomas and him, all three, fell on the ground at the same time. Do you agree with that?

A I don't remember.

Q Okay. So you don't remember falling on the ground with Oaks?

A (No audible response).

Q And – okay. Is that true? I mean, that's what you said?

A Yeah.

Q All right. Okay. But you do remember Thomas being on the ground, is that right?

A Yeah.

Q Do you ever remember Oaks falling at all?

A Yeah.

Q Were the two of you on the ground at the same time?

A I don't know.

Q So you fell or Thomas falls, Oaks falls. Do you remember if they fell together?

A No.

Q They did not fall together or you do not remember?

A I don't remember.

Q Okay. But you remember Thomas falling?

A I don't remember if he fell.

Q Okay. Do you remember Thomas being on the ground?

A Yes.

Q Did you have snow on your shoes?

A What?

Q Did you have snow on your shoes? Was it snowing outside that night?

A Yeah, it was snowing.

Q Okay. Now, do you believe that Thomas was just on the ground when you came in there? Is that possible?

A No.

Q All right. So how did he get to the ground? That's what I want to find out.

A I don't remember.

Q Okay. Do you remember him walking at all?

A Yes.

Q Okay. And how far did he walk?

A From the bed to near the phone.

Q And then what happened?

A I don't remember how he ended up on the floor.

Q Where were you when he was walking?

A On his side.

Q What do you mean on his side? Which side, left or right?

A I don't remember.

Q Are you sure you were on his side?

A I know I was near him.

Q So you may not have been on his side?

A I was holding onto the arms.

Q Which one?

A I don't remember.

Q Okay. Well, you moved your right hand. I mean, maybe you have a visual in your mind. Do – which arm do you think you were holding?

A I don't remember.

Q Okay. And how was he walking?

A I remember he was staggering.

Q Now, how could you tell that if you were standing beside him?

A We had to help him walk.

Q How did you help him?

A We held his arms.

Q Which arm? You already said you don't know?

MR. INGALDSON: We have an objection. He's already asked and answered – that's already been asked and answered.

Q Which arm?

MR. WIDMER: Answer it again though.

A I don't remember.

Q Okay. So you have gone from being somewhere near him to now being on his side to now holding his arm and now helping him walk, is that right? I mean, this kind of progression is where you're going here, right?

MR. WIDMER: Objection as to form. Counsel seems to

suggest he's been changing his story and that, I don't think, is apparent from the answers given.

Q You can still answer.

A Okay. What was that again?

Q Okay. You started off that you were somewhere near him. Is that the first thing you told me?

MR. WIDMER: Objection, mischaracterization.

MR. INGALDSON: Join.

Q Did you tell me that you were somewhere near Thomas Olson?

A Yes.

Q And we were trying to discover where you were. You said you were somewhere near him, is that right?

A Yes.

Q Now you're saying that you were walking on his side, is that right?

A Yes.

Q About how far did you walk?

A Are you asking how many steps.....

Q Yes.

Adid I take from the door to the bed?

Q Yes.

A Or from the bed to where he.....

Q How far did you walk before he was on the floor?

A I don't remember how many steps it was but it wasn't far.

Q And did you handcuff him?
 A No.
 3 Q Who handcuffed him?
 4 A He was handcuffed when I arrived.
 5 Q All right. Did you push him to the floor?
 6 A No.
 7 Q Are you sure?
 8 A Yes.
 9 Q How can you be sure?
 10 A The only reason I would push someone to the floor if they
 11 were handcuffed is if they were trying to hurt me or
 12 somebody else in the first place.
 13 Q Okay. But regarding this specific incident, do you have
 14 any memory about whether you pushed him to the floor?
 15 A No.
 16 Q You don't have any memory?
 17 A No.
 18 Q And you don't have any memory about which side you were
 19 walking on, is that correct?
 20 A That is correct.
 21 Q And you don't have any memory about how he got on the
 22 floor at all, is that correct?
 23 A No.
 24 Q That's not correct?
 25 A I don't remember how he got on the floor.

1 A When he was seated on the floor, I was standing on his
 2 left.
 3 Q Okay. And was he seated facing the door, the steps at
 4 the time, or was he seated facing the bed or was he
 5 seated facing the couch? Where was he seated?
 6 A I don't remember what part of furniture he was facing but
 7 my back was to the door.
 8 Q Okay. All right. So your back was to the door and his
 9 feet were around the pole.
 10 A Yeah.
 11 Q And was his back to you or were his feet toward you?
 12 A He was facing.....
 13 Q Okay.
 14 A I'm standing to his left, on his left side and he's
 15 facing this way.
 16 Q Oh, this way? Toward the door or away from the door?
 17 A The door is to his left. Yeah, I know.
 18 Q So and Officer Joseph was behind him?
 19 A Yes.
 20 Q And Officer Oaks was on the other side?
 21 A Yes.
 22 Q So three officers were around him at that time, is that
 23 right?
 24 A Oaks and I were next to him.
 25 Q Okay. So was he kicking over his head?

1 Q Okay. You do not remember how he got on the floor even.
 2 Okay. So after you were walking with him, tell me the
 3 next thing you do remember.
 4 A I'm trying to help him stand up, trying to tell him to
 5 cooperate, not to go at us.
 6 Q Okay. And what does he do?
 7 A He tries to bite and kick at me.
 8 Q Okay. Now, his legs are around a pole, is that right?
 9 A Yes.
 10 Q And he is seated on the floor?
 11 A Yes.
 12 Q Okay. And you weren't really afraid he was going to bite
 13 you, were you?
 14 A He tried to and almost did.
 15 Q But were you really afraid he was going to bite you?
 16 A Yes.
 17 Q Okay. Now, how is that? Where were you standing that
 18 you thought he was going to bite you?
 19 A I was standing on his left side.
 20 Q So now you remember.
 21 MR. WIDMER: Objection.
 22 MR. INGALDSON: Object to the form.
 23 Q So now you remember where you were standing?
 24 MR. INGALDSON: Object to the form.
 Q You can still answer.

1 A I don't remember if he kicked over his head but I know he
 2 turned to kick at me.
 3 Q So he let go of the pillar and turned to kick at you?
 4 A Yes.
 5 Q And at that time, his back would have been toward Oaks,
 6 is that right?
 7 A Yes.
 8 Q So Oaks could have grabbed him?
 9 A He may have been able to.
 10 Q Okay. And is that when you first taser him or do you
 11 already taser him before this?
 12 A I tasered him afterwards.
 13 Q All right. So what happens after that then? He turns to
 14 kick at you.
 15 A He turns to kick at me. I get kicked in the chest and I
 16 stand. I get kicked on the thigh again. I don't
 17 remember at what point he kicked Oaks but he kicked Oaks.
 18 I guess as I'm standing, he wraps his legs around the
 19 pole again and I drive stun him on the -- I don't
 20 remember which shoulder it was, on the back but -- just
 21 on his back.
 22 Q Was that the first use of your taser?
 23 A Yes.
 24 Q All right. Now -- okay. You understand you're under
 25 oath today, right, to tell the truth? You know what that

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means?
 1 A Yes.
 2 Q Okay. And you remember signing a -- do you remember
 3 signing an affidavit in this case?
 4 A Yes.
 5 Q And did you prepare that affidavit?
 6 (Pause)
 7 A Is it the....
 8 Q I don't mean to confuse you. Did you write that
 9 affidavit?
 10 A Is it the civil affidavit or the criminal affidavit?
 11 Q The civil. You won the civil in this case.
 12 A Yes.
 13 Q You did write that?
 14 A Is this the one that was sent to the court or the one for
 15 this civil case?
 16 MR. INGALDSON: Why don't you show him the
 17 affidavit?
 18 Q Yeah, I'm glad to. I here. This is your signature?
 19 A (No audible response).
 20 Q Okay. All right. Do you remember -- it looks like this
 21 was faxed to you -- let me look here -- maybe on the 11th
 22 of April. Do you remember seeing this?
 23 A Yes.
 24 Q All right. And is that signature?
 25

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1 A Yes.
 2 Q And did you write this?
 3 A Yes.
 4 Q So you wrote this. Okay. All right. Did you type it?
 5 A No.
 6 Q All right. So right after you wrote it, who did you send
 7 it to to type it?
 8 A It was faxed to -- it was faxed to a lawyer's office.
 9 Q Okay. And so this is -- these are your words that you
 10 actually wrote then?
 11 MR. BROWN: And what he's reading right now is the
 12 affidavit of Charles Simon that was filed in support of the
 13 motion for summary judgment in case number 4BE-07-26 CI.
 14 Q Did you write this? I don't mean to trick you.
 15 A Yes.
 16 Q Okay. So you wrote it out -- what'd, you write it out
 17 and then you sent it to the attorney to type? Is that
 18 what you did?
 19 A I didn't write it out.
 20 Q Okay. What did you do? If I'm confusing you, just tell
 21 me. I'm not trying to trick you, I'm just trying to
 22 figure out where this affidavit came from. It's not a
 23 trick question. I mean, I just -- where did it come
 24 from? It's no big deal, it's just....
 25 A I typed up a supplementary report for Sergeant Joseph as

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1 it was his case.
 2 Q Okay.
 3 A And....
 4 Q Go on, the....
 5 AI couldn't remember everything that I had typed in
 6 that report and that was where the majority of that came
 7 from.
 8 Q Okay. So you did write this then?
 9 A Yes.
 10 Q All right. Now, you understand that when you sign
 11 something like this, you are under oath? Do you
 12 understand that?
 13 A Yes.
 14 Q Okay. So when you wrote this, you mean to tell the
 15 truth, I'm sure, is that right?
 16 A Yes.
 17 Q Okay. All right. Paragraph six says I slipped on trash,
 18 falling to the floor. Is that possible of what caused
 19 you to fall to the floor?
 20 A Yeah, I remember slipping.
 21 Q Okay. But now you just testified that he kicked you and
 22 that kick caused you to fall.
 23 MR. WIDMER: Objection.
 24 Q Did you say that?
 25 MR. WIDMER: Mischaracterization.

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1 Q Maybe you didn't say that. Did the kick cause you to
 2 fall or not in the chest?
 3 A That was part of the reason I fell.
 4 Q Okay. Now, in your supplemental report to Officer
 5 Joseph, you said the kick on the chest didn't hurt.
 6 A No, it didn't hurt.
 7 Q Okay. And here you wind -- you fall on the garbage.
 8 A That was the other part of the reason.
 9 Q What I want to get at here is every reason. I wanted to
 10 find out everything that went on. So when you testify, I
 11 want to know everything if you can tell me everything,
 12 please. Okay?
 13 A Okay.
 14 Q All right. So when you say that he kicked you in the
 15 chest and you fell to the floor, you need to say he
 16 kicked me in the chest, there was something on the floor,
 17 the kick didn't hurt but I fell.
 18 MR. WIDMER: Objection, he does not - he has to
 19 answer the questions that are asked.
 20 MR. BROWN: I want to find out, you know, if there's
 21 something in there, if the kick didn't hurt, I would like to
 22 know that.
 23 Q Did the kick to the chest hurt?
 24 A No.
 25 Q Okay. And was the reason you fell to the floor because

of the trash?
 A That was.....
 3 MR. INGALDSON: Object to the form.
 4 A That was part of the reason.
 5 Q Okay. Did you put any other reason in this affidavit?
 6 A Excuse me?
 7 Q Did you put any other reason you fell in this affidavit
 8 besides the trash?
 9 A You may have misread that. I mean, the -- his kick, that
 10 was part of the reason I fell. I mean, I got knocked --
 11 knocked back and the trash was the other reason.
 12 Q In your affidavit, it says that you and Dimitri slipped.
 13 This is the affidavit supporting the police report.
 14 A Okay.
 15 Q You see that?
 16 A Yeah.
 17 Q Okay. Then it seems a little bit later, you're talking
 18 about the chest and things of that nature. Do you see
 19 that?
 20 A Yeah.
 21 Q Okay. So, having refreshed your memory with the
 22 affidavit that you produce to support the police report,
 23 does this change your memory at all regarding how you and
 24 Dimitri got on the floor?
 25 A I don't remember if Dimitri fell once or twice but I know

1 A What?
 2 Q Okay. When do you fill this form out? I'll strike the
 3 former question and ask this new question, the form --
 4 last two questions. Start with this one now. Sorry.
 5 A Okay.
 6 Q When do you fill this form out? And I'm referring to the
 7 use of force form. Why did you complete that form?
 8 A Because I had to use force other than verbal or presence.
 9 Q And on this form, you are supposed to tell why the
 10 tactics were used, is that correct?
 11 A Yes.
 12 Q Okay. Did you do that?
 13 A Yes.
 14 Q And these are the reasons that it was used, is that
 15 correct? These are the reasons that force was used on
 16 this form, is that correct?
 17 A Yes.
 18 Q All right. I'll mark this defendants' exhibit D. I'm
 19 sorry, plaintiff's exhibit D.
 20 MR. BROWN: Deposition, the plaintiff's deposition.
 21 Q Okay. So now I'm just going to read over what you wrote
 22 here. Okay?
 23 A Okay.
 24 Q All right. What techniques and tactics were used? Were
 25 they effective? I first tried to use the handcuffs that

1 he fell.
 2 Q Just talking about you now.....
 3 A Okay.
 4 Qdoes it change your memory about how you got to the
 5 floor now that you've reviewed the affidavit supporting
 6 the police report and also the affidavit supporting the
 7 action, does that change your mind about how you got to
 8 the floor?
 9 A No.
 10 Q And in either one of those, does it say you landed on
 11 your back?
 12 A No.
 13 Q What did you write first, did you write the use of force
 14 report first or the affidavit supporting the police
 15 report first?
 16 A The supplement and the use of force, I -- I don't
 17 remember which I wrote first.
 18 Q Okay. On the use of force, do you write in there
 19 anywhere that you even fell to the floor?
 20 MR. BROWN: And what I'm showing him now is the use
 21 of force report that is marked defendants' exhibit 1.
 22 A No.
 23 Q So when you're talking about the use of force, this is
 24 what you based your use of force upon, is that right,
 this information right here?

1 were on him to escort him out of the house. This is when
 2 he tried to kick at me and bite my hand. I then used two
 3 two-second drive stuns to his back from my Taser M-26.
 4 They didn't work. I then tried drive-stunning Thomas
 5 just above his collarbone, three two-second deployments.
 6 Did Thomas have his shirt on?
 7 A I don't remember.
 8 Q He was still not compliant and was still combative. I
 9 then tried drive-stunning him on the inner thigh, two
 10 two-second deployments. At this point, he started
 11 kicking at us and I got kicked once more on the leg.
 12 Sergeant Joseph had to deploy his taser. After a few
 13 deployments of the current, Thomas finally became
 14 compliant. I would have used pepper spray but there was
 15 a newborn in the house. Is that a true and accurate
 16 representation of what you wrote in there?
 17 A Yes.
 18 Q Do you mention anywhere in this use of force report that
 19 you fell to the ground?
 20 A No.
 21 Q Do you mention anywhere in this use of force report that
 22 a kick to the chest caused you to fall to the ground?
 23 A No.
 24
 25

(Tape two:)

Q When you -- that when he tried -- not your -- (pause) --
 3 all right. You're still under oath. We changed the
 4 tape. You understand that? And restricted use of the
 5 advanced taser, I believe that you know those five
 6 reasons why it cannot be used. Do you agree with that?
 7 A Yes.
 8 Q All right. And this has been marked exhibit B for the
 9 purpose of the deposition today and this document reads
 10 Common Effect of EMD.
 11 A Okay.
 12 Q What does EMD stand for?
 13 A Electro-muscular disable.
 14 Q Okay. All right. And can you tell me what the common
 15 effects are without reading the document? You did very
 16 well before but you needed to see this document to know
 17 what the common effects are.
 18 A Yes, sir.
 19 Q Okay. You want to take a -- take a look and if you
 20 could, read that.
 21 A Okay.
 22 Q Oh, can you -- okay. All right. The fifth item down,
 23 subject may feel dazed for several seconds or minutes, do
 24 you see that?
 25 A Yes.

1 (tape skips). I just want to be forthcoming on it.
 2 MR. WIDMER: All right.
 3 Q What's this?
 4 A I don't know. (Tape skips). What happened to me is I
 5 don't exactly lose my balance but it feels like the world
 6 was kind of maybe just a little bit maybe vibrating so
 7 much.
 8 Q Okay. So kind of like being dizzy, is that what -- is
 9 that....
 10 A Something like that.
 11 Q I don't want to put words in your mouth but is that
 12 similar to what you're talking about?
 13 A Yeah.
 14 Q Now, on your use of force report, you talk about the
 15 seven times that you deployed the taser and -- but you do
 16 not mention about Thomas being on the floor at any of
 17 those times. Do you recall if he was on the floor at all
 18 or do you recall if he was on the floor when you deployed
 19 the first one, the second one, the third one, the fourth
 20 one, fifth, etcetera? Do you recall?
 21 A The first -- I know for sure on the -- on the first --
 22 first two drive stuns and the last two, he was on the
 23 floor.
 24 Q Okay. What about the three in between?
 25 A I don't remember.

1 Q All right. What does that mean to you?
 2 A Dazed or just -- I don't know the dictionary definition
 3 but to me it's like in the (indiscernible) and after
 4 that, it's like (indiscernible) and I've also been
 5 knocked unconscious a couple times. After a short --
 6 after a short while, I'd wake up and I don't know exactly
 7 what's going on or what happened. That isn't exactly how
 8 to do that but that -- I think this is one of the
 9 definitions of dazed.
 10 MR. BROWN: And just for purposes that -- so I won't
 11 say (tape skips) and when you get to say these are (tape
 12 skips), if you want to watch, what happened earlier was the
 13 video ran out of time (tape skips) and that -- I wanted to
 14 stipulate that what's recorded is recorded and if it's not
 15 recorded, it's not recording, you guys will have to watch it
 16 and just so that you guys know, what he said is not on there
 17 and I won't say it again. Is that -- everyone stipulate to
 18 that, what's on there is on there or you want to watch it
 19 first?
 20 MR. WIDMER: I think we can -- well, what's on there
 21 is on there. There's not much we can do now but we can break
 22 right now to review.
 23 MR. BROWN: Okay.
 24 MR. WIDMER: (Tape skips) made a tape.
 MR. BROWN: All right. You'll do that? We can

1 Q All right. Now, your attorneys in their motions say at
 2 about five minutes past from -- I want to say what he
 3 (tape skips) reports say. You saw five minutes aft --
 4 during this time period of the stunning? Does that sound
 5 about accurate to you or how much time do you think?
 6 A I don't know.
 7 Q Do you think more time than that or less time than that?
 8 A I don't know.
 9 Q And if you know that someone is going to feel dazed for
 10 several minutes, you're supposed to give them time to
 11 recoup between one stun and another stun or you just
 12 don't let them do that?
 13 A After the initial stun, if -- if they're (tape skips)
 14 need without using force, then we use the voice.
 15 Q Has anyone ever told you that after someone is tased,
 16 that they (tape skips) to immediately respond to
 17 commands?
 18 A He wasn't -- (tape skips) respond to that.
 19 Q Has anyone ever told you that? Was that in any part of
 20 your training?
 21 A I don't remember.
 22 Q And have you ever been given any training about tasing
 23 someone or drive stunning them on their neck?
 24 A Don't know.
 25 Q And vertigo, you said is being like being dizzy. Did you

remember that?
 1 A (No audible response).
 2 Q Okay. When -- it would be difficult to stand up if you
 3 had vertigo, isn't that correct?
 4 A Yes.
 5 Q So a man that's been tased seven times just by you and
 6 more by Officer Joseph, it would be reasonable -- (tape
 7 skips) reasonable?
 8 A Yeah.
 9 Q It would be reasonable to believe that -- I mean, it'd be
 10 hard to stand up after all that, do you (tape skips)?
 11 A It may be.
 12 Q It would be reasonable to believe that he may feel dazed
 13 for several seconds or minutes after maybe at least seven
 14 discharges and maybe more. Is that reasonable?
 15 A Yes, that's reasonable.
 16 Q The subject may feel dazed for several minutes.
 17 A And should be (tape skips).
 18 Q Now, you deployed the first two -- and I want to number
 19 this but until we're putting -- you deployed the first
 20 two when he tried to kick and bite at your hand, then you
 21 used two two-second drive stuns, correct?
 22 A Yes.
 23 Q Now, what if you were just out -- you know, what if you
 24 and I got into a fight....
 25

1 Q Even if her hands were tied behind her back?
 2 A No.
 3 Q And even if she was on the ground?
 4 A That (tape skips).
 5 Q Yeah. Do you think that then he'd be authorized (tape
 6 skips) it should be legal, you respond to a call and you
 7 believe before the -- for someone to use four stuns of
 8 the taser which can cause the injuries that you
 9 photographed here....
 10 MR. WIDMER: Objection.
 11 Q Did you photograph -- are these your photographs? (Tape
 12 skips) we'll stipulate (tape skips). Do you think that
 13 someone that is -- has their hands restrained behind
 14 their back down on the floor, trying to bite someone,
 15 trying to kick someone should receive those type of
 16 injuries as a result?
 17 A I don't know. And if it was the best way to stop them
 18 compared to other means and if it was the best way they
 19 could find, yes.
 20 Q Do you remember taking these photographs or are these
 21 photographs that you took? These were taken at the
 22 police force, the police office is my understanding and I
 23 don't know if you took them or if Officer Joseph did. Do
 24 you remember taking the 13 photographs in front of you?
 25 A I know for sure that Sergeant Joseph took them because I

1 A Okay.
 2 Q All right? And (tape skips) if I tried to bite and kick
 3 you, then you can sit, I deserve to be tasered?
 4 A Yes.
 5 Q Okay. And if I kicked you on your leg, would I deserve
 6 to be tasered?
 7 A Okay. When we say deserve, can you make a stop that's a
 8 counter-punch?
 9 Q Well....
 10 A Yeah.
 11 Qdo you think you would be authorized, you think it
 12 would be legal for you to use that type of force against
 13 me if I had kicked you on your leg?
 14 A Yes.
 15 Q Mm hmm. So if you were investigating a crime and someone
 16 said well, Molly tried to kick me and then she tried to
 17 bite me and the husband says I just took out -- you know,
 18 I took this taser out and I was -- fired it in her arm.
 19 Think Molly should be arrested in that incident?
 20 A Yes.
 21 Q So you don't think that the amount of force that someone
 22 used against her in that example I just gave would be
 23 excessive at all?
 24 A No.
 25 MR. WIDMER: Objection.

1 for sure couldn't take them. I don't remember who took
 2 all of them.
 3 Q Do you remember taking any of them?
 4 A No.
 5 Q In your investigation at the time, did you find that you
 6 get the most accurate statement closer to the date of the
 7 crime or months later?
 8 A Excuse me?
 9 Q When you are investigating a crime, do you find that you
 10 get the most accurate statement when it's right close to
 11 the crime or months later?
 12 A Probably close.
 13 Q You were using the force of the gun right close, is that
 14 correct?
 15 A Yes.
 16 Q And the affidavit for -- in this case was done months
 17 later, is that correct?
 18 A Yes.
 19 Q But your memory reflected use of force is a more accurate
 20 reflection perhaps than this?
 21 A It could be.
 22 Q All right. Just a second. Let's just kind of (tape
 23 skips). Officer Joseph stated in his police report that
 24 it was really hot inside. Do you remember how hot it was
 25 inside?

MR. INGALDSON: Foundation.

- 1 A I don't know.
- 3 Q Someone -- you don't know if that could have been poss --
- 4 you don't know if it's reasonable to believe that could
- 5 have been caused by a taser?
- 6 A I don't know.
- 7 Q If someone was kicking at you on your shin or your
- 8 legs....
- 9 A (Indiscernible).
- 10 Q But if they were kicking, how are you going to be able to
- 11 make that connection (tape skips)?
- 12 A I don't remember how (tape skips) legs but I (tape skips)
- 13 side of him.
- 14 Q That would have been difficult if his legs were kicking
- 15 back and forth, moving, do you agree?
- 16 A If he was doing that at the time, yes.
- 17 Q Now, you said that you drive stunned his back. Is that
- 18 what you said?
- 19 A Yeah.
- 20 Q So now, if he was kicking at you when you were behind
- 21 him, there was no chance you were going to be kicked
- 22 (tape skips)?
- 23 A Say it again?
- 24 Q Explain that.
- 25 A I guess how much time you (tape skips).

- 1 Q You think maybe you could have strained him while you
- 2 were behind him?
- 3 A I may have been able to.
- 4 Q Okay. But you didn't try?
- 5 A Yes, I did.
- 6 Q Oh, where did you say that?
- 7 A It says (indiscernible) in this paragraph here. Oh, this
- 8 here, yeah.
- 9 Q Okay. Well, you don't see it down here where you said
- 10 you pointed it to his back. It's not down there, is it?
- 11 A No.
- 12 Q You just say that's the first thing you tried to do, is
- 13 that right?
- 14 A Yes.
- 15 Q And it just says you just tried it once, is that right?
- 16 A I'm not sure what it says there.
- 17 Q Okay. What's Thomas Olson's criminal history prior to
- 18 this date?
- 19 A (Tape skips).
- 20 Q Okay. Any -- anything big pop out that you want to tell
- 21 me about? If you don't know, you don't know. I just
- 22 wonder if you know.
- 23 A I don't believe (tape skips) my own conditions of release
- 24 (tape skips).
- Q What about prior to this event?

- 1 kinds of situation does not make it into that use of
- 2 force report, is that an accurate statement?
- 3 A Yes.
- 4 Q Sometimes it doesn't say you had a uniform on or that you
- 5 were carrying certain items of equipment. Is that
- 6 accurate? Does anyone -- the use of force report form,
- 7 does it mention you were dressed in a uniform?
- 8 A No.
- 9 Q Is it fair to say that you were dressed in a uniform when
- 10 you responded to that?
- 11 A (No audible response).
- 12 Q So there are a number of things that may have happened
- 13 that you may not have made it in that use of force
- 14 report?
- 15 A Yes.
- 16 Q And you created this report?
- 17 A Yes.
- 18 Q Why would you decide that some things should be reported,
- 19 some things should not?
- 20 A They typed that into the report form.
- 21 Q Okay. One of the things that -- one of the questions
- 22 that were asked of you was that you couldn't have been
- 23 kicked while you were behind the shoulders. Do you
- 24 remember those questions?
- 25 A Yes.

Q Did you believe -- let me, first of all, ask this question. When Mr. Olson -- there was a question asked about whether or not Mr. Olson might have been dazed. When Mr. Olson said on the tape or we listened on the tape, when he made the comment is that all you've got, damn it, it feels like a vibrator, did you get the impression that he was just dazed when he said that?

A No.

Q And my last question, Sergeant Simon, is when you used the taser on Mr. Olson, did you believe what you were doing was lawful and proper?

A Yes, sir.

Q That's all I have.

MR. BROWN: And I have a few follow-up here.

EXAMINATION

BY MR. BROWN:

Q Going back to the what's been marked as deposition D, deposition exhibit D here, Mr. Widmer brought your attention to this use of force form earlier and he only mentioned one section though which was what techniques and tactics were used and why were they effective but, actually, right above that, a section that he (tape skips) says describe the incident. Isn't that what it says, for you to describe the incident?

Q You were able to administer seven (indiscernible), is that correct?

A Yes.

Q Did you ever deploy the -- I'll call them close (tape skips) do you recall right now, did you ever deploy with the wires, the part of the taser?

A The probes?

Q The probes, yeah.

A No.

Q Okay. All right. Now, Mr. Oaks was saying earlier that if two -- the two probes do not both make contact, then they short out, is that correct? Is that what happens?

If only one probe makes contact with the person who's being arrested, does the charge short out?

A It does make a circuit. I don't know if it's called shorting out but....

Q Electrical charge, is that right?

A There's an electrical charge circuit -- circuiting.

Q Mr. Olson, is that right, something that would have caused Mr. Olson, for example, yell is that all you've got (tape skips) feels like a vibrator (tape skips)? It's just a little charge, is that what you're saying or (tape skips) and I will start all over. It's getting late. (Indiscernible). When only one probe, what happens?

A Yes.

Q All right. And in either one of those sections, either the tactics that were used or in describe the incident, do you ever that you were on the ground?

A No.

Q All right. And just a moment ago, you demonstrated for us where the prongs were located on the taser?

A Yes.

Q Okay. Now, when you were holding that, that was just right in your hand, right?

A Yes.

Q You would have to come within very close proximity, very close to Mr. Olson in order to do that, is that right?

A Yes.

Q One time you even had it right in between his legs and used it on his inner thigh, is that right?

A Yes.

Q Another time used it right on his back and on his collarbone, is that right?

A (No audible response).

Q Just above the collarbone?

A Yes.

Q Okay. So he was at least calm enough for you to get close enough to him to administer that, is that right?

A I wouldn't say calm, no.

A It doesn't work.

Q All right. And Officer Joseph said that his first ones did not work. Do you have any knowledge of whether that worked or did not work? Do you yourself know? You may not.

A I don't remember.

Q Okay. Do you remember Thomas saying call and (tape skips) with the kids and I'll leave?

A I don't remember.

Q If you were investigating a crime scene and there were -- you came upon (tape skips) with burn marks on them and they said that they were (tape skips) investigating (tape skips).

A I'd investigate further.

Q Why?

A They've spoken with one person.

Q And that one person tells you that their hands were behind their back and they were trying to bite and kick and they got those 14 burn marks, what would (tape skips)?

A I still don't know the whole story.

Q You see that there could be a legal problem here?

MR. WIDMER: Objection, that calls for a legal conclusion.

A (Tape skips).

1

Q Do you see a problem there that an investigator should investigate and maybe file a report on?

Q Do you see a problem there that an investigator should investigate and maybe file a report on?

A Yes. Something like that should be investigated.

Q Why?

A Get the whole story.

Q Something like that, what do you mean something like that?

A From what you just told me (tape skips) someone with burn marks, biting and kicking, that's all (tape skips).

That's what I'm referring to (tape skips).

MR. INGALDSON: (Indiscernible). (Tape skips) plane to catch before you go?

(Off record)

TRANSCRIBER'S CERTIFICATE

I, Linda S. Foley, hereby certify that the foregoing pages numbered 2 through 62 are a true, accurate, and complete transcript of deposition of Charles Simon in Case No. 4BE-07-00026 CI, Thomas J. Olson v. City of Hooper Bay, Officer Dimitri Oaks, Officer Charles Simon, Officer Nathan Joseph, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

May 1, 2008

Linda S. Foley, Transcriber

1 A Yes, sir.
 2 Q Crack their skull open maybe.
 3 A Yes, sir.
 4 Q And you were -- you also, I guess, could have -- I
 5 suppose it'd be possible, wouldn't it have been, for you
 6 guys to just grab Mr. Thomas's arms and just jerk them up
 7 behind his head to kind of cause pain in his arms to get
 8 him to -- instead of tasing him? You could have done
 9 that, right?
 10 A Mm-hmm. That was right.
 11 Q That was possible.
 12 A It's possible we could have done it, yes, sir.
 13 Q Have you ever had your shoulder dislocated?
 14 A Yes, sir.
 15 Q And you've been tased you said, right?
 16 A Yes, sir.
 17 Q What feels -- felt worse to you, the tase or the
 18 dislocated shoulder?
 19 A Dislocation of the shoulder.
 20 Q And after you're tased, how long do you continue to feel
 21 the pain from the tase?
 22 A Not long.
 23 Q When it -- once the electricity stops from the taser, do
 24 you still....
 25 A A little while after, it wears -- it stops.

1 Q How about your dislocated shoulder, how long were you in
 2 pain with that?
 3 A Days. We didn't want to cause any serious injuries
 4 though.
 5 Q There was some question about, you know, what -- the
 6 slipperiness on the floor and, you know, whether it could
 7 have been flammable. Do you remember those questions?
 8 A Yes.
 9 Q You know what gas smells like?
 10 A Yes.
 11 Q Do you know what kerosene smells like?
 12 A Yes.
 13 Q You know what diesel fuel smells like?
 14 A Yes.
 15 Q Did you smell any of those things?
 16 A Oh, I couldn't tell, my nose was slightly plugged because
 17 I had a slight cold at the time, chest cold. My smelling
 18 wasn't -- wasn't all that well.
 19 Q If you smelled gas or diesel fuel or kerosene....
 20 A I would have smelled it if it was there....
 21 Qwould you have....
 22 Amost likely.
 23 Q So when you say you don't know what was on the floor....
 24 A On the floor.
 25 Qdid you have any reason to believe at all -- any

1 reason at all to believe that there was a flammable
 2 liquid, something that might start a fire if a spark hit?
 3 Did you have any reason to believe that?
 4 A No, my wife had told me my smelling my smelling wasn't
 5 too good.
 6 Q That's all I have. Thanks.
 7 A Thank you.
 8 MR. BROWN: Okay. I have a couple more here for
 9 you.
 10

EXAMINATION

11 BY MR. BROWN:
 12 Q You said that you were tasered before?
 13 A Yes.
 14 Q Have you ever been tasered multiple times within a five-
 15 minute period?
 16 A When I -- when I started to get -- get back up, I guess
 17 that -- it -- it was a tasing class and it was taught to
 18 keep -- to stay down.
 19 Q And how many times were you tased?
 20 A Oh, maybe twice.
 21 Q What if you would have been tased five times?
 22 A No.
 23 Q You think that may have caused a little bit more pain?
 24 A No.

1 MR. INGALDSON: Objection, foundation.
 2 Q You don't think it would have?
 3 A No.
 4 Q How is that true?
 5 A It -- it wears off very -- very shortly after you're
 6 tased.
 7 Q Several minutes is what you were trained, right?
 8 A Yes, it wears off and you don't feel no pain anymore.
 9 Q Now, look at these photos that -- I don't know if these
 10 were -- have you ever had a cut on your neck?
 11 A No.
 12 Q Have you ever had a cut on your body?
 13 A Oh, yes, on my leg.
 14 Q Have you ever had a burn?
 15 A Yes.
 16 Q When you got burned, was it well within just a few
 17 minutes?
 18 A No.
 19 Q You see all those marks on Thomas Olson?
 20 A Yes.
 21 Q And what part of his body is not photographed here in
 22 front of you? These are photographs from your police
 23 department.
 24 A You're asking what part of the body that's not....
 25 Q Not photographed, from the waist up.

1 A Okay. I don't know.
 2 Q Do you see his stomach there?
 3 A Yes, over here?
 4 Q Where is his stomach at?
 5 A I think that's his stomach.
 6 Q I think that's his shoulder.
 7 A Oh, that's his shoulder? It's hard to tell. Looked like
 8 his stomach.
 9 Q You agree now that you see then that can -- this
 10 collarbone, that that's the -- his stomach?
 11 A Oh, yeah, that -- all right. Okay.
 12 Q You see that? So do you see the stomach anywhere there?
 13 A You say this is -- this looks like the stomach to me.
 14 Q Okay. All right. It looks like the stomach to you then.
 15 That's fine. We'll talk with some other folks about it
 16 too. These are some photos that our office took after
 17 Thomas came in.
 18 A Well, like I told you, I never -- I never looked at his
 19 body.
 20 Q Okay. Did you see that -- the stomach there?
 21 A Yes.
 22 Q And those look like plastic (ph) taser marks?
 23 A No.
 24 MR. WIDMER: Objection, foundation.
 25 A They don't look like taser marks.

1 and so I just wanted to go on and Bates stamp them and give
 2 them to you today.
 3 MR. INGALDSON: Well, I mean, I think if you're
 4 going to be asking these witnesses questions about them on
 5 things that they haven't seen, we haven't had a chance to talk
 6 to them about them.
 7 MR. BROWN: All right.
 8 MR. INGALDSON: I'm going to object to that.
 9 It's....
 10 MR. BROWN: I think it's a fair -- you know, as far
 11 as the objection goes, we'll let the record reflect that and
 12 the only thing I'm asking him is just if those look like taser
 13 marks to him.
 14 MR. WIDMER: I also -- I'm going to make an
 15 objection because the pictures you're showing him right now
 16 are not pictures that I'm having -- I see in this packet. I
 17 specifically don't see any of the -- what appear to be
 18 iridescent welts with hair. I don't know if this is going to
 19 be produced or not but....
 20 MR. BROWN: Well, no -- wait a minute, these have
 21 been produced. The ones I just gave you have not been
 22 produced.
 23 MR. WIDMER: Those have been produced?
 24 MR. BROWN: These have been produced.
 25 MR. WIDMER: Do you recall when those have been

1 Q Okay.
 2 A That's a burn over there but they don't look like tasers,
 3 really. Those are -- those are tasers, yes.
 4 Q Oh, we're just looking through the photos and we'll go on
 5 and identify these. These are photos that were produced
 6 by Power and Brown in our office and they have been
 7 produced to the defendant. We have one....
 8 MR. INGALDSON: Were these just produced today?
 9 MR. BROWN: Yes, they are just produced today, now
 10 and....
 11 MR. INGALDSON: It looks like they were taken....
 12 MR. BROWN: They were taken some time ago, that's
 13 true....
 14 A It does look like....
 15 MR. BROWN:and I believe that they....
 16 MR. INGALDSON: I just want to make -- say an
 17 objection for the record, these -- I don't know -- these
 18 should have been produced to us long before. This is....
 19 MR. BROWN: They may have been given to Phil Palamer
 20 during the settlement conference, actually, and to -- we've
 21 had a settlement conference on this case and they may have
 22 been given to Phil and to Margo at the settlement conference
 23 when we were talking about settling this case because this
 24 case has been up for a settlement conference in the past but I
 did not have a Bates-stamped copy that they had been produced

1 produced?
 2 MR. BROWN: I don't but I can find out from my
 3 office. These have not been produced. The ones I just gave
 4 you had not been produced. Let's leave those for a little bit
 5 until we talk to the people that actually tasered.
 6 MR. WIDMER: Fine.
 7 Q But these were taken at your police station, is that
 8 right?
 9 MR. WIDMER: Objection, he's already stated that he
 10 doesn't know who took those pictures.
 11 MR. BROWN: Okay.
 12 Q But does this look like your police station here in the
 13 background?
 14 A Yes.
 15 Q Okay. And is that -- who is that?
 16 A Sergeant Simon.
 17 Q Okay. And....
 18 MR. BROWN: Have you ever seen that picture?
 19 MR. INGALDSON: Is that it then?
 20 MR. BROWN: Let me see. That is, actually -- let me
 21 see....
 22 Q So your nose was stopped up that night, is that what
 23 you're saying?
 24 A Yes.
 25 Q You said you fell over a trash bag and that's all you

noticed in the floor, is that right?
 2 A It was slippery, yes.
 3 Q And the supplemental report that you filed, you said that
 4 this caused you discomfort. Do you have a recollection
 5 of that pain and discomfort?
 6 A Oh, on my knee, yup, when he was kicking me.
 7 Q Okay. What would your reaction be if someone came into
 8 your house at 4:00 in the morning and your children are
 9 there and you were asleep and they wake you up and
 10 started to drag you out leaving your children there,
 11 would you try to stay?
 12 MR. INGALDSON: Objection, scope, also form,
 13 foundation and I don't think this is relevant or likely to
 14 lead to the discovery of relevant evidence.
 15 Q You can still answer it.
 16 A Do I have to answer it?
 17 Q Yes.
 18 MR. INGALDSON: Also, an incomplete hypothetical.
 19 A Oh, no, I guess I wouldn't like that.
 20 Q Okay. And would you try to stay to make sure your
 21 children are okay?
 22 A Yes.
 23 MR. BROWN: I have nothing further.
 24 MR. WIDMER: I don't have any follow-up questions.
 25 MR. INGALDSON: I just have one follow-up question.

1 TRANSCRIBER'S CERTIFICATE
 2 I, Linda S. Foley, hereby certify that the foregoing
 3 pages numbered 2 through 75 are a true, accurate, and complete
 4 transcript of deposition of Dimitri Oaks in Case No. 4BE-07-
 5 00026 CI, Thomas J. Olson v. City of Hooper Bay, Officer
 6 Dimitri Oaks, Officer Charles Simon, Officer Nathan Joseph,
 7 transcribed by me from a copy of the electronic sound
 8 recording to the best of my knowledge and ability.
 9
 10 April 29, 2008
 11 _____
 12 Linda S. Foley, Transcriber
 13
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 22
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 24
 25

1 EXAMINATION
 2 BY MR. INGALDSON:
 3 Q Let's give the same example you were just asked, that
 4 also that you were intoxicated and maybe you're not
 5 asking -- acting rationally wanting to stay but would you
 6 be thankful that police officers came in and protected
 7 your children?
 8 A Yes, sir.
 9 MR. INGALDSON: That's all I have.
 10 MR. BROWN: Thank you. You are done. Have a good
 11 afternoon.
 12 A All right.
 13 MR. BROWN: It was nice to meet you, sir.
 14 A All right.
 15 MR. BROWN: Okay.
 16 (Off record)
 17
 18
 19
 20
 21
 22
 23
 24
 25

1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

THOMAS J. OLSON,)

)

Plaintiff,)

)

v.)

)

CITY OF HOOPER BAY,)

OFFICER DIMITRI OAKS,)

OFFICER CHARLES SIMON and)

OFFICER NATHAN JOSEPH,)

)

Defendants.)

)

No. 4BE-07-00026 CI

VOLUME I

VIDEOTAPED DEPOSITION OF NATHAN JOSEPH

Pages 2 through 40, inclusive

April 23, 2008

Hooper Bay, Alaska

Exhibit L

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

1 THOMAS J. OLSON,)
2)
3)
4)
5 Plaintiff,)
6)
7)
8)
9)
10)
11)
12)
13)
14 Defendants.)
15)

16 No. 4BE-07-00026 CI

17 VOLUME I

18 VIDEOTAPED DEPOSITION OF NATHAN JOSEPH

19 taken on behalf of the Plaintiff, pursuant to notice, at the
20 Sea Lion Corporation Boardroom, Hooper Bay, Alaska, before
21 Sean E. Brown, a Notary Public for the State of Alaska.
22
23
24
25

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Hooper Bay, Alaska, April 23, 2008

MR. BROWN: Suit yourself. You look good. All right. Once again, I'll say the same thing at the beginning, we're here on Thomas Olson versus City of Hooper Bay, Officer Dimitri Oaks, Officer Charles Simon, Officer Nathan Joseph, case number 4BE-07-26 CI. My name is Sean Brown. I'm plaintiff's attorney but I'm also a notary for the State of Alaska so I can issue an oath to you. If you'd raise your right hand and state your name?

MR. JOSEPH: Nathan Joseph.
(Oath administered)

MR. JOSEPH: Yes.

MR. BROWN: Thank you. All right. And I think everyone pretty much knows who's here by now so we'll just -- oh, good. All right. Okay.

NATHAN JOSEPH
called as a witness herein on behalf of the Plaintiff, having been duly sworn upon oath by Mr. Sean E. Brown, Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. BROWN:

2 (Pages 2 to 5)

April 23, 2008

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Exc. 264

Page 6

1 Q So, Mr. Joseph, could you state and spell your name and
 2 give your address, please?
 3 A Nathan Joseph. N-a-t-h-a-n. J-o-s-e-p-h. P. O. Box
 4 , Hooper Bay, Alaska, 99604.
 5 Q And how long have you been a member of the Hooper Bay
 6 Police Department?
 7 A Just about 11 years.
 8 Q All right. And how – what type of training have you
 9 received during those 11 years?
 10 A Well, back in '99, I had a – a basic VPO training up in
 11 Kotzebue. It was for two weeks. A few months later, I
 12 had the advanced VPO training up – down in King Salmon
 13 and just recently, I graduated from the 10-week VPSO
 14 training.....
 15 Q Congratulations.
 16 Ain Sitka.
 17 Q And was any of the training that you just mentioned –
 18 you were here earlier when Dimitri Oaks testified. Was
 19 any of the training you just mentioned the same as what
 20 Mr. Oaks had?
 21 A The first one, yes.
 22 Q Okay. And where was that training specifically?
 23 A That was – that train – that first training I had was
 24 up in Kotzebue.
 25 Q Okay. And what was the name of that, if you remember?

Page 7

1 A Basic VPO training.
 2 Q And during that training, at that time, were there tasers
 3 used?
 4 A No.
 5 Q So, based upon the training you received at that point,
 6 what was considered reasonable and legal – or without
 7 being legal, just reasonable? What was considered
 8 reasonable as far as use of force if someone was not
 9 coming along?
 10 A Well, reasonable would be soft hand and if that didn't
 11 work, forcing would be used. If that didn't work, we'd
 12 go to a hard hand. If there wasn't – a hard hand didn't
 13 work, we'd go to a impact weapon.
 14 Q What is hard hand?
 15 A It's when we hit somebody with our elbow, fist, knees.
 16 Q Okay. All right. And was hard handed force used on Mr.
 17 Olson?
 18 A No.
 19 Q Why not?
 20 A It wasn't necessary.
 21 Q And the training that you have received up until now
 22 indicates that it's more reasonable to use a taser than
 23 it is to hit someone.
 24 A In my experience, a taser is more reasonable than hitting
 somebody, yes.

Page 8

1 Q And who has told you that?
 2 A I've had that training from Chief Hoelscher who's an
 3 instructor on the taser and I've had it again down in
 4 Sitka by Corporal Grantineau (ph).
 5 Q What about a choke-hold, is that considered a hard hand
 6 or a soft hand?
 7 A Choke hold? Definitely not using soft hand.
 8 Q So that would be hard hand then?
 9 A That would be right, they're using deadly force.
 10 Q What about just wrapping your hands around someone,
 11 holding them, is that hard hand or soft hand?
 12 A It – it would depend on where you're holding onto them.
 13 Q Tell me.
 14 A See, if you – if you were holding a person around the
 15 body.....
 16 Q Mm-hmm.
 17 Athat's not considered using hard hand. It's just
 18 restraining them.
 19 Q Okay. So is that soft hand or is it not soft hand
 20 either?
 21 A It's just restraining a person.
 22 Q So what's soft hand?
 23 A Soft hand is when you put your hand on somebody, ask them
 24 to come with you.
 25 Q Okay. On the night that you went over to Thomas Olson's

Page 9

1 house – well, let's back up. First of all, I've asked
 2 everyone else, I'll ask you too. What is Mr. Olson's
 3 criminal history?
 4 A Mr. Olson's criminal history? In the past, he has been
 5 assaultive, uncooperative and combative with police
 6 officers.
 7 Q All right. Are you aware of anything that happened 10
 8 years ago?
 9 A No.
 10 Q All right. So if your attorneys made any reference that
 11 you had knowledge of something that happened 10 years
 12 ago, that would be not accurate, is that right?
 13 A You'd have to consult them about it first.
 14 Q Tell me what happened to Mr. Olson 10 years ago.
 15 A I wouldn't know what happened to Mr. Olson 10 years ago.
 16 Q Okay. And then have you ever investigated Mr. Olson at
 17 any other time for anything he's done to himself?
 18 A Not that I can recall.
 19 Q Okay. So you are the one that wrote about slime on the
 20 floor?
 21 A Yes.
 22 Q Tell me what slime is.
 23 A Slime is pretty slimy on the floors. The floor was
 24 really slick. Even when we stepped on it, it felt like
 25 slime, just really slippery.....

Q Could it....
 Aand you had to keep your balance just to walk on the floor.
 Q Could it have been from the snow on your shoe?
 A No.
 Q All right. Now, you were seated most of the time with , isn't that right?
 A Yes.
 Q And in your report, there's reference by Mr. Oaks that there was a garbage bag with garbage in it and I believe Mr. Simon says the same thing. Neither one of them mentioned this slime on the floor and they're the ones that were standing up most of the time, right?
 A They weren't the only ones standing. I was standing up also.
 Q Okay. Well, now, Mr. Oaks stated that you were actually seated holding . Is that inaccurate?
 A Yes.
 Q Okay. Where were you standing?
 A I was standing next to at the couch.
 Q And how far was that from the action going on?
 A I'd say about six feet.
 Q Out of kicking distance though?
 A Yes.
 Q And out of biting distance.

1 door and then the next door open, is that correct?
 2 A Yes.
 3 Q All right. So you're downstairs and then you decide to go on upstairs, is that right?
 4 A Yes, to where the kids had come in.
 5 Q So you go upstairs and you open the door?
 6 A The upstairs door? There was no upstairs door at that time, if there is even a door now.
 7 Q All right. Well, Mr. Oaks testified earlier that there was an upstairs door.
 8 A The entrance, I remember a door.
 9 Q All right. So you go upstairs and you open whatever it is, a board, a door, whatever, and go in and you said it was hot inside, is that right?
 10 A Yes, it was hot inside the house.
 11 Q And when I'm talking about that, I'm talking about what you said in your police report, not just now, that it was hot inside there, right?
 12 A Yes.
 13 Q Were the lights on or off?
 14 A There was one light in the room and it was pretty dim.
 15 Q Okay. Now, you said you slipped. Did you slip going up the stairs or was it at the top of the stairs?
 16 A At the top of the stairs.
 17 Q Before you got off the stairs or once you were off the

1 A Yes.
 2 Q Were you focused on or were you focused on Boya control?
 3 A I was -- I was mainly focused on
 4 Q So let's talk about what happened that night when you got to the residence.
 5 A Okay.
 6 Q Tell me about it.
 7 A When we got to the residence after receiving a phone call from Boya's girlfriend, who they have quite a bit of kids together, got to the house. It was after 4:00 in the morning. I saw that both doors were open, the arctic entrance and the main door to the house. I knocked on the inside door about four times and then one of the kids answered the door saying come in so we went in. We went up the steps. That's where I almost slipped was at the top by -- by the trash, a plastic bag and a trash heap. Right -- right -- right when I stepped past that, I almost slipped and I saw that was on the couch.
 18 Q Let's -- I'm sorry to interrupt you but, just so I'm clear her, I'm not sure I understand, so you go in the first door....
 19 A Yes.
 20 Q ... and from your vantage point, you can see the first

1 stairs?
 2 A Once I was off the stairs and past the trash can.
 3 Q Okay.
 4 A The trash bag, not the can, trash bag.
 5 Q There was a trash bag on the floor.
 6 A Yes, on the floor.
 7 Q Okay. All right. And that had the garbage in it that we were talking about earlier?
 8 A Yes.
 9 Q All right. Now, that second door was actually an arctic entry also, isn't it? I mean, there's arctic entry or the port, as you call it here, but even under their house, that's kind of an arctic entry also. They don't really live downstairs, do they?
 10 A No.
 11 Q All right. Did you know that before you went there that night?
 12 A Not that I remember.
 13 Q Okay. Well, you were talking about all these assaults and things. Have you never investigated any of them?
 14 A No.
 15 Q All right. So how did you know about them?
 16 A He's had a past history with other police officers that responded to calls.
 17 Q Okay. Did you know about that right then?

Page 14

1 A Yes.
 2 Q Tell me specifically what you knew going in.
 3 A I knew that he's been assaultive towards police officers
 4 in the past.
 5 Q Okay. Who?
 6 A I can't remember which ones.
 7 Q Who told you that?
 8 A I wasn't told by any of them. I read.
 9 Q What did you read?
 10 A I read that he's been assaultive with police officers,
 11 uncooperative.
 12 Q Where did -- where'd you read that?
 13 A In the police department.
 14 Q Where?
 15 A I'm not going to account for details of where. It's in
 16 the paper work.
 17 Q Okay. I need to know where because I'd like to see those
 18 documents myself so if you could tell -- so we could get
 19 your attorney to get them.
 20 A They would be filed.
 21 Q Where?
 22 A The cabinets, file cabinets in the police department....
 23 Q Okay.
 24 Aor on dispatch cards.
 25 Q All right.

Page 15

1 A And these have -- these have them on dispatch cards.
 2 Q How many of those did you read?
 3 A I read quite a bit.
 4 Q How many do you think that you read of him?
 5 A I don't remember.
 6 Q Did you remember that night?
 7 A I remember some of them, not all of them.
 8 Q Tell me what you remember.
 9 A I remember that he's been assaultive towards police
 10 officers, uncooperative.
 11 Q But you don't remember who, right?
 12 A No.
 13 Q You don't remember how many.
 14 A Yes.
 15 Q All right. So you saw it on dispatch card or a police
 16 report or something?
 17 A Yes.
 18 Q All right. Okay. So you go in, you go upstairs and it's
 19 4:00 in the morning and the first thing you see is two
 20 men asleep, is that right?
 21 A In kind -- different parts of the house, yes.
 22 Q But it's just one big room, correct?
 23 A Yes.
 24 Q And so you see two men asleep in -- on -- one on a couch,
 one on the bed.

Page 16

1 A Yes.
 2 Q And the children are awake by now because you've been
 3 knocking on the doors, right?
 4 MR. INGALDSON: Objection, foundation.
 5 Q They're not awake?
 6 A Some of them are already awake.
 7 Q That's what I said. So.....
 8 A You said all of them.
 9 Q Okay. So how many were awake?
 10 A I don't remember.
 11 Q You don't remember?
 12 A No.
 13 Q Okay. So you get to the top of the steps and there's
 14 actually a wall there behind the steps, right? I mean, a
 15 slanted wall so it -- as you come up, you can see into
 16 the room? Do you remember that?
 17 A Well, there's a wall right at the top of the stairway.
 18 It's not a very big wall.
 19 Q Correct. Okay. So you get inside, see these two men
 20 asleep. What do you do? 4:00 in the morning, what do
 21 you do?
 22 A What do I do?
 23 Q Yeah.
 24 A See two men asleep.
 25 Q It's warm.

Page 17

1 A Well, the door's open, go check to see if any of the men
 2 can wake up. Soon as I get clo -- approach them, trying
 3 to wake them up, can smell the alcohol coming from their
 4 breath.
 5 Q Okay. Back up a little bit. Now, are we agreeing that
 6 the top had a board over it and may not be considered a
 7 door but it did have a board laying down on it that would
 8 -- kept it warm in there? Do you agree with that?
 9 A No.
 10 Q You don't agree with that?
 11 A No.
 12 Q How is it so warm in there if it was so cold outside?
 13 A It's a -- it's a two-story building. All that heat stays
 14 up. The stove was up to 90 something degrees.
 15 Q Okay. So you go inside, see the two men asleep. You
 16 said that you smelled alcohol on their breath, is that
 17 right?
 18 A Yes, when I approached.
 19 Q Which one?
 20 A Both.
 21 Q Same time?
 22 A No, I went and approached first and then I
 23 approached Thomas.
 24 Q And what's Mr. Oaks doing?
 25 A Mr. Oaks is following me.

Q Just right behind you?
 A Yes.
 3 Q Okay. So do you walk over to and what do you say?
 4 A I try waking him up, saying , wake up.
 5 Q Okay.
 6 A Wouldn't wake up.
 7 Q And then what do you do next?
 8 A And then I started shaking him and waking him up, then I
 9 walk over to Boya.
 10 Q Okay.
 11 A I call his name out a few times. I shook - if I
 12 remember correctly, I shook him too.
 13 Q Uh-huh.
 14 A Didn't wake up right away.
 15 Q All right. So then - and then what do you do?
 16 A Then as - as I'm walking away, he wakes up and I go up
 17 to him and I talk to him and he's asking what we're doing
 18 in the house and I told him that we're here for a welfare
 19 check, make sure everybody who's at the house is okay.
 20 Q And at that point, was everyone okay?
 21 A I don't know how long the children were left alone with
 22 two intoxicated people. If you want to call two
 23 intoxicated people okay, no, it's not okay.
 24 Q From your viewpoint, what you could see, was anyone hurt?
 25 A The kids weren't hurt. Doors left wide open.

1 A For his safety, our safety and the safety of everybody
 2 else because we didn't want anybody to get - to get hurt
 3 or into a fight.
 4 Q And should that be on the tape?
 5 A Yes.
 6 Q Okay. Go on.
 7 A And as we continue, he's starting to yell in the house,
 8 saying that we're trespassing and I tell him no, we're
 9 not trespassing, we were told to come in and he continues
 10 that we're trespassing and that you can get shot for
 11 trespassing. That's what he tells us.
 12 Q Okay.
 13 A I said no, we're not trespassing.
 14 Q All right. Now, you were talking about the handcuffs.
 15 Before you handcuffed him....
 16 A What I wanted to do before handcuffing him was tell him
 17 to stand up so I can do a quick field sobriety test on
 18 him.
 19 Q And what happened there?
 20 A That's when he started getting out of control.
 21 Q How so?
 22 A He said I was (indiscernible - whispering) the way he's
 23 raising his boys, clenching his fists.
 24 Q Okay. And what did - so after you get the handcuffs on
 25 him, then does he sit back down?

1 Q It was warm.
 2 A It was hot.
 3 Q So hot inside. The adults were asleep. For all you
 4 know, the children - some of the children were asleep
 5 and you wake him up and he asked you what you're doing
 6 here, is that right?
 7 A Yes.
 8 Q And what -- and you said you were there for what?
 9 A To do a welfare check.
 10 Q Okay. And?
 11 A Just make sure everybody in the house was okay.
 12 Q All right. And so what happens next?
 13 A Boya gets pretty combative and started just clenching his
 14 fists. What I do is I put the handcuffs on him and tell
 15 him I'm putting on them - him for his safety and our
 16 safety and then....
 17 Q I just want to be sure we're recording. Maybe just speak
 18 up a little bit. You have a real light voice. I just
 19 want to be sure we're picking you up.
 20 A Mm-hmm.
 21 Q So if you'd just stay -- you know, because if you were
 22 putting the handcuffs on him - say you were doing that
 23 for his safety.
 24 A Yes.
 Q Okay. Go on.

1 A No, he stands up.
 2 Q Now, where do you call for backup along in there?
 3 A After trying to wake up again.
 4 Q Okay. So now you have Thomas standing.
 5 A Mm-hmm.
 6 Q Is Dimitri Oaks by him?
 7 A Yes.
 8 Q And you walk over to ?
 9 A Yes.
 10 Q And you try to wake him up?
 11 A Yes.
 12 Q Okay. And what happens?
 13 A Well, Thomas continues to come into the room where the
 14 kids, that newborn and were.
 15 Q But it's one room. You just said that.
 16 A To the area of them.
 17 Q Okay.
 18 A Continues his yelling. He's telling us that we're
 19 scaring his kids.
 20 Q Were you?
 21 A No.
 22 Q Okay.
 23 A We weren't yelling. We were talking normally and told
 24 him -- he's the one that's doing all the yelling and
 25 scaring his kids at that time that all the kids were

6 (Pages 18 to 21)

1 crying.
 2 Q Okay.
 3 A And somewhere in that time, I called for backup to help
 4 with the kids and escort the prisoner over to the police
 5 department.
 6 Q All right. Again, I just want you to be sure -- talk up
 7 so we can be sure we're getting you recorded because it's
 8 really light. All right. And then -- so now, you're
 9 walking over to ?
 10 A Yes.
 11 Q All right. But now you're telling me you were having
 12 this conversation with Thomas.
 13 A I can walk and talk at the same time.
 14 Q Because it's such a -- it's one room.
 15 A Yes.
 16 Q All right. So you walk over to the area where is
 17 and what do you do?
 18 A Start shaking him some more trying to wake him up,
 19 yelling off his name.
 20 Q And what does he do?
 21 A Nothing.
 22 Q And then what happens?
 23 A Boya started yelling some more, got louder and louder and
 24 some time after -- somewhere after all -- during all the
 25 yelling, wakes up because Boya here gets loud

1 Q Somebody did, right?
 2 A His wife called -- not his wife, his girlfriend.
 3 Q Okay. So someone had called.
 4 A Yes.
 5 Q All right. So -- well, you said it's hard to find
 6 someone at 4:00 in the morning.
 7 A Yes, and after.....
 8 Q What were you going to do with the kids after you
 9 arrested him?
 10 A After we called -- after I called for a backup so we can
 11 get them over after we get both -- both Thomas and
 12 to the house, while that one officer's at the house, we'd
 13 have somebody else go to the house, stay with the kids.
 14 Q Who?
 15 A The mother.
 16 Q Where was she?
 17 A She was at her mom's house.
 18 Q Why didn't you just go get her to start with?
 19 A Because when you leave kids that young alone, it's a
 20 crime.
 21 Q But why didn't you just go get the mother on the way over
 22 there or tell whoever you were calling for backup have
 23 the mom to come over?
 24 A There's -- there's -- it's -- it's very hard when you're
 25 dealing with one person, one police officer with two

1 enough.
 2 Q And is Simon here yet?
 3 A No.
 4 Q Okay. Go on.
 5 A And I asked him if okay and then asked him if
 6 he's been drinking. I wouldn't recall what he said but I
 7 could smell the alcohol coming from his breath and I
 8 remember putting on -- handcuffs on him.
 9 Q On ?
 10 A Yes.
 11 Q Okay.
 12 A At that point in time, I decided to arrest both and
 13 Thomas.
 14 Q Now, why were you arresting ?
 15 A Because he was an intoxicated adult inside the house
 16 along with his brother, Thomas.
 17 Q So do you always arrest intoxicated adults?
 18 A Yes. Not always.
 19 Q Could you have just removed the children from the home?
 20 A Yes, I could have done that.
 21 Q Why didn't you?
 22 A Well, it's pretty hard to find some people 4:00 in the
 23 morning.
 24 Q Well, his wife had just called though, right?
 25 A Yes, his wife called.

1 intoxicated people, one of them really aggressive and the
 2 other one can be aggressive on that police officer. It's
 3 an officer safety issue.
 4 Q I wasn't asking you to leave one officer there.
 5 A That's what you were just saying.
 6 Q You called Simon to come over, is that right?
 7 A Yes, I did.
 8 Q And you knew where the mother of the children were?
 9 A Yes.
 10 Q And as of this time, there's no crime being committed in
 11 the house. There's two intoxicated men in the house with
 12 the children, is that right?
 13 A Backup to help with the escort of the prisoner to the
 14 police department.
 15 Q Okay. Let's back up again. Why.....
 16 A While -- while one -- while one police officer's -- is at
 17 the house and they get that one prisoner to the police
 18 department, they -- they get the other prisoner coming
 19 back to the police department. Then that one officer
 20 that has the time can go pick up the parent, other
 21 parent, and bring them over.
 22 Q Okay. Let's back up. All right. You have two officers
 23 in the house.
 24 A Yes.
 25 Q You have two drunk men in the house.

7 (Pages 22 to 25)

1 A Yes.
 2 Q You decide to arrest because he's just drunk.
 3 A Uh-huh. Because what he was doing was illegal too.....
 4 Q What?
 5 Aand I cannot leave children that very young - that
 6 age with a drunk - drunk relatives.
 7 Q But you could have asked Officer Simon to stop by and get
 8 the mom and send her home.
 9 A It would have gotten a lot worse than what it was.
 10 Q How do you know?
 11 A Just how it ends up.
 12 Q How do you know?
 13 A Because, in my experience, that signi - significant
 14 other of the person that's being arrested turns on the
 15 police officers.
 16 Q Okay. So - but here you thought that the significant
 17 other had actually called you to go do a welfare check,
 18 is that right?
 19 A It happens that way and the significant other can attack
 20 the police officers at the same time. This happened in
 21 my experience.
 22 Q All right. So, needless to say, you were now arresting
 23 two men even though the children appear to be just fine.
 24 A They wouldn't be fine with two men passed out on
 25 (indiscernible).

1 Q All right. So then what happens next?
 2 A Okay. You're getting me confused here. You're going to
 3 this, you're going to that and you're going back to this
 4 and then after I explain what happened, you're telling me
 5 to go back to that same spot to explain again and after
 6 explaining as clear as I can and you're still going back
 7 to that area.
 8 Q Right. Okay. So do you need me to ask that question
 9 again?
 10 A It's how you're asking the question.
 11 Q What happens next?
 12 A What happens next is after wakes up, I - if I
 13 remember correctly, I put the handcuffs on him to detain
 14 him and then he starts getting a - Thomas gets along
 15 worse and that's when I called for backup.
 16 Q Why did you shine your flashlight on Boya, on Mr. Olson?
 17 A To see if he was - see him wake up. He was in a dark
 18 area of the house.
 19 Q Well, I thought it was just one room.
 20 A The light was in this part of the room and he was farther
 21 over here.
 22 Q All right. So now you have in handcuffs.
 23 A Mm-hmm.
 24 Q You have Mr. Olson in handcuffs.
 25 A Yes.

1 Q All of these criminal charges were dropped, is that
 2 right?
 3 A I don't know.
 4 Q Would it surprise you to learn that they were?
 5 A Yeah.
 6 Q Were you ever called to testify?
 7 A Not that I can recall.
 8 Q Okay. All right. So you're upstairs now. You are over
 9 with Oaks is with Mr. Olson. What happens next?
 10 A Okay. You need to be more clear of where you're going
 11 to.
 12 Q Okay. I just - I don't want to confuse you. I want to
 13 be very clear with you and, backing up, my understanding
 14 was that you had just walked over to wake up.....
 15 A Mm-hmm.
 16 Qand you were shaking him awake.
 17 A Attempting to.
 18 Q Okay. And then you said that Boya, Mr. Olson.....
 19 A Mm-hmm.
 20 Qyelling, woke -- awoke, is that correct?
 21 A Yeah, after quite a - after awhile of yelling.....
 22 Q Had you ...
 23 Ahe finally came to.
 24 Q Had you already called for backup at that point?
 A Not that I can recall.

1 Q Mr. Olson is yelling you say and then keep going. What
 2 do you do?
 3 A Oh, I call for backup. I can't remember how long it
 4 takes for Sergeant Simon to get to the residence and as
 5 they were trying to - when they were trying to escort
 6 Thomas out of the house, they got on -- right around the
 7 trash bag and all of them fell.
 8 Q So you remember it as all three fell together?
 9 A Yes.
 10 Q And you saw that?
 11 A I looked back and saw that they were falling down on the
 12 floor.
 13 Q So you don't know that it was the trash bag that caused
 14 them to fall or what caused them to fall but you just saw
 15 them all -- all on the floor?
 16 A Yes.
 17 Q Okay. Just want to be sure, I just want to know what you
 18 saw.
 19 A Mm-hmm.
 20 Q All right? So then you see the three of them on the
 21 floor.
 22 A Mm-hmm.
 23 Q Where exactly do you remember them being?
 24 A Let's see, where the trash bag was, the entrance, I
 25 remember Corporal Si - Sergeant Simon right around the

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trash bag, Boya and Officer Oaks.
 Q Okay.
 3 A As they were getting up, I remember Boya kicking at one
 4 of them.
 5 Q Which one?
 6 A I can't remember which one he was kicking at first.
 7 Q Help me understand that. So you remember where they --
 8 you remember seeing them fall.
 9 A Yes.
 10 Q You remember seeing him on the ground.
 11 A Yes.
 12 Q You remember seeing all three of them on the ground.
 13 A Yes.
 14 Q You remember seeing them stand up.
 15 A I've seen all three of them on the ground more than once.
 16 Q Okay. You see them -- you're the first one to tell us
 17 that today. Do you realize that?
 18 A Yes, I do.
 19 Q Okay. And then you see them -- you see the two officers
 20 stand up.
 21 A Yes.
 22 Q All right. And at that point, you see Thomas kick but
 23 you don't know where or who?
 24 A Yes.
 25 Q So just kind of a drunk man kicking?

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1 A Can you say that again?
 2 Q Well, it was just -- you know, I mean, you've seen drunk
 3 men kick before, haven't you?
 4 A I've seen intoxicated people kicking, yes.
 5 Q Is that kind of what he was doing?
 6 A He was kicking his -- kicking at the officer so he
 7 wouldn't take him out.
 8 Q You don't really know why he was kicking, do you? I'm
 9 just asking you what you saw.
 10 A Yes.
 11 Q Okay. What you observed, was it -- you observed a drunk
 12 man kicking?
 13 A Oh, I observed Thomas to be kicking at both Sergeant
 14 Simon and Corporal Oaks.
 15 Q This is different than what you just said which was you
 16 saw him kick at one of them but you did not know which
 17 one.
 18 A I don't know which one he was kicking at but I....
 19 Q You saw a drunk man kick.
 20 Abut I do know they were taking him out because I
 21 instructed them to take him out.
 22 Q Okay. Try to answer my question. You just saw a drunk
 23 man kick.
 24 A He was intoxicated at the time, yes.
 Q And you saw him kick?

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1 A Yes.
 2 Q Okay. And then -- now, were you the supervisor of Mr.
 3 Simon and Mr. Oaks?
 4 A I still am their supervisor.
 5 Q Okay. All right. So tell me what happens when officers
 6 get up.
 7 A When the officers get up, Thomas turns to one, starts
 8 kicking at him. As he -- that position he was in, he
 9 went back, turned around, started kicking at the other
 10 officer. The -- Officer Oaks falls down and then he
 11 turns back and starts kicking at Sergeant Simon.
 12 Sergeant Simon falls down and, as Officer Oaks is trying
 13 to approach him again, Thomas starts turning and
 14 somewhere in that time frame, I looked to -- looked at
 15 . He looked like he was getting ready to kick at me
 16 so I asked him if he was going to kick at me several
 17 times and he answered yes and that's when I turned my
 18 attention to him.
 19 Q So, generally, when people are going to kick at you, is
 20 that kind of how it works, you just look over at them,
 21 you say are you going to kick me now and they say yes or
 22 how does that usually work?
 23 A It was an obs -- observation I saw and I -- I asked him
 24 and he said yes and that's when I grabbed him, flipped
 25 him over to keep him from kicking at me.

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1 UNKNOWN: Anybody's planning on leaving, the plane
 2 should be here any minute.
 3 MR. BROWN: Okay. All right.
 4 UNKNOWN: Those are the last flights.
 5 MR. BROWN: Thank you.
 6 MR. WIDMER: Thank you.
 7 MR. BROWN: Thank you very much.
 8 MR. INGALDSON: If you want to hit the main ones, if
 9 you want to, we can keep this open too if you want, you know.
 10 MR. BROWN: Okay. We'll see.
 11 Q When have you ever said that the two officers fell --
 12 both fell? Have you ever said that before today?
 13 A Did I say that they both fell?
 14 Q You said they both fell twice. You saw them on the floor
 15 more than once.
 16 A Yes, I saw them on the floor more than once.
 17 Q Have you ever said that before today?
 18 A Not that I can recall.
 19 Q Okay. And before today, you wrote a police report, is
 20 that right?
 21 A Yes, I did.
 22 Q And in that police report, you wrote a -- seven pages of
 23 police report.
 24 A Okay.
 25 Q Okay? And it looks like you wrote maybe three with a

cover also. You do not mention that there.
 A Mm-hmm.
 3 Q Do you agree with that?
 4 A No.
 5 Q Let's see it. Tell me when you're done.
 6 (Pause)
 7 A I'm done. It's not in the police reports for me here and
 8 now.
 9 Q Okay. That's one human error. All right. Then you did
 10 an affidavit to support the.....
 11 A I didn't write the affidavit.
 12 Q Who wrote it?
 13 A The attorneys did.
 14 Q Did you read it?
 15 A Yes, I did, I've read it.....
 16 Q Did you think it was true?
 17 A I've read it over. I've got it, for instance, when
 18 this.....
 19 Q Okay.
 20 A That's.....
 21 Q So you had a chance to change it before you signed it?
 22 A Yes.
 23 Q Did you add in they are the (indiscernible)?
 24 (Pause)
 25 MR. INGALDSON: How're we looking, Sean?

1 up.
 2 A Mm-hmm.
 3 Q You agree? It's a -- you wrote this. This is your use
 4 of force report, right?
 5 A Yes.
 6 Q Thomas started kicking at both Corporal Simon and Officer
 7 Oaks, kicking Corporal Simon on the chest of the right
 8 thigh and in the left shin and kicking Officer Oaks in
 9 the left knee twice and continued to kick officers when
 10 they couldn't get -- couldn't get what's that word?
 11 A Control.
 12 Qcontrol of him. I deployed my taser and drive
 13 stunned him with a what? Brent? Drive stunned him
 14 approximately five or six times. So you drive stun him
 15 five or six times. This is in addition to the.....
 16 A I did a cycle five or six times and the drive stunning
 17 was, well, three or four times.
 18 Q Okay. But you put here you drive stunned him
 19 approximately five or six times. Is that what you say,
 20 drive stunned him five or six times?
 21 A I deployed my taser and I drove stunned him approximately
 22 five or six times. I was -- that's sort of in cycles.
 23 Q Okay. After he calmed down, after that, many drive
 24 stuns. I deployed the taser because Thomas was a threat
 25 with the floor being slippery and the trash the officers

1 MR. BROWN: Mm-hmm.
 2 MR. INGALDSON: How are we looking?
 3 MR. BROWN: That too.
 4 A Well, I see in here that Officer Oaks was kicking
 5 (indiscernible), not that (indiscernible).
 6 Q Okay. And then in our use of -- okay. So I'm going to
 7 mark that exhibit F and that is your affidavit of Nathan
 8 Joseph.....
 9 A Mm-hmm.
 10 Qwhich does not indicate anything about two people
 11 following and an exhibit G which does not indicate
 12 anything which is -- well, G, which is the police report
 13 which does not indicate anything about anyone falling.
 14 A Mm-hmm.
 15 Q And you agree with that, correct, does not indicate
 16 anything about two people falling down?
 17 A Mm-hmm.
 18 Q About everyone falling twice, is that right? Do you
 19 agree with that?
 20 A Yes.
 21 Q Okay. Now, let's look at your use of force here.
 22 Officers went to do a welfare check, found both Thomas
 23 and Peter to be passed out, detained both. When Thomas
 24 was behind, escorted, Corporal Simon and Officer Oaks
 shift from -- slip from the trash with Thomas. They got

1 were slipping on. Is that right?
 2 A Yes.
 3 Q Okay. So those deployed -- you're doing five or six.....
 4 A Mm-hmm.
 5 Qthe other officer's done about seven, we've heard.
 6 So it's about 13 times. Is that right?
 7 A Not that I recall.
 8 Q Okay. You say you don't recall but you've got five or
 9 six here.
 10 A Yes.
 11 Q Okay. Simon just testified awhile ago. You were in the
 12 room.
 13 A Yes.
 14 Q He did it with seven.
 15 A Yes.
 16 Q How many is that? How many drive stuns is that, six plus
 17 seven?
 18 A That's 13.
 19 Q Thirteen. And then you still deployed the taser again,
 20 is that right?
 21 A No.
 22 Q I deployed the taser because Thomas was a threat.
 23 A If that's what (indiscernible - whispering).
 24 Q All right. And on top of all this, sometimes when you
 25 were deploying the taser, Thomas was over on his belly

10 (Pages 34 to 37)

with his hands behind his back. Isn't that correct?
 A Yes. Still struggling with the officers.
 3 Q And you think that's appropriate use of force?
 4 A Yes, with him still struggling with the officers, yes.
 5 Q On his belly having been drive stunned repeated times.
 6 A Not repeated times.
 7 Q Okay. Well, seven plus six?
 8 A No.
 9 Q How many?
 10 A He was drive stunned at least once or twice when he was
 11 on his belly. He was probably being drove stunned at the
 12 same -- twice at the same time by Sergeant Simon and
 13 myself.
 14 Q So about four times then?
 15 A When he was on his belly?
 16 Q Yes.
 17 A No, twice.
 18 Q You said twice by you and twice by Simon.
 19 MR. BROWN: That's the plane, isn't it?
 20 A He only had....
 21 MR. INGALDSON: Hmm?
 22 MR. BROWN: That's the airplane. All right.
 23 MR. INGALDSON: I think it's (indiscernible -
 24 simultaneous speaking).
 25 MR. BROWN: How are we going to wrap this up though?

1 morning. We'll call him and what time are you on duty
 2 tomorrow?
 3 A I get in at 1:00 o'clock in the afternoon.
 4 MR. INGALDSON: Maybe I can (indiscernible).
 5 MR. WIDMER: I'll set something up.
 6 A And I -- and I have managerial duties sometime in the
 7 afternoon too.
 8 MR. INGALDSON: Yeah.
 9 UNKNOWN: Just want to call him?
 10 MR. BROWN: Yeah.
 11 UNKNOWN: At 1:30?
 12 MR. INGALDSON: We'll call and check the schedule.
 13 MR. BROWN: You guys do not get to leave without me.
 14 MR. INGALDSON: All right.
 15 MR. BROWN: Hold on. Yes.
 16 MR. INGALDSON: We'll tell them to wait.
 MR. BROWN: Hold on just a second. No, no, no, you
 17 hold on.
 18 MR. INGALDSON: We'll make sure they wait.
 19 (Off record)
 20
 21
 22
 23
 24
 25

1 I mean, obviously, I've got to get to this....
 2 MR. WIDMER: Well....
 3 MR. BROWN:because I think it -- you know, let
 4 me turn this off real....
 5 MR. INGALDSON: It's -- it was....
 6 MR. BROWN: Well....
 7 MR. INGALDSON: Some of it's getting a little
 8 argumentative now and we could count the times that it's....
 9 MR. BROWN: I think it's getting argumentative
 10 because I'm in a hurry, to be quite honest with you, and I can
 11 see that happening. I just need....
 12 MR. INGALDSON: But if you want to finish it, I
 13 mean, we can do the rest by phone probably, don't you....
 14 MR. BROWN: We could do that in the morning if you
 15 want to do that.
 16 Q Can you be by a phone in the morning?
 17 A It depends on what time it is.
 18 Q What time's good for you?
 19 A I don't know.
 20 Q You don't know a lot of stuff. Tell me what would work
 21 for you.
 22 MR. WIDMER: Why don't we just continue the -- just
 23 -- why don't we just continue with (indiscernible -
 24 simultaneous speaking) and then we will figure it out.
 MR. INGALDSON: Okay. Let's just call in the

1 TRANSCRIBER'S CERTIFICATE
 2 I, Linda S. Foley, hereby certify that the foregoing
 3 pages numbered 2 through 40 are a true, accurate, and complete
 4 transcript of videotaped deposition of Nathan Joseph (Vol. I)
 5 in Case No. 4BE-07-00026 CI, Thomas J. Olson v. City of Hooper
 6 Bay, Officer Dimitri Oaks, Officer Charles Simon, Officer Nathan
 7 Joseph, transcribed by me from a copy of the electronic sound
 8 recording to the best of my knowledge and ability.
 9
 10 May 20, 2008 _____
 11 Linda S. Foley, Transcriber
 12
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

THOMAS J. OLSON,)

)

Plaintiff,)

)

v.)

)

CITY OF HOOPER BAY,)

OFFICER DIMITRI OAKS,)

OFFICER CHARLES SIMON and)

OFFICER NATHAN JOSEPH,)

)

Defendants.)

)

No. 4BE-07-00026 CI

VOLUME II

TELEPHONIC DEPOSITION OF NATHAN JOSEPH

Pages 41 through 52, inclusive

May 15, 2008

Bethel, Alaska

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

3 THOMAS J. OLSON,)
4)
5 Plaintiff,)
6)
7 v.)
8)
9 CITY OF HOOPER BAY,)
10 OFFICER DIMITRI OAKS,)
11 OFFICER CHARLES SIMON and)
12 OFFICER NATHAN JOSEPH,)
13)
14 Defendants.)

17 No. 4BE-07-00026 CI

19 TELEPHONIC DEPOSITION OF NATHAN JOSEPH

21 taken on behalf of the Plaintiff, pursuant to notice, at the
22 offices of Power and Brown, LLC, 460 Ridgcrest Drive,
23 Suite 113, Bethel, Alaska, before Sean E. Brown, a Notary
24 Public for the State of Alaska.
25

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Bethel, Alaska, May 15, 2008

MR. BROWN: Okay. Are you actually talking into the
phone or are you talking into a speaker phone?
MR. JOSEPH: Speaking into the phone.
MR. BROWN: Okay. I just need you to speak up. I
can hear Bill really well but you are not coming through very
well so I need you to speak up. Okay?
MR. JOSEPH: Okay.
MR. BROWN: Okay. That's much better so if you
could just talk like that, that would be great. We are
recording this here in our office at Power and Brown and we
will proceed forward. If we could start, Sergeant Joseph, the
last time that you and I were together there in Hooper Bay, I
put you under oath. If you could just raise your right hand
and we'll put you under oath again.
MR. JOSEPH: Okay.
(Oath administered)
MR. JOSEPH: Yes.
MR. BROWN: You may put your hand down. If each
participant could tell their name? My name is Sean Brown and
I am representing the plaintiff in this matter, Thomas Olson.
MR. WIDMER: My name is Matthew Widmer. I'm with
Angstman Law Office and represent Sergeant Joseph and Sergeant
Simon as well as Officer Oaks in this matter.

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